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# CASES IN EQUITY

SELECTED FROM DECISIONS OF

## ENGLISH AND AMERICAN COURTS

BY

GEORGE H. BOKE

EXCHANGE PROFESSOR AT YALE UNIVERSITY 1914-15

AND

PROFESSOR OF LAW IN THE UNIVERSITY OF CALIFORNIA

AMERICAN CASEBOOK SERIES

WILLIAM R. VANCE

GENERAL EDITOR

ST. PAUL

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1915

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# THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. This preface has appeared in each of the volumes published in the series up to the present time. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements.

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis

and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

"International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical, and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

"As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published, or put in press, books on the following subjects:

*Administrative Law.* By Ernst Freund, Professor of Law, University of Chicago.

*Agency.* By Edwin C. Goddard, Professor of Law, University of Michigan.

*Bills and Notes.* By Howard L. Smith, Professor of Law, University of Wisconsin, and William U. Moore, Professor of Law, University of Chicago.

*Carriers.* By Frederick Green, Professor of Law, University of Illinois.

*Conflict of Laws.* By Ernest G. Lorenzen, Professor of Law, University of Minnesota.

*Constitutional Law.* By James Parker Hall, Dean of the University of Chicago Law School.

*Corporations.* By Harry S. Richards, Dean of the University of Wisconsin Law School.

*Criminal Law.* By William E. Mikell, Dean of the University of Pennsylvania Law School.

*Criminal Procedure.* By William E. Mikell, Dean of the University of Pennsylvania Law School.

*Damages.* By Floyd R. Mechem, Professor of Law, Chicago University, and Barry Gilbert, Professor of Law, University of California.

*Equity.* By George H. Boke, Professor of Law, University of California.

*Insurance.* By W. R. Vance, Dean of the University of Minnesota Law School.

*Partnership.* By Eugene A. Gilmore, Professor of Law, University of Wisconsin.

*Persons* (including *Marriage and Divorce*). By Albert M. Kales, Professor of Law, Northwestern University, and Chester G. Vernier, Professor of Law, University of Illinois.

*Pleading (Common Law).* By Clarke B. Whittier, Professor of Law, Stanford University.

*Sales.* By Frederic C. Woodward, Dean of Stanford University Law School.

*Suretyship.* By Crawford D. Hening, Professor of Law, University of Pennsylvania.

*Torts.* By Charles M. Hepburn, Professor of Law, University of Indiana.

*Trusts.* By Thaddeus D. Kenneson, Professor of Law, University of New York.

*Wills and Administration.* By George P. Costigan, Jr., Professor of Law, Northwestern University.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

The following well-known teachers of law are at present actively engaged in the preparation of casebooks on the subjects indicated below:

Frank Irvine, Dean, Cornell University Law School. Subject, *Evidence.*

Charles Thaddeus Terry, Professor of Law, Columbia University. Subject, *Contracts.*

James Brown Scott, Professor of International Law, Johns Hopkins University. Subject, *International Law.*

Edward S. Thurston, Professor of Law, University of Minnesota. Subject, *Quasi Contracts.*

Henry Wade Rogers, Dean, Yale Law School. Subject, *Public Corporations.*

Albert M. Kales, Professor of Law, Northwestern University. Subject, *Property.*

Harry A. Bigelow, Professor of Law, University of Chicago. Subject, *Property.*

Ralph W. Aigler, Professor of Law, University of Michigan. Subject, *Property.*

WILLIAM R. VANCE,
General Editor.

MINNEAPOLIS, July, 1915.

# INTRODUCTION

A BOOK must speak for itself, and any comment of its author can assist it but little. In the preparation of this collection of cases the author has taken the primal question to be: How can the student's mind be brought to function according to the nature of equity? There is, behind the principles that we call equitable, a place in the mind from which arises all equity. It is a way of seeing these specific forms of legal problems. It is the life itself of those forms and those principles. It may be called the spirit of equity. That it is approached through an observation and understanding of the forms and principles of the past is immaterial. Equity is ever new. It must be living law, which is the only law. The student must catch the fire of its flame.

To this primary viewpoint these cases are to respond. A case of an inferior court or a bad decision is frequently a better way to bring the mind to its proper attrition, under the safe guidance of the instructor, than the well-reasoned and more perfected case. Each has its place. One case is needed as a mere problem; another, to lead the way into the true view of the law.

In the conflict of views as to the proper form of notes and cited cases, the author has followed that view, which—at least in a subject so well settled as are the leading principles of equity—seems to him to accord best with the art of the teacher. That view is, not to put into the student's hand the key to his cases from the notes, nor to attempt to make a treatise or collection of authorities in note form. The instructor knows his equity, and it can be safely left to him to work out the ultimate statements of the principles.

The experience of the author as a teacher has led him to believe there is danger in going too quickly to new points in opening up a virgin field. For that reason an elaborated and intensive treatment has been given to the fore part of the subject, not considered necessary after some degree of equitable equilibrium has been established.

The practical utility that may be had from section 1 of the first chapter—on the basis of equity—will depend upon the manner of its use. It is believed that the instructor can find it an invaluable way of bringing the student home to the fundamental conception of equity as a totality. It may be best to use section 1 at the close of chapter 1, rather than at the beginning, after some slight concreteness from actual cases gives the student a place to stand.

The author desires to acknowledge his great personal indebtedness to his former instructor in equity, the late Dean Ames, whose teaching ever pointed the way to a true understanding of the law.

Acknowledgment is made to the courtesy of the Banks Publishing Company of New York City, publishers of Bispham's Principles of Equity, in allowing extended excerpts to be used from that text.

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# CASES ON EQUITY

## CHAPTER I

## BASIS OF EQUITY JURISDICTION

### SECTION 1. RISE OF EQUITY JURISDICTION

#### ANONYMOUS.

(Year Book 4 Henry VII, Hilary Term, 1489. Placitum 8, pages 4 and 5.)[1]

A subpœna in Chancery was sued for this: There were two executors, and one without the consent of his companion released to a man who was indebted to their testator; and it was surmised that for this cause the will of their testator could not be performed, and a subpœna was sued against the executor, who released, and the man to whom the release was made, etc.

Fineux said that this was not remediable; for each executor had entire power by himself (a par luy), and one can do all that his companion can do, and so the release made by him is good.

CHANCELLOR. No man may leave the Court of Chancery without a remedy, and it is against reason that one executor should have all the goods and make a release alone.

Fineux: Sir, if no one may leave without a remedy, then no one need go to confession; but, sir, the law of the land is for many things, and many things are to be sued here which are not remediable at common law,[2] and a considerable number are *in conscience between a man and his confessor,* and so is this thing, etc.

CHANCELLOR. To make a remedy for such a thing is well done *according to conscience.*[3]

[1] The translation is taken from Bispham, Principles of Equity (7th Ed.) note 3, page 11.

[2] "In this court of chancery a man shall not be prejudiced by his mispleading, or defect of form, but according to the truth of the matter; for the decision should be made according to conscience and not according to the rigour of law." Dyversyte des courtes (Ed. 1534) fol. 296, 297. Bro. Abr. tit. Jurisdiction. Quoted 3 Bl. Com. 446.

[3] See the discourse on conscience in "Doctor and Student" (1518), where the learned Doctor is thus reported:

"This word conscience, which in Latin is called *conscientia,* is compounded

## THE CHANCERY.

(From "The Mirrour of Justices," presumedly written by Andrew Horn of London about 1290, and translated from the French by William Hughes of Gray's Inn in 1646. Robinson's Edition, Washington, 1903, pp. 291, 298, 299, 300.)

The King is the fountain of Justice * * *

And note, that the Court of Chancery is a court of a high nature, * * * and in that court a man shall have remedy for that which he can have no remedy at the common law; and it is called by the common people "the Court of Conscience."

And therefore see of matters in conscience, how the party shall have remedy. * * * If a man infeoffeth another of certain lands to his use, and the feoffee selleth the land to another, if he giveth notice to the vendee at the time of the sale of the intent of the first feoffment, he is bounden to perform the will of the first feoffer, as it seemeth in the Chancery. * * *

In the Court of Chancery a man shall not be prejudiced by mispleading, or for want of form, but according to the truth of the cause, judgment ought to be given according to equity, and not ex rigore juris. And note that there are two jurisdictions, ordinary, and absolute; ordinary is as positive law, and absolute is omnibus modis quibus veritas sciri poterit.

If a man be bounden by obligation unto two men unto the use of one of them, and one of them, viz. is he to whose use it is not, releaseth to the obligor all actions, so as the obligation is discharged, he to whose use the obligation was made hath good remedy in Chancery by subpœna against his companion who released him, but against the obligor it seemeth he hath no remedy, for every man is bounden to help himself, and it is lawful to get a discharge of that which he is charged withall, and in danger to others. * * *

It is said, that the Chancellor of England, wheresoever he shall be in England, hath power to command a man to prison, and he shall not be bailed.

of this preposition *cum*, that is to say in English with; and of this noun *scientia*, that is to say in English, knowledge: and so conscience is as much to say knowledge of one thing with another thing: and conscience so taken is nothing else but an applying of any science or knowledge to some particular act of man. And so conscience may sometime err, and sometime not err. And of conscience thus taken, doctors make many descriptions. Whereof one doctor saith, that conscience is the law of our understanding. Another, that conscience is an habit of the mind discerning between good and evil. Another, that conscience is the judgment of reason judging on the particular acts of man. All which sayings agree in one effect, that is to say, that conscience is an actual applying of any cunning of knowledge to such things as are to be done; whereupon it followeth, that upon the most perfect knowledge of any law or cunning, and of the most perfect and most true applying of the same to any particular act of man, followeth the most perfect, the most pure, and the most best conscience. And if there be default in knowing of the truth of such a law, or in the applying of the same to particular acts, then there-

## Petition of THOMAS DE YORK.

**(Before the King and the Great Council, 1337. Select Cases in Chancery, Case 134.)**

Petitioner alchemist was imprisoned in house and made to sign bonds for 200 marks, and then imprisoned in Newgate and his goods detained. Relief ordered.

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## WILLIAM BY THE BROOK v. GILES.

Cases Cases p 37 A

**(Petition to Edmund de Stafford, Bishop of Exeter, Chancellor of England, About 1394. Select Cases in Chancery, Case 83.)**

To the most gracious Lord and most reverend Father in God, the Bishop of Exeter, Chancellor of England, Showeth William by the Brook, and complaineth of John Giles of Longdon, that whereas the said William and John made an agreement before Sir Thomas Daston, James Arblaster and others, last year at Lichfield in manner following, that is to say, the said John should sue at common law for certain lands and tenements, formerly Thomas Colman's, in the fee of Elmhurst, which the said William purchased of Richard Colman, son and heir of the said Thomas in exchange for half a virgate of bond-land in Longdon, at their joint costs, and thereupon the said William should release to the said John his right in the same, on this condition, that after the said lands were recovered from William Bird, his adversary, the said John should have enfeoffed the said William therein for the term of his life; and the said John will not now fulfil his covenant with the said William touching the said lands and tenements so recovered at their joint costs, but hath entered into the said lands and tenements and keepeth (William) out of them, against right: May it please your most gracious Lordship to command the said John Giles to come before you, and to compel him to fulfil his said covenant with the said William; For God and in way of charity.

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## Petition of JOHN HAMPTON.

**(To the Lord Chancellor of England, About 1337. Select Cases in Chancery, Case 133.)**

May it please his most honoured and most gracious Lord, the Chancellor of England, to grant a writ to make to come before you and the Council of our most redoubted Lord, the King, Walter Crawford of the County of Buckingham, to answer to (Margaret, mother of) John Hampton, touching great wrongs and damages which he hath done to

**upon followeth an error or default in conscience." American Edition, Cincinnati, 1874, pp. 41, 42.**

your said suppliant; understanding, most gracious Lord, that the said Walter is so great in that country that no one can have right or reason against him: in way of charity.

At the foot.—The same John hath sworn that his complaint is true, and he hath granted to satisfy the said Walter for his expenses of coming before the Council of the King for the cause aforesaid in case he shall not be able to prove his said complaint to be true.

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## Petition of BERNARD EDWARD DE RECO.

**(Before Thomas de Arundel, Archbishop of York and Chancellor of England, 1389. Select Cases in Chancery, Case 9, English Translation.)**

To the most reverend, gracious and merciful Father in Christ, the Archbishop of York and Chancellor of England, Humbly beseecheth your servant Bernard Edward de Reco[4] of your charity that if it be possible to do that which I crave of you, of your mercy let it be speedy, because six months are now elapsed since those merchants held my moneys and would not return them to me, and my ship remains unfreighted in the dock, and I cannot load her, and I cannot go, nor yet stay for a long prosecution, and my creditors in London wish to be paid: Wherefore, most reverend father and lord, you who are the mother of Justice, deign to provide right and justice, and may your holiness please to send for the said merchants that they may appear before you to pay to the said Bernard what shall seem just according to your discretion.

Writ directed to Reginald Grille, Ciprian de Maris and Benedict Lomelyn, merchants of Genoa, commanding their appearance before the King and his Council in the Chancery, on Friday next, to answer, etc., on pain of our grave indignation and the peril which will thereby ensue. Dated 15 Feb. 1389.[5]

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## Petition of WALTER BROWN and Margaret, His Wife.

**(To Edmund de Stafford, Bishop of Exeter, Chancellor of England, About 1394. Select Cases in Chancery, Case 78.)**

May it please the most reverend Father in God the Bishop of Exeter and Chancellor of England, To provide a remedy to Walter Brown and Margaret his wife touching certain lands and tenements in Winford, Saltford, and elsewhere in the County of Somerset, of

[4] **Both parties to the suit were aliens. The Council always assumed jurisdiction in cases between aliens, or between aliens and subjects; the reason being, no doubt, that an alien plaintiff could not sue in the ordinary law courts, while in the case of an alien defendant it would be difficult in most cases, and impossible in many, to enforce a judgment by ordinary process. See Select Cases in Chancery, Introduction, page xlii.**

[5] **This bill seems to refer to a former complaint made to the Chancellor, and to urge expedition in the matter. The three names at the end are probably those of the merchants complained of.**

which they are deforced because of the delay in the execution of a judgment given in an action against one Edmund Basset in the King's Bench for the said Walter and Margaret, in respect of the rightful inheritance of the said Margaret as daughter and heir of one John Basset, who died seised thereof, as was found by an office taken before the Escheator of Somerset, by virtue of a writ of mandamus; (which Margaret) is now of full age and 20 years more; and by force of that judgment the King had possession of the wardship and lands because of the nonage of the said Margaret, by his prerogative, and by the said recovery of the said lands held of Lord le Spencer (and) of the manor of Lasborough held of the King in chief, of which lands so recovered the King had the profits for a long time notwithstanding the commandments of the King by his letters close and by his privy seal: Whereupon the said suppliants humbly request to have livery of the said lands and tenements by your advice and that of the Chief Justice of the King, who gave judgment on the verdict of the inquest, as to the right of the said Margaret and the profit of the King, which is pending before you in the Chancery; having regard, most gracious Lord, that the said Edmund is for-judged of the said lands by the said recovery, and that no other stranger claims title of right, and considering, most gracious Lord, that (the said Walter) hath nothing whereon to live and maintain his wife and his six young children; For God and in way of charity; Considering that the King took the profits of the said lands for six years and more after the full age of the said Margaret, which amounteth to four score pounds and more for the said term.

Indorsed.—The King hath commissioned the Chancellor to make due remedy and right in this behalf by the authority of Parliament, according to what shall seem best to him in his good discretion with the advice and counsel of those to whom it shall seem needful to him to appeal in the matter.

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## DISCOURSE ON EQUITY BETWEEN DOCTOR AND STUDENT.

**("Doctor and Student," 1518. American Edition, Cincinnati, 1874, pp. 44, 48, 49.)**

Student.—But I pray thee, show me what is that equity that thou hast spoken of before, and that thou wouldst that I should keep.

Doctor.—I will with good-will show thee somewhat thereof. Equity is a right wiseness that considereth all the particular circumstances of the deed, the which also is tempered with the sweetness of mercy. And such an equity must always be observed in every law of man, and in every general rule thereof: and that knew he well that said thus, *Laws covet to be ruled by equity.* * * *

But yet it is to be understood, that most commonly where anything is excepted from the general customs or maxims of the laws of the

realm by the law of reason, the party must have his remedy by a writ that is called subpœna, if a subpœna lie in the case. But where a subpœna lieth and where not, it is not our intent to treat of this time. And in some cases there is no remedy for such an equity by way of compulsion, but all remedy therein must be committed to the conscience of the party.

Doctor.—But in case where a subpœna lieth, to whom shall it be directed, whether to the judge or to the party?

Student.—It shall never be directed to the judge, but to the party plaintiff, or to his attorney; and thereupon an injunction commanding them by the same, under a certain pain therein to be contained that he proceed no farther at the common law till it be determined in the king's *chancery*, whether the plaintiff had title in conscience to recover, or not: and when the plaintiff by reason of such an injunction, ceaseth to ask any farther process, the judges will in likewise cease to make any farther process in that behalf.

Doctor.—Is there any mention made in the law of England of any such equities?

Student.—Of this term equity, to the intent that is spoken of here, there is no mention made in the law of England: but of an equity derived upon certain statutes mention is made many times, and often in the law of England; but that equity is all of another effect than this. But of the effect of this equity that we now speak of, mention is made many times: for it is oft-times argued in the law of England, where a subpœna lieth, and where not, and daily bills be made by men learned in the law of this realm to have subpœnas. And it is not prohibited by the law, but that they may well do it, so that they make them not but in case where they ought to be made, and not for vexation of the party, but according to the truth of the matter. And the law will in many cases, that there shall be such remedy in the chancery upon divers things grounded upon such equities, and the lord chancellor must order his conscience after the rules and grounds of the law of the realm; insomuch that it had not been inconvenient to have assigned such remedy in the chancery upon such equities for the seventh ground in the law of England. But forasmuch as no record remaineth in the king's court of no such bill, nor of the writ of subpœna or injunction that is used thereupon; therefore it is not set as for a special ground of the law, but as a thing that is suffered by the law.

## LORD DUDLEY and Ward, an Infant, by the Honourable THOMAS NEWPORT, v. LADY DOWAGER DUDLEY, &c. & econt'.

(In Chancery, 1705. Prec. Ch. 241, 24 E. R. 118.)

Sir JOHN TREVOR, M. R.[6] * * * The great question, contended between the mother and son (for the other demands on both sides will, I presume, easily be determined) is, whether the lady dowager, the plaintiff in the cross bill, shall have the benefit of the trust of the term, as to a third part of the profits above the charge of annuities, during their respective continuance, and after the determination, a third part of the whole profits as her dower.

And as this case is, I am of opinion she ought. * * *

My reasoning shall be drawn from the original institution of this court of equity and conscience; and also from the rules and common law principles of that which is regular law, which is bound to rules, to which equity in general may be said to be opposite: for all kingdoms in their constitution, says my Lord Hobart, are with the power of justice, both according to the rule of law and equity. These are the grounds which I shall go upon, and not upon any notions or arbitrary rules of my own.

My first reason is, that the right a dowress has to her dower is not only a legal right, so adjudged at law, but is also a moral right, to be provided for, and to have a maintenance and sustenance out of her husband's estate to live upon; she is therefore in the care of the law, and a favourite of the law; and upon this moral law is the law of England founded, as to the right of dower.

Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assists it. * * *

I must therefore decree the lady dowager the benefit of this trust term. * * *

[6] Parts of the opinion are omitted.

## EARL OF OXFORD'S CASE.

(In Chancery before Lord Ellesmere, Chancellor, 1615. 1 Ch. 1, 21 E. R. 485.)

* * *[1] The present Master of the College having by undue Means obtained the Possession of one of the 130 Houses, whereof one Castillion was Lessee, who being secure of his Title both in Law and Equity, sealed a Lease thereof for three Years to one Warren, who thereupon brought an Ejectment against one John Smith, for Trial of the Title in B. R. wherein a Special Verdict was had; and while that depended in Argument the Lease ended, and so no Possession could be awarded for the Plaintiff, nor Fruit had of his Suit.

Yet he proceeded to have the Opinion of the Judges to know the Law (which was a voluntary Act of his), to the Intent, if the Law were with him, he might begin a new Suit at Law, and spare to proceed in Equity; and if the Law were against him, that then he might proceed in Chancery. And the Judges of that Court having delivered their Opinions against his Title, before any Judgment entred upon the Roll, the Earl and Mr. Wood, for themselves, and their Lessees, preferred their Bill in Chancery; and then Judgment was entred, Quod Querens nil capiat per Billam.

To which Bill in Chancery the Defendant put in a Plea and Demurrer, alledging the Conveyance to be void by the Statute of 13 Eliz. and that they evicted one House, Parcel of the Premisses by Judgment at Law; which Plea and Demurrer were referred by Order to Sir John Tindal and Mr. Woolridge, who reported, That they thought it fit the Cause should proceed to Hearing, notwithstanding the Plea and Demurrer; and afterwards in Default of an Answer, an Attachment was awarded against the Defendants, whereupon they were attach'd, and a Cepi Corpus return'd, and by Order of the 22d of Octob. 13, Jac. 1 [1615], they were committed to the Fleet for their Contempts, in refusing to answer; and do now stand bound over to answer their Contempts, they still refusing to answer.

And now this Term it was argued, That the Defendants thus standing in Contempt, &c., may be sequestred until Answer.

1. The Law of God speaks for the Plaintiff. Deut. 28.

2. And Equity and good Conscience speak wholly for him.

3. Nor does the Law of the Land speak against him. But that and Equity ought to join Hand in Hand, in moderating and restraining all Extremities and Hardships.

By the Law of God, He that builds a House ought to dwell in it; and he that plants a Vineyard ought to gather the Grapes thereof; and it

[1] Parts of the opinion are omitted. For a full note to this case see 1 White & Tudor's Leading Cases in Equity, page 773. The facts of the case, which are not clear in the report, are explained in this note.

was a Curse upon the Wicked, that they should build Houses and not dwell in them, and plant Vineyards and not gather the Grapes thereof. Deut. 28, v. 30.

And yet here in this Case, such is the Conscience of the Doctor, the Defendant, That he would have the Houses, Gardens and Orchards, which he neither built nor planted: But the Chancellors have always corrected such corrupt Consciences, and caused them to render quid pro quo; for the Common Law it self will admit no Contract to be good without quid pro quo; or Land to pass without a valuable Consideration and therefore Equity must see that a proportionable Satisfaction be made in this Case. * * *

And Equity speaks as the Law of God speaks. But you would silence Equity.

1st. Because you have a Judgment at Law.

2dly. Because that Judgment is upon a Statute-Law.

To which I answer,

First, As a Right in Law cannot die, no more can Equity in Chancery die, and therefore nullus recedat a Cancellaria sine remedio, 4 E. 4, 11, a. Therefore the Chancery is always open, and although the Term be adjourned the Chancery is not; for Conscience and Equity is always ready to render to every one their Due, and 9 E. 4, 11, a. The Chancery is only removable at the Will of the King and Chancellor; and by 27 E. 3, 15. The Chancellor must give Account to none but only to the King and Parliament.

The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.

The Office of The Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called Summum Jus.

And for the Judgment, &c., Law and Equity are distinct, both in their Courts, their Judges, and the Rules of Justice; and yet they both aim at one and the same End, which is, to do Right; as Justice and Mercy differ in their Effects and Operations, yet both join in the Manifestation of God's Glory. * * *

The Chancellor sits in Chancery according to an absolute and uncontrolable Power, and is to judge according to that which is alleged and proved; but the Judges of the Common Law are to judge according to a strict and ordinary (or limited) Power. * * *

And the Statute of 4 H. 4, cap. 23, was never made nor intended to restrain the Power of the Chancery in Matters of Equity, but to restrain the Chancellor and the Judges of the Common Law, only in matters meerly determinable by Law, in legal Proceedings, and not in equitable, and they should be constant and certain in their own Judgments,

and not play Fast and Loose. For by 37 H. 6, 13, and divers other Authorities; no Writ of Error or Attaint lieth when the Suit is by Subpœna, and the Party only seeks to Equity for the Equity of his Cause.

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## SUITS IN CHANCERY BY SUBPŒNA.

**(Found in the Appendix to "Doctor and Student," 1518. American Edition, Cincinnati, 1874, p. 343 et seq.)[9]**

A serjeant of the law of England hearing the communication and dialogue between a doctor of divinity, and a student in the laws of England, saith to the doctor in this wise:

Serjeant—Mr. Doctor, after my mind you have right well declared divers laws, that is to say, the law eternal, the law of reason, the law of God, and the law of man. And you, Mr. Student, have right well

[8] This case had a leading part in the controversy between Lord Chancellor Ellesmere and Lord Coke, in which Chancery was victor by the decision of the king (James I), an account of which is reported at the end of volume 1, Chancery Reports, 21 English Reprint, 576, as follows:

"ARGUMENTS Proving from ANTIQUITY the Dignity, Power and Jurisdiction of the COURT OF CHANCERY.

"A question being raised in the Court of King's Bench, Whether after a Judgment given at the Common Law, the Chancery could in any case give Relief in Equity? Or, Whether it were not debarred thereof by the Statutes of 27 E. 3, cap. 1, and of 4 H. 4, cap. 23. King James taking Notice of that Difference (and taking himself to be the Judge of the Jurisdictions of his Courts of Justice) did seriously advise thereupon with his Learned Counsel, upon whose Opinions and Certificate, he did give Judgment for the Chancery; and accordingly all Things were in Peace. The Chancery Court went on in the Times of the Lord Ellesmere, Lord St. Albans, Lord Coventry, and all others that were Lord Keepers of the Great Seal of England ever since (as it had formerly done). And (Lord Coke) the then Lord Chief Justice of the King's Bench did never question that Judgment, although he lived many Years after, and was of four Parliaments, wherein he had both Opportunity and Power to have done it, if he had not known that Judgment to have been given according to Justice and the Laws of the Realm; but he desisted, and did openly profess before the Lords of the Privy Council, That he would not maintain a Difference between the Two Courts, nor bring it into question, whereof Entry was made in the Council-Book 26 Junii, 1616.

"Notwithstanding the Publisher of his third and fourth Books of the Institutes finding (as it should seem) some old Notes collected, when the Question was on Foot and undecided, hath taken the Boldness to print them long after the Author's Death, and therein hath made him to question all again, by mentioning many Cases, wherein divers Persons had been indicted in Præmunire upon the Statute of 27 E. 3, for seeking Relief in Chancery after Judgments given between the Parties at the Common Law, and concluding with [See a Privy Seal to the contrary, 18 Julii, 1616, obtained by the Importunity of the Lord Chancellor, being vehemently afraid: Sed judicandum est legibus, and no Precedent can prevail against an Act of Parliament. And Besides the supposed Precedents (which we have seen) are not Authentical, being most in torn papers, the rest of no Credit]."

There follow several pages of historical review of, and argument on, the power of Chancery.

[9] The dialogue here given is selected from several parts of the text, and is found on the pages indicated at the close of each excerpt.

showed how the law of England is grounded upon the law of reason, and have showed your mind therein right well, against which I intend not to reply. But my intent is, Mr. Student, to reply against your opinion in one point in a case demanded of you by Mr. Doctor, which is this. If a man be bound in single obligation to pay a certain sum of money at a day to the obligee, and the obligor payeth the money at the day and taketh none acquittance neither the obligation wherein he is bound; and notwithstanding this he that hath the obligation bringeth an action of debt upon the said obligation against the obligor; you have said, that in this case the obligor hath no remedy by the common law at (of) the realm, and you have showed the cause why right well, as it appeareth by your declaration, the which I need not to rehearse. But you say further in this case, that the defendant may be helped by a subpœna in the King's chancery; and to that I intend to reply. Notwithstanding I shall first of all move you, that in this case after my mind the defendant may have remedy at the common law. (Page 343.)

Student—It appeareth in the King's chancery in the time of so many noble princes and kings of this realm, and in the time of so many of their chancellors, whereof some have been spiritual men, and some temporal men, that so many have been put to answer upon writs of subpœna in the chancery, that it is not to presume that the chancellors have directed them temerously in the King's name without authority, but rather by good authority, and by commandment of the King and his council, and by knowledge of all the realm. * * * And me thinketh that all these things well-considered, no man ought to marvel, what authority the chancellor hath to make such a writ of subpœna in the King's name; for the old custom, not restrained by any statute, warranteth him by reason of his office so to do, after certain grounds, and under certain manner. (Pages 354–356.)

Serj.—But if reformation be had in this case in the said chancery by a subpœna, it must needs follow, that this good common law must be made as void and set at nought. For by a subpœna the plaintiff is prohibited to sue (at) the common law, and is compelled to make answer in the chancery, where the obligor shall be admitted to plead a payment of the debt contained in a single obligation without writing, which is clean contrary to the common law; so that if that be admitted for law, the common law that is contrary to this must needs be no law. For these two laws, one being contrary to the other, cannot stand together, but one of them must be as void. Wherefore it must need follow, that if this law be maintained in the chancery by a subpœna, the common law, which is contrary to that, must needs be as void and of none effect. I marvel much what authority the chancellor hath to make such a writ in the King's name and how he dare to presume to make such a writ to let (hinder) the King's subjects to sue his laws, the which the King himself cannot do righteously; for he is

sworn the contrary, and it is said, "hoc possumus quod de jure possumus." (Page 345.)

Student—First he saith, that he marvelleth how the chancellor may make such a writ to let (hinder) the King's subjects to sue his laws, the which the King himself cannot do righteously, for he is sworn to the contrary.—To that it may be answered, that the King's oath in that point is this, that he shall grant to hold the laws and customs of the realm; and then if the laws and customs of the realm shall be understood as well as the laws and customs used in the chancery as at the common law, as I suppose they be, then it is not against the King's oath, though the chancellor by means of a subpœna minister justice unto the subjects. (Page 379.)

Serj.—But if the subjects of any realm shall be compelled to leave the law of the realm, and to be ordered by the discretion of one man, what thing may be more unknown or more uncertain? But if this manner of suit by a subpœna be maintained, as you, Mr. Student, would have it, what uncertainty shall the King's subjects stand, when they shall be put from the law of the realm, and be compelled to be ordered by the discretion and conscience of one man. And, namely, forasmuch as conscience is a thing of great uncertainty, for some men think that if they tread upon two straws that lie across, that they offend in conscience; and some man thinketh that if he lack money and another hath too much, that he may take part of his with conscience; and so divers men, divers conscience; for every man knoweth not what conscience is as well as you, Mr. Doctor.

Student—How is it then, that the chancellors of England have used this?

Serj.—Verily I think for lack of knowledge of the goodness of the laws of the realm; for most commonly the chancellors of England have been spiritual men, that have had but superficial knowledge in the laws of the realm. (Pages 346–347.)

Student—In what uncertainty (saith he) shall the King's subjects stand, when they shall be put from the law of the realm, and be compelled to be ordered by the discretion and conscience of one man: and namely forasmuch as conscience is a thing of great uncertainty, for some men (he saith) think, that if they tread upon two straws that lie across that they offend in conscience, and that some man thinketh that if he lack money, and another hath too much, that he may take part of his with conscience, and so divers men divers conscience; for every man knoweth not what conscience is as well (saith he) as Mr. Doctor.—And to that he may be answered, that the said two consciences by him before remembered, whereof the one is a scrupulous conscience and the other an erroneous conscience, are not such a conscience as the chancellor or any other are bound to follow. * * * But the conscience, which the chancellor is bound to follow, is that conscience,

which is grounded upon the law of God and the law of reason and the law of the realm not contrary to the law of God and the law of reason. And therefore to be ruled by such a conscience seemeth neither to be against the law of God nor the law of reason, nor the commonwealth of the realm, as in that said treatise it is supposed to be. And that the chancellor is bound to order his conscience after the law of God and the law of reason is evident of itself, and needeth no further proof. (Pages 380–381.)

Serj.—Yet this notwithstanding, if the King's subjects, upon a surmised bill put into the chancery, shall be prohibited by a subpœna to sue according to the law of the realm, and be compelled to make answer before my lord chancellor, then shall the law of the realm be set as void and taken as a thing of none effect, and the King's subjects shall be ordered by the discretion of the chancellor and by no law, contrary to all good reason and all good policy. And so seemeth, that such a suit by subpœna is not only against the law of the realm, but also against the law of reason. (Page 346.)

Student—For what praise were it to the law to prohibit all writs of subpœna, and yet no remedy to be therein at the common law? But if remedy were provided at the common law, it were the less force (consequence), if writs of subpœna were put away. But in some cases where subpœnas lie, it were very hard to provide any remedy to be at the common law, as in the case of the evidences whereof the party knoweth not the number, and whereof mention is made in the 2nd chapter. (Page 367.)

Student—It hath been used, that when feoffees have been seized to that use of a man and his heirs, and that they have been required to make estate according to the use that they were infeoffed to do it, that then he to whose use they be so seized, should have a subpœna to cause them to make the re-feoffment unto him. (Page 364.)

Serj.—Moreover, Mr. Student, I marvel much that you say that men that have wrong may be helped in many cases by a subpœna, insomuch as you have in your Natura Brevium several writs and (of) divers natures for the reformation of every wrong that is done and committed contrary to the laws of the realm; and among all your writs that you have in your Natura Brevium, you have none there called a subpœna, neither yet the nature of him (it) declared there, as you have all of the writs specified in the said book. Wherefore me seemeth it standeth not with your study, neither yet with your learning of the laws of the realm, that any man that is wronged should have his remedy by a subpœna. If a subpœna had been a writ ordained by the law of the realm to reform a wrong, as other writs in the said book be, he (it) should have been set in the book of Natura Brevium. (Page 348.)

Student—(Your) meaning is, that because a subpœna is not in Natura Brevium, therefore there should be no such writ. And this should

seem to be but a slender objection. For the said book is not taken of such authority, that all things that is in it is clear law, nor that it is not so perfect that all writs that pertain to law should be contained therein. And therefore I suppose that it will be hard to find in Natura Brevium, where an action upon the case or a writ of forcible entry lie; and so I suppose it will be of divers other actions upon statutes if it were thoroughly searched.

And so I think, that the said objections be but of small strength and of small effect to prove that a subpœna may not lie in some cases. (Page 384.)

And also in divers other cases, whereof I intend to touch briefly by certain cases and grounds, a man sometime may have a right to a thing in conscience, and where he has no means to come unto it at the common law, and yet there lieth no subpœna. (Page 367.)

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## THE FUNCTION OF THE COURT OF EQUITY.

The institution of Courts of Equity, as Lord Mansfield has expressed it, is to prevent substantial justice from being entangled in the net of form. Is the court by a form, instituted by itself, to prevent a party having a legal remedy from availing himself of it? * * * Could the court suffer itself to be made the instrument of inequity?

Counsel in Pulteney v. Warren (1801) 6 Ves. Jr. 73, 78, 31 E. R. 944, 947.

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## COWPER v. EARL COWPER.

(In Chancery before Sir Joseph Jekyll, Master of the Rolls, 1734. 2 P. Wms. 720, 754, 24 E. R. 930, 942.)

* * *[10] The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; and though proceedings in equity are said to be *secundum discretionem boni viri,*[11] yet when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum qui leges juraque servat;* and as it is said in *Rook's* Case, 5 Rep. 99 b, that discretion is a science, not to act arbitrarily according to men's wills and private affections: so the discretion which is exercised here, is to

[10] Parts of the opinion are omitted.

[11] Selden, in Table Talk, tit. Equity, said: "For *law* we have a measure, and know what to trust to: *equity* is according to the conscience of him that is chancellor: and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience."

be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court.[12] That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with.[13] * * *

[12] In the often quoted case of Gee v. Pitchard (1818) 2 Swanst. 402, 414. Lord Eldon expressed the now accepted view of equity as a legal system, there remarking: "The doctrine of this Court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot."

[13] In Bond v. Hopkins (1802) 1 Sch. & Lef. 413, 428, Lord Redesdale, L. C., said: "The cases which occur are various: but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles: but the principles are as fixed and certain as the principles on which the courts of common law proceed."

In Haywood v. Cope (1858) 25 Beav. 140, 53 E. R. 589, 595, Sir John Romilly, M. R., said: "Then it is said that this is an extremely hard case, that, in point of fact, the Plaintiff is insisting upon the Defendant paying him £1400. for a thing that has turned out to be literally worth nothing, and that according to the discretion which the Court exercises in such cases, it cannot compel specific performance of the contract. Upon this subject, which is one upon which I have before made several observations, I will refer again to a passage which I have always considered binding upon me, for it is most important that the profession, and those who have to advise in reference to this subject, should understand the rule which is adopted in this and the other Courts, which is, that the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. Lord Eldon observes in the case of White v. Damon, [1802] 7 Ves. 35: 'I agree with Lord Rosselyn, that giving specific performance is matter of discretion; but that is not an arbitrary capricious discretion. It must be regulated upon grounds that will make it judicial.' I also refer, as I believe I have upon former occasions, to a passage in the celebrated argument of the Master of the Rolls in Burgess v. Wheate, [1759] 1 Eden, 214, where, at the conclusion, he cites a well-known passage from Sir Joseph Jekyll's judgment (in Cowper v. Earl Cowper, [1734] 2 Peere W. 752, 753), upon the subject of the discretion of the Court, and gives his own opinion. He says: 'And though proceedings in equity are said to be secundum discretionem boni viri, yet, when it is asked vir bonus est quis, the answer is, qui consulta patrum, qui leges juraque servat. And as it is said in Rooke's Case, [1598] 5 Coke Rep. 99 b, that discretion is a science, not to act arbitrarily according to men's wills and private affections, so the discretion which is to be exercised here is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it and advances the remedy; in others, again, it relieves against the abuse or allays the rigour of it; but in no case does it contradict or overturn the grounds and principles thereof, as have been sometimes ignorantly imputed to this

## ROOKE'S CASE.

(Common Pleas, 1598. 5 Coke, 99 b, 77 E. R. 209.)

* * * [14] Notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law.[15] For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, talis discretio discretionem confundit. * * * [16]

Court. That is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with. This description is full and judicious, and what ought to be imprinted upon the mind of every Judge.' [1759] 1 Eden, 214. If, therefore, in a case of this description, I were to say that according to my discretion I ought to leave these persons to their action at law, upon what principle or ground could I do it, except that in a matter of speculation it has turned out very favourable to one party, and very unfavourable to the other. It is obvious that in the case of a sale by auction, if the property is sold for an extremely inadequate value, it is impossible for the person to repudiate the contract. The mere principle of what might have been fair, or what might have been a right thing to do between the parties, had all the elements of value been known which have since transpired, cannot be a ground for exercising or regulating the discretion of the Court when all the facts which were then in existence were known to both parties. I can understand that the Court will exercise a discretion, and will not enforce the specific performance of a contract, where to decree the performance of the contract will be to compel a person, who has entered inadvertently into it, to commit a breach of duty, such as where trustees have entered into a contract, the performance of which would be a breach of trust. Those are cases where, by a fixed and settled rule, the Court is enabled to exercise its discretion; but the mere inadequacy or excess of value is not in my opinion a ground for exercising any such discretion as that which is suggested in this case. That this is a very hard case there is no doubt, and it may be extremely proper for the Plaintiff to make an abatement in respect of it, but that is a totally different matter, one which is in the forum of his own conscience, but not one which I can notice judicially. In my opinion, this is a contract which was fairly entered into between the parties; there is nothing to invalidate it, and the usual decree must therefore be made for the specific performance of the contract, with costs to the present time. A reference must be directed to Chambers to settle the lease in case the parties differ."

[14] Part of the case is omitted.

[15] In Sharp v. Wakefield, [1891] A. C. 173, the Lord Justices discussed the extent of their discretion to refuse the renewal of a license to sell intoxicating liquors under the Licensing Acts of 1828, 1872, and 1874. Lord Halsbury, L. C., said: "An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion (Rooke's Case [1598] 5 Coke Rep. 100 a); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself. Wilson v. Rastall [1792] 4 T. R. 757."

[16] There is no sentence more often spoken by courts of equity than that found (as an instance) in Scott v. Alvarez, [1895] 2 Ch. 603, at page 612, where

## MOORE v. BLAKE.

(In Chancery before Lord Manners, Chancellor, 1808. 1 Ball & B. 62–69.)

* * *[17] A bill of this description (that is, for the specific performance of an agreement) is an application to the discretion, or rather to the extraordinary jurisdiction of this court, which I apprehend can not be exercised in favour of persons, who have so long slept upon their rights, and acquiesced in a title and possession adverse to their claim. Due diligence is necessary to call this court into activity, and where it does not exist, a court of equity will not lend its assistance, it always discountenances laches and neglect; and here the plaintiff does not offer by his bill to pay the money he owes, he only seeks to set off his debts against the rents and profits. Is a plaintiff so conducting himself entitled to call on this court, to exercise its discretion,[18] using that discretion according to the facts and circumstances of the case? Upon the principles adopted by courts of equity in respect to cases seeking a specific execution, I think the laches equally as strong against a plaintiff in not prosecuting, as in not commencing a suit.[19] * * *

Lindley, L. J., said: "The extraordinary remedy by specific performance is always more or less open to discretion."

The extra-legal order of a court of equity is not to be issued peremptorily, as the legal remedy would be administered, but may be withheld if in the opinion of the court it will result in injustice.

[17] The statement of facts and parts of the opinion are omitted.

[18] Discretion is here used as the equivalent of grace, as of the sovereign's grace by virtue of his royal prerogative to do justice. See Jackson v. Torrence (1890) 83 Cal. 521, 23 Pac. 695, where Chief Justice Beatty states basic position of equity most succinctly: "The specific enforcement of contracts is allowed as a matter of grace, and not of right."

In a court of law the plaintiff came asserting his right and claiming his remedy out of his right. In equity the suitor petitioned the King or Chancellor to move his grace to operate as special or extraordinary favor.

[19] In Louisville Ry. Co. v. Kellner-Dehler Realty Co. (Ky. 1912) 147 S. W. 424, 426, the court speaking through Nunn, J., said: "A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld accordingly as equity and justice seem to demand, in view of all the circumstances in the case. In the case of Bluegrass Realty Co. v. Shelton, 148 Ky. 666, 147 S. W. 33, 41 L. R. A. (N. S.) 384, the opinion in which was delivered May 31, 1912, the court said: 'In Story's Equity (section 750) the author says: "Indeed, the proposition may be more generally stated that courts of equity will not interfere to decree a specific performance, except in cases where it would be strictly equitable to make such a decree." In Woollums v. Horsley (1892) 93 Ky. 582 [20 S. W. 781], it was said that a specific execution was not a matter of absolute right in a party, but of sound discretion of the court; that a hard or unconscionable bargain would not be specifically enforced, nor if the decree would produce injustice or under the circumstances be inequitable; that a court of equity would allow a defendant to resist a decree, where the plaintiff might not be allowed relief upon the same evidence; and that a contract ought not to be carried into a specific performance, unless it should be just and fair in all respects.' "

The court by Rice, Presiding Judge, in Fister, Appellant, v. Kutztown Borough (1912) 49 Pa. Super. Ct. 483, at 492, considers "grace" has ripened in

## SECTION 2.—DEVELOPMENT OF EQUITY JURISDICTION

### DALTON v. VANDERVEER.

(Supreme Court of New York, 1894. 8 Misc. Rep. 484, 29 N. Y. Supp. 342, 31 Abb. N. C. 430, 23 Civ. Proc. R. 443.)

GAYNOR, J. The complaint alleges in sum and substance that the defendant owned a tract of 65 acres of land, and in order to secure the experience and assistance of the plaintiff in laying it out in lots and streets, and selling it off by lots at auction or private sale, entered into an agreement of copartnership with the plaintiff, whereby the plaintiff was given a certain interest in common with the defendant in the lands and the future proceeds of sales thereof; that out of such proceeds the defendant was first to be paid the moneys expended in preparing the land for sale by lots, as aforesaid, the agreement requiring him to advance it all, and then $3,000 an acre for the tract, after which the overplus, if any, should be divided between the parties, the plaintiff's share to be one-quarter; and that after the plaintiff had so plotted and prepared the land for sale, and a large number of lots had been actually sold, the defendant notified the plaintiff that he dissolved the partnership, and refused to go any further with the enterprise as a joint one; and the prayer is for a judgment declaring the plaintiff to be a part owner of the land, for the appointment of a receiver to sell the land, and for an accounting and division. The answer denies the copartnership, and alleges that the plaintiff was only the employé of the defendant. The proof shows that there was no copartnership, but that the plaintiff was employed as an agent by the defendant to prepare the land for sale and sell it, as aforesaid; and that for his services he was to be paid one-quarter of the overplus, as already stated; and

modern times into an equitable right. It interprets the modern view of grace in the following language: "While it is often said that an injunction is matter of grace, yet that phrase has acquired a definite meaning, which does not leave the exercise of the power to the mere pleasure or will of the chancellor. 'Certainly no chancellor in any English-speaking country will at this day admit that he dispenses favors or refuses rightful demands, or deny that when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable ex debito justitiæ, and needs not to be implored ex gratia.' Walters v. McElroy (1892) 151 Pa. 549, 25 Atl. 125. And in the very recent case of Sullivan v. Jones & Laughlin Steel Co. (1904) 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712, Justice Brown said: 'It is urged that as an injunction is a matter of grace, and not of right, and more injury will result in awarding than refusing it, it ought not to go out in this case. A chancellor does act as of grace, but that grace sometimes become a matter of right to the suitor in his court, and, when it is clear that the law cannot give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them. This is too often overlooked when it is said that in equity a decree is of grace, and not of right, as a judgment at law.'"

that after the contract had been partly performed, a large number of sales having been made, the defendant discharged the plaintiff. The cause of action which the proof presents is therefore one for damages for breach of contract for services. The amount already realized from sales is easily ascertained. Past sales furnish evidence of the time and effort it would take to sell off all of the lots, and also of the price for which the lots can be sold, and it would not be difficult to otherwise prove their value; so that no difficulty would be encountered in proving the damages which the plaintiff has sustained by the breach of the contract. In this state of the case, may the court go on and assess the damage in this, or must the complaint be dismissed? The complaint states a case which is within the jurisdiction of equity, and is not an action at law, but the evidence fails to sustain the complaint, and also fails to make out any case which is within the jurisdiction of equity. This being so, must not the complaint be dismissed?

The origin of the high court of chancery in England was due wholly to the inability, and, to a limited extent, the unwillingness, of the common-law courts to entertain and give relief in every case, and thus meet all the requirements of justice. The common-law courts paid such deference to forms and precedents that they became slaves to them. Their jurisdiction was thus circumscribed. They adhered to certain precise writs and rigid forms of action which were not sufficiently comprehensive to enable them to give adequate redress in some cases of injustice and wrong, or to give any redress in many others. In such cases the aggrieved person was remediless, except he could get a hearing of the king himself. Petitions by those in such case were, therefore, frequently presented to the king, asking for relief of him as matter of grace, because it could not be got of his courts. From the fact that the king usually referred such petitions to his secretary, called his "chancellor," they came in course of time to be presented to the chancellor directly by the suitors themselves; and thus, gradually and at a time which history cannot enable us to precisely fix, the court of chancery came to be established. As is seen, its jurisdiction was wholly extraordinary. Relief was afforded by it only in those cases wherein the common-law courts either could give no redress at all, or could not give adequate redress; and any one coming to chancery with a case which did not need its extraordinary jurisdiction, but could be adequately dealt with in the common-law courts, was dismissed for lack of jurisdiction. Thus, side by side there existed the court of chancery and the common-law courts, each with a distinct jurisdiction, the test of chancery's jurisdiction in any given case being that the suitor could either get no relief, or could not get adequate relief, in a court of common law; and, therefore, necessarily, there also grew up, not only two distinct systems of practice in these courts, but also two distinct systems of substantive jurisprudence, that in the court of chancery being the system which we call "equity." In the formation of the government of this state these two distinct kinds of courts and systems

were given a place from the beginning, and the court of chancery here was clothed with the general jurisdiction and powers of the high court of chancery in England.[20] Separate courts thus administered these separate systems of jurisprudence in this state until, by the constitution of 1846, the court of chancery was abolished, and its jurisdiction and powers were devolved upon the supreme court. From that time on the same court has administered justice under both systems; but, all the same, the two systems have necessarily preserved their identity and continued to exist. The court of chancery is gone, but the system of equity jurisprudence remains, and is still administered, but by the same court which also administers the common-law system. There is only one court to administer both systems, but they remain distinct systems.

This much have I said, because we seem sometimes to lose sight of it, and think otherwise. The cause of this is no doubt the enactment in our first Civil Procedure Code of 1848, and found in our present revised Code of Civil Procedure, namely:

"There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." Section 3339.

But this enactment relates only to the two systems of practice, and has no reference to the two systems of substantive jurisprudence. They still exist side by side, but the separate systems of practice under which they were formerly administered have been abolished, and the one system of our practice statute substituted. It is in this view that our court of appeals has said that "the distinction between legal and equitable actions is as fundamental as that between actions ex contractu and ex delicto, and no legislative fiat can wipe it out" (Gould v. Bank, 86 N. Y. 83); and, again, that "the names of actions no longer exist, but we retain in fact the action at law and the suit in equity" (Stevens v. Mayor, etc., 84 N. Y. 304); and, again, that, "although the distinction between actions at law and suits in equity is abolished, the distinguishing features between the two classes of remedies, legal and equitable, are as clearly marked and rigidly observed as they ever were, and this is necessary to the administration of justice in an orderly manner and the preservation of the substantial rights of suitors" (Chipman v. Montgomery, 63 N. Y. 230). In a word, the forms are

[20] In American Malting Co. v. Keitel (Circuit Court of Appeals, Second Circuit, 1913) 209 Fed. 351, at 353, 126 C. C. A. 277, Rogers, Circuit Judge, speaking for the court, said: "Courts of equity like courts of law follow established precedents. They cannot usurp powers they do not possess. We recognize the fact that equity is an elastic system; that its procedure is progressive and is capable of accommodating itself to the changing emergencies and demands of the age. If it were otherwise it could not so well have met the needs of our civilization. At the same time courts are not to usurp powers they do not possess. In a country which has constitutional guaranties of freedom of speech and of the press and of trial by jury, courts of equity should be slow to assume that they possess a power to deal with the publication of libels that the High Court of Chancery in England disclaimed."

all that are changed. The two distinct systems of justice still remain, though they are administered by the same court, under one system of practice.[21]

This brings me down to saying what must be done with this action. Under our existing system, both actions at law and suits in equity being brought in the same court, they are in regular course placed upon separate calendars by the parties themselves; namely, actions at law upon the calendar of causes to be tried by a jury, and equity actions upon the calendar of causes to be tried by the court without a jury. When chancery existed as a separate court, if a suitor came there with a common-law action he was dismissed for lack of jurisdiction; but now, if a plaintiff place an action at law upon the equity calendar, and notice it for trial there, he may not be dismissed out of court. The court may, of its own motion, refuse to hear it, and send it to the jury calendar;. or, if the court be willing to hear it, the defendant may, nevertheless, by demanding a jury trial, have the cause sent to the jury calendar; and, if he did not so demand, he waives the right to a jury trial, and confers jurisdiction upon the court to hear it without a jury; and the rule is the same whichever side has so placed it upon the calendar and noticed it. Code Civ. Proc. § 1009. The cause of action stated in the complaint in this action being wholly equitable, and in no aspect constituting an action at law, the case was properly placed upon the equity calendar and noticed for trial there by the parties. For the same reason the defendant had no right to demand a jury trial. The case presented by the complaint was not one which entitled the plaintiff to a jury trial, and he was bound by the complaint in that respect. It cannot therefore be claimed that he has waived a trial by the jury of the cause of action presented by the evidence. Nor can it be said that, by failure to plead in his answer that the defendant had an adequate remedy by an action at law, he has waived his right to so claim now. When chancery existed as a separate court, and a suitor came there asking for equitable relief upon a statement of facts in his bill upon which he could get full, complete, and adequate relief in an action at law, the chancellor was free to so inform him, and refuse to be vexed by his suit; but in order that the defendant might so insist, and have the suit dismissed on his motion, it was necessary for him to so

[21] In Powers' Appeal (1889) 125 Pa. 175, 186, 17 Atl. 254, 11 Am. St. Rep. 882, the court said: "The maxim of the common law that wherever there is a right there is a remedy for its infraction has never been adopted by courts of equity. A party whose right is clear may sleep upon it until his demand becomes stale. He may look on while valuable structures are erected, when he might successfully object, and remain silent until large sums have been expended or important intervening interests have grown up. In such cases the fact that he might have objected at the outset will not avail him. A suitor must not only appear in a court of equity with clean hands, but he must come with reasonable promptness, in good faith, and with a just and equitable demand; otherwise the conscience of the chancellor will not be moved. If an injunction is prayed for where, upon a consideration of the whole case, it ought not in good conscience to issue, a mere legal right in the plaintiff will not move the chancellor."

plead in his answer, in default of which he was held to have waived that defense, and submitted the cause to the chancery for equitable disposition, provided that court could in the end make any such disposition of it; and such is still the rule of pleading. Grandin v. Le Roy, 2 Paige, 509; Wiswall v. Hall, 3 Paige, 313; Le Roy v. Platt, 4 Paige, 77; Truscott v. King, 6 N. Y. 147; Town of Mentz v. Cook, 108 N. Y. 504, 15 N. E. 541; Ostrander v. Weber, 114 N. Y. 95, 21 N. E. 112; Watts v. Adler, 130 N. Y. 646, 29 N. E. 131. But the facts stated in the complaint made the action at bar an equitable one solely, and not of legal cognizance, and therefore the defendant could not properly have pleaded that the plaintiff had an adequate remedy in an action at law. He was not required to plead that, upon the actual facts which the plaintiff had not pleaded, the plaintiff could get adequate redress in an action at law. He was only required to plead to the complaint; and the complaint being framed solely for equitable relief, it being found upon trial that the plaintiff is not entitled to such relief, the court cannot entertain the action to give judgment for damages or to amend the complaint so as to change the action into one at law. Wheelock v. Lee, 74 N. Y. 495; Oakville Co. v. Double-Pointed Tack Co., 105 N. Y. 658, 11 N. E. 839; Bockes v. Lansing, 74 N. Y. 437. The complaint is therefore dismissed, with costs.[22]

[22] "*Principles of Equity Adopted in the United States*

"It has already been stated that the principles of justice, as administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction, have been adopted in nearly all, it would not be too much to say in *all*, of the United States. While this is true, it must be remembered that the practical application of these principles through the machinery of the courts has varied very much throughout the Union, and has received many modifications at different periods.

"*Jurisdiction of Federal Courts*

"The federal courts have equity powers within the scope of the jurisdiction conferred upon them by the Constitution.

"By the Constitution of the United States it is provided that the judicial power of the federal government shall extend to all cases at law or in *equity* arising under the Constitution and laws of the United States, and treaties made or which shall be made under their authority. This jurisdiction, as explained in the judiciary act, is not to be exercised in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law, but this enactment is declaratory merely of the existing law. It has also been said that the practice of the English High Court of Chancery forms the basis of the equity practice of the courts of the United States.

"Not only are both the principles and practice of the High Court of Chancery recognized in the administration of equity in the federal courts, but the administration of chancery doctrines under chancery forms is uniform throughout the Union.

"At the time the Constitution was formed, the distinction between law and equity as known in the country from whence our ancestors came was recognized by the Constitution; and the courts of the United States have uniformly held that the rules of decision in equity cases were the same in all the states, and they are the equity law which we derived from England. It is, moreover, settled law that the courts of the United States do not lose any of their equitable jurisdiction in those states where no such courts exist, but, on the contrary, are bound to administer equitable remedies in cases to which

they are applicable, and which are not adapted to a common-law action. Equitable titles, therefore, though allowed to be set up in state courts, in common-law suits, cannot be recognized in such suits in the federal courts. They must be made the subjects of suits in equity.

*"Changes of Procedure in Some States*

"After the separation of the American Colonies from the British Crown, the Constitutions of many of the states provided for the establishment of courts of chancery, after the model of the High Court of Chancery in England. Such was the case in New York, New Jersey, Maryland, Delaware, South Carolina, and also Michigan.

"In other states, as in Pennsylvania, there were no separate courts of chancery, and the equity powers conferred upon the common law courts were extremely limited. Changes were, however, made from time to time in most of the states. In 1840 the state convention which revised the Constitution of New York abolished the courts of chancery, and conferred upon the Supreme Court a general jurisdiction in law and equity; while, on the other hand, in Pennsylvania enlarged equity powers were conferred upon the courts in obedience to the suggestions contained in the report to revise the Civil Code, made in 1835.

"The example of New York in abolishing the distinction between legal and equitable forms of action, and substituting a general form of civil action in their place, has been followed by very many Western states of the Union, and even the state of South Carolina, so justly celebrated for the learning and ability of its chancellors, has given in its adherence to the new system, and has adopted a code whereby separate courts of equity are abolished, and all civil injuries are redressed by one form of action.

"But even in those states where this sweeping change has been effected it has still been found necessary to make provisions for certain equitable remedies, the absence of which would inevitably result in a failure of justice in many cases. Thus, injunctions and writs of ne exeat are issued, specific performance enforced, and receivers appointed upon applications not made according to the course and practice of chancery, but under common-law or statutory forms; and relief which falls under the quia timet jurisdiction of equity is afforded through the medium of a petition or complaint.

*"Classification of States*

"In considering this subject, therefore, the states of the Union may be conveniently divided in three groups or classes.

"The first embraces those states wherein distinct courts of chancery exist, and includes New Jersey, Kentucky, Delaware, Tennessee, Mississippi, and Alabama.

"The second class is composed of those states wherein chancery powers are exercised by judges of common-law courts, but according to the course and practice of chancery. These states are Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, West Virginia, North Carolina, Illinois, Texas, Florida, Michigan, Iowa, Arkansas, Oregon, North Dakota, South Dakota, Washington, and Colorado.

"The third class of states includes, it is believed, all those which have not been mentioned as falling within the other two classes. In these states the distinction between actions at law and suits in equity has been abolished; but, as has been already stated, certain equitable remedies are still administered under the statutory form of the civil action.

"Whatever modifications have been introduced by statute into the forms of relief, the system of justice which is administered in courts of equity must, of necessity, enter into the laws of every civilized state whose institutions are derived, directly or indirectly, from England; and no state in the Union, however widely it may depart from the practice of the English High Court of Chancery, can discard the principles upon which its extraordinary jurisdiction is founded."

Bispham, Principles of Equity (7th Ed. 1906) pp. 21 to 25.

## CHANCELLOR'S EXTRAORDINARY JURISDICTION.

Of course, if the Courts of the King's Bench, Common Pleas, and Exchequer had been able and willing to redress every imaginable wrong, the reserve jurisdiction of the Council never would have been called into play, and the Court of Chancery never would have grown into being. But the jurisdiction of each of the common-law courts was circumscribed. Certain precise and rigid forms of action existed, which were supposed to carry the great maxim of justice, "ubi jus ibi remedium," but which in point of fact were not sufficiently comprehensive to do so. No common-law writ, for example, existed by which a defective instrument could be reformed; a fraudulent conveyance set aside, a mistake or accident effectually relieved against, or a beneficial interest in property be enforced as against the holder of a legal title. Hence many injuries must necessarily and actually did exist, for which the common-law courts furnished no appropriate redress; and therefore it was that, finding no relief in the King's Bench or Common Pleas, the suitor was compelled to throw himself upon the grace and compassion of the King and Council.

Two or three circumstances, moreover, concurred to render this extraordinary jurisdiction liable to increase: First, the tendency of the common-law rules to hardness and rigidity by reason of the deference paid to precedents; secondly, the refusal of the common law to adopt that part of the Roman law which may be called equitable, as distinguished from that which is merely stricti juris; and, finally, the desire to increase the dignity and importance of the office of Chancellor, which grew to great proportions after the abolition of the office of Chief Justiciary, whereby an ambitious holder of the great seal would naturally be led to give redress by virtue of his extraordinary jurisdiction, rather than by directing a writ to be issued to bring the cause before the ordinary tribunals.

The jurisdiction above described was not exercised without opposition. In the successive reigns of Richard II, Henry IV, Henry V, and Henry VI, petitions were, from time to time, presented by the Commons setting forth encroachments upon the common law, complaining that men were brought before the Council on matters which were remedial at law, and (in two instances) inveighing against the use of subpœna. The jurisdiction of the Chancellor and the Council was, however, upheld by the sovereign; and the obnoxious writ was not abolished.

In the reign of Henry VIII a statute was passed which threatened at first to remove a large portion of the jurisdiction of the Chancellor by destroying a species of property which had hitherto been solely cognizable in his court, namely the use.

By the celebrated Statute of Uses (27 Henry VIII, c. 10) this estate in the land (the use), which had hitherto been recognized solely in a court of equity, was clothed with the legal title, and thereby rendered a

proper subject for the recognition of a common-law court. The nature of the use and the effect of the statute will be explained hereafter. It will be sufficient to say, at present, that the threatened blow at the jurisdiction of the Chancery was averted by an ingenious construction of the statute, whereby these equitable estates were rescued from destruction, and their control still retained in the court where they had originated.

In the reign of James I, another attempt was made to interfere with the jurisdiction of the Chancellor. An action was tried before Coke in which the plaintiff lost the verdict in consequence of one of his witnesses being artfully kept away. He then had recourse to Chancery to compel the defendant to answer on his oath, which the latter refused to do, and was committed for contempt. Coke then had indictments preferred against the parties to the bill, their counsels and solicitors for suing in another court after judgment obtained at law, which was alleged to be contrary to the statute of præmunire.

The matter was referred to the King, whose decision was in favor of the Lord Chancellor.

From that time to the present the jurisdiction of the Court of Chancery has been free from interference, and has expanded into a wise and comprehensive system of justice. This system has been perfected by the hands of many illustrious men who have sat upon the woolsack or at the Rolls—among whom are to be mentioned Nottingham, Hardwicke, Eldon and Grant, St. Leonards, Westbury, Selborne, and Jessel.

Courts of common law, in modern times, have afforded relief in many cases which formerly fell under the cognizance of Chancery alone; but the latter tribunal has not, on that account, abandoned the jurisdiction which it had acquired, and the suitor has now, not unfrequently, two tribunals from which he may obtain redress.

The choice between the two tribunals in England has been in late years greatly affected in favor of the Court of Chancery, by reason of the vast improvements which have been introduced in the constitutions of the equity courts and the practice therein. The jurisdiction formerly administered by the Chancellor alone came, by various statutes, to be vested in eight judges, viz., the Lord High Chancellor, two Lord Justices of Appeal, the Master of the Rolls, three Vice Chancellors, and the Chief Judge in Bankruptcy; and many improvements were introduced tending to the prompt and economical administration of justice.

### *Supreme Court of Judicature Act*

The system, however, of two distinct sets of courts administering different and sometimes conflicting rules at last ceased to find favor in England. On the fifth of August, 1873, an Act of Parliament was passed under the title of "Supreme Court of Judicature Act," whereby the constitution of the English courts was radically changed. By this Act (which it was declared should come into operation on the second

day of November, 1874) it was provided that the Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy should be united and consolidated, and should constitute one Supreme Court of Judicature, to consist of two divisions, under the names of "Her Majesty's High Court of Justice" and "Her Majesty's Court of Appeal." It was further provided that the judges of the High Court of Justice should not exceed twenty-one in number, and that the Court of Appeal was to consist of five ex officio judges, and so many ordinary judges (not to be exceeding nine at any time) as might from time to time be appointed. The ex officio were declared to be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. The act further provided that, if the plaintiff claims any equitable estate, or right, or relief upon any equitable ground, or equitable relief upon a legal right, the said courts and every judge thereof should give the same relief as ought to have been given by the Court of Chancery before the passing of the Act, and that, if a defendant claims any equitable estate or right, or relief upon any equitable ground, or alleges any ground of equitable defence, the said courts and every judge thereof should give the same effect to every estate, right, or ground of relief so claimed, and to every equitable defence so alleged, as the Court of Chancery ought to have given in proceedings in that court before the passing of the Act. Other provisions also exist, whereby equitable titles and rights are directed to be recognized, and equitable remedies substantially applied.

By Statute of 38 & 39 Vict. c. 77 (1875), the constitution of the Court of Appeal was changed, and that tribunal was made to consist of the five ex officio judges already named, and as many ordinary judges, not exceeding three, as should be from time to time appointed. By the Act of 1876, c. 77 (39 & 40 Vict. c. 59), three additional judges of appeal may be appointed, and an appeal lies from the Court of Appeal to the House of Lords. The positions of Lord Chief Justice of the Common Pleas and Lord Chief Baron of the Exchequer are now abolished.

It will be observed that, by the provisions of these acts, the principles of justice, as administered in the Court of Chancery, were made to pervade the whole mass of English jurisprudence, and that, in fact, by the rules growing out of those principles, all questions of justice in England are hereafter to be determined.

Bispham, Principles of Equity (7th Ed.) pp. 8, 9, 17, 18, 19, 20.

### PROCESS IN EQUITY.

The process in equity was a subpœna, issued by the Chancellor, in the name of the King, whereby the party was summoned to appear and answer the complaint of the plaintiff, and abide by the order of the court. It is commonly supposed to have been invented by John de Waltham, Keeper of the Seal under Richard II, and it is so stated in the complaint made by the Commons to Henry V; but this is doubtless an error, as an instance of the writ is found in 37 Edward III; and de Waltham was not Master of the Rolls until the fifth year of Richard II.

Bispham, Principles of Equity (7th Ed.) pp. 14, 15.

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## SECTION 3.—GROUNDS OF EQUITABLE RELIEF

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### PUSEY v. PUSEY.

**(In Chancery before Sir Francis North, Lord Keeper, 1684. 1 Vern. 273, 23 E. R. 465.)**

Bill was, that a horn which time out of mind had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him; upon which horn was this inscription, viz. pecote this horn to hold huy thy land.

The defendant answered as to part, and demurred as to other part; and the demurrer was, that the plaintiff did not by his bill pretend to be intitled to this horn, either as executor or devisee; nor had he in his bill charged it to be an heir loome.

The demurrer was over-ruled, because the defendant had not fully answered all the particular charges in the bill, and was ordered to pay costs. And the LORD KEEPER was of opinion, that if the land was held by the tenure of a horn, or cornage, the heir would be well intitled to the horn at law.

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### FELLS v. READ.

**(In Chancery before Lord Loughborough, 1796. 3 Ves. 70, 30 E. R. 899.)**

The plaintiffs were members of a club, called "The Past Overseers of St. Margaret's Parish, Westminster," which consisted of persons who had served the office of Overseer of the Poor of that parish. This society had been for a long period in possession of a silver tobacco-box, enclosed in two large silver cases, all which were adorned with several engravings of public transactions, and heads of distinguished persons.

The date of the box did not appear in the cause: but the ornaments, which had been added by different overseers during the time the box and cases remained in their custody, began in the year 1713. This box and the cases were always kept by the overseer for the time being; who upon coming into office, received them from the churchwarden, with a particular charge, in which he was enjoined, under a penalty, to produce them at all meetings of the society, and to deliver them up at going out of office to the senior churchwarden, to be by him delivered to the succeeding overseer. They were delivered in the usual form to the defendant Read, on his coming into office as overseer. On going out of office, he refused to deliver them up, unless the vestry would pass his accounts; in which they had refused to allow him certain payments. Upon this a meeting was called; and it was resolved, by those members who attended, that legal steps should be taken; and, after some negotiation, an action was brought; and Read was arrested. Hanley and Byfield, two of the members, in whose name the action was brought, executed a release to Read; who delivered the box and cases to Hanley. An application was made to Mr. Justice Buller at Chambers to set aside the release; but that application failed. The bill was then filed against Read, Hanley, and Byfield, to have the box and cases delivered up. They were ordered to be placed in the custody of Master Leeds.

It was proved by Cartaret, that the box and cases were delivered to Read, under the usual injunctions and conditions; to which he expressly consented. The defendants Hanley and Byfield insisted, that the action was commenced without their authority. They did not attend the meeting: but it was regularly called.

Mr. Mansfield, and Mr. Cox, for the Plaintiffs,

Cited The Duke of Somerset v. Cookson, 3 P. Wms. 389, as having established the jurisdiction, where the thing, of which the delivery is sought, is of such a sort that damages can be no compensation.

Attorney-General [Scott], for the Defendants.

Except that case, and Pusey v. Pusey, 1 Vern. 273, in which the chattel had a connexion with the tenure of the land, there is no case like this. The Court will order title deeds and heirlooms to be delivered up, and will not permit valuable things to be defaced: but except in those cases there is no instance of a decree specifically to deliver up a specific chattel. If from a complication of circumstances they cannot succeed at law by stress of damages to compel delivery, I do not say this Court will not interfere. There was a special property in the person to whom this box was to be delivered, that would have supported an action; or they might have expelled Hanley and Byfield, and have gone on at law. * * *

LORD CHANCELLOR [Loughborough]. I am sorry this cause has come into this Court: but the regret I feel is no other than that one always feels, that litigation and expense should have been occasioned by the peevishness and obstinacy of the parties. The value I cannot measure.

The Pusey horn, the Patera of the Duke of Somerset, were things of that sort of value, that a jury might not give two-pence beyond the weight. It was not to be cast to the estimation of people who have not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange, if the law of this country did not afford any remedy. It would be great injustice, if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it. But this has very particular circumstances; for if no such cases as those cited had occurred, if this had come here originally, it is impossible that I should not have permitted the suit to stand. In the case of the Pusey horn in Vernon, it does not appear how the defendant got it. In the case of the Duke of Somerset, the Patera was in the possession of a goldsmith, who bought it in the way of trade, with notice of the claim of the Duke of Somerset. But in this case the possession is by a qualified title. It was delivered upon an express trust to keep it and produce it at the meetings of the club, and at the expiration of his office to deliver it over to the senior churchwarden, in order that he might give it to the next overseer. He accepts it upon that condition. The witness Cartaret states his express assent to the conditions. Had he then any right to retain this possession, against the terms upon which it was delivered to him? He was a depositary upon an express trust; and he does not perform the trust. Upon the common ground of equity there was a right in the plaintiffs to have called upon him in the first place, during the term, to have used it according to the trust. That would be a small subject of a suit in equity; but if he had not produced it at the meeting, I must have compelled it; so, if he retains it after the expiration of the term. I must compel him to use it according to the trust. There was a legal remedy; and I think it was done very wisely not to begin in equity. There was another remedy which did not occur to them. Upon the terms of Cartaret's evidence, the person, to whom Read was bound at the time to deliver it, might have been plaintiff in assumpsit. The conduct of these defendants is perfectly groundless: the idea, that by keeping possession of this ornament, he would compel the Vestry to allow his accounts. As to Hanley and Byfield, it is not necessary for me to determine it, but I incline to think they would be bound to let the others make use of their names: but an indemnity as to the costs was the utmost they could have been entitled to. It is unfortunate, that the application made to the Court of law did not succeed to set aside the release. I am then to judge of the conduct of the parties, not with regard to the ground of the decree, but upon the nature of the possession coupled with a trust. There was a proper ground as much as in any case. Where the right is not to use the thing as his own, but coupled with a trust to deliver it at a certain time, there is a clear jurisdiction upon the ordinary equity to compel the execution of the trust, by the delivery of the thing at the time. But the conduct was extremely bad

in Read; and not better in those who conspired with him to frustrate the purpose of the trust, and act contrary to it.

Declare the plaintiffs entitled to the possession of this box. Let them receive it from the Master's office. Let all the defendants pay the costs; and let the defendant Read pay the costs at law.

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## DUKE OF SOMERSET v. COOKSON.

(In Chancery before Lord Talbot, Chancellor, 1735. 3 P. Wms. 390.)

The Duke of Somerset, as Lord of the Manor of Corbridge, in Northumberland, (part of the estate of the Piercy's late Earls of Northumberland) was entitled to an old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules. His Grace became entitled to it as treasure trove within his said Manor. This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at Newcastle, but who had notice of the Duke's claim thereto. The Duke brought a bill in Equity to compel the delivery of this altar-piece in specie, undefaced.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at Law, by an action of trover or detinue, and ought not to bring his bill in Equity; that it was true, for writings savouring of the realty a bill would lie, but not for any thing merely personal; any more than it would for an horse or a cow. So, a bill might lie for an heir-loom; as in the case of Pusey versus Pusey, 1 Vern. 273. And though in trover the plaintiff could have only damages, yet in detinue the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of trover would be turned into bills in Chancery.

On the other side it was urged, that the thing here sued for, was matter of curiosity and antiquity; and though at Law only the intrinsic value is to be recovered, yet it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity, or matter of antiquity, or ornament, nolens volens. Besides, the bill is to prevent the defendant from defacing the altar piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out, or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar piece, yet such answer could not help the demurrer; that in itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again in specie; and the Law being defective in this particular, such defect is properly supplied in Equity.

Wherefore it was prayed that the demurrer might be over-ruled, and it was over-ruled accordingly.

## BUXTON v. LISTER and Cooper.

(In Chancery before Lord Hardwicke, 1746. 3 Atk. 383, 26 E. R. 1020.)

The defendants entered into an agreement for the purchase of several timber trees, marked and growing at the time it was reduced into writing: and on the first of November, 1744, the following memorandum was signed by the parties:

"Matthew Lister and John Cooper have agreed with Joseph Buxton for the purchase of all those several large parcels of wood, consisting of oaks, ashes, elms, and asps, which are numbered, figured, and cyphered, standing and being within the township of Kirkby, for the sum of 3050£ to be paid at six several payments, every Lady-day for the six following years; and Lister and Cooper to have eight years for disposing of the same; and that articles of agreement shall be drawn and perfected as soon as conveniently can be, with all the usual covenants therein to be inserted concerning the same."

There were two parts of the agreement.

The plaintiff signed one, and the defendants the other; one was left in the custody of the plaintiff, and the other in the custody of the defendants.

The bill was brought by the vendor for the specific performance of the agreement.

LORD CHANCELLOR, upon the opening, said, he did not know any instance of a bill of this nature, where it is a mere chattel only, and nothing that affects the realty.

That a bill might as well be brought for compelling the performance of an agreement for the sale of a horse, or for the sale of stock, or any goods or merchandise.

Sir Joseph Jekyll did, in Cud versus Rutter, 1 P. Wms. 570, decree a specific performance in the case of a chattel, but Lord Macclesfield reversed it, and it has been the rule of the court ever since, not to retain such a bill.

The proper remedy is an action at law, where you may recover damages for the non-performance of the agreement.

The defendants' counsel, to shew the impropriety of such a bill, and that the parties ought to be left to law, cited Roll's Reports 493. and Latch's 172.

Upon hearing what the plaintiff's counsel could alledge, in order to take this case out of the general rule of the court, Lord Chancellor delivered his opinion as follows: [23]

The general question is, as to the decree for specific performance, and this divides itself into two subordinate ones.

First, Whether the plaintiff is intitled to seek his remedy in a court of equity for a specific performance.

Secondly, whether, as to the merits of his case, he is intitled to such a decree.

[23] Part of the opinion is omitted.

As to the first, I am of opinion, that this is such an agreement, though for a personal chattel, that the plaintiff may come here to have a specific performance.

To be sure, in general this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c. for as those are contracts which relate to merchandise, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, that party might not have paid, perhaps, above a shilling damage.

Therefore the court have always governed themselves in this manner, and leave it to law, where the remedy is so much more expeditious.

As to the cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade.

But, however, notwithstanding this general distinction between personal contracts, and for goods, and contracts for lands, yet there are indeed some cases where persons may come into this court though merely personal, and the plaintiff's counsel have cited a case in point, Taylor versus Neville. (Vide Colt v. Netterville, 2 P. W. 504. Thompson v. Harcourt, 2 Bro. Par. Ca. 415.)

That was for a performance of articles for sale of eight hundred ton of iron, to be paid for in a certain number of years, and by installments, and a specific performance was decreed.

Such sort of contracts as these, differ from those that are immediately to be executed.

There are several circumstances which may concur.

A man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, and this on the part of the buyer.

On the part of the seller, suppose a man wants to clear his land, in order to turn it to a particular sort of husbandry, there nothing can answer the justice of the case, but the performance of the contract in specie.

In the case of John Duke of Buckinghamshire v. Ward, a bill was brought for a specific performance of a lease relating to Alum Works, and the trade thereof, which would be greatly damaged, if the covenant was not performed on the part of Ward.

The covenants lay there in damages, and yet the court considered if they did not make such a decree, an action afterwards would not answer the justice of the case, and therefore decreed a specific performance.

This is something of the like kind; the memorandum appears not to be the final contract, but is to be made complete by subsequent articles.

I am doubtful, whether at law the plaintiff would not have been told this was an incomplete agreement.

Suppose two partners should enter into an agreement by such a memorandum as is in the present case, to carry on a trade together, and that it should be specified in the memorandum, that articles should be drawn pursuant to it, and before they are drawn, one of the parties flies off, I should be of opinion, upon a bill brought by the other in this court, for a specific performance, that notwithstanding it is in relation to a chattel interest, yet a specific performance ought to be decreed.

On the circumstances of the present case, such a bill ought to be entertained, but at the same time I will add that courts ought to weigh with great nicety cases of this kind, before they determine the bill proper, where it is a mere personal chattel. * * *[24]

Upon the whole, I am of opinion the bill must be dismissed.

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## EARL OF MACCLESFIELD v. DAVIS.

**(In Chancery, 1814. 3 Ves. & B. 16, 35 E. R. 385.)**

Thomas Blackall by his Will devised to the Earl of Macclesfield and James Musgrave all his Freehold Estates, to hold to the Use of John Blackall for Life, without Impeachment of Waste; with Remainder to the Trustees to preserve contingent Remainders; with Remainder to the first and other Sons of John Blackall in Tail-male; and gave his Leasehold Estate for such Persons, &c., as nearly as its Nature admitted to be enjoyed as his Freehold Estates. He bequeathed to the Earl of Macclesfield and Musgrave, their Executors, &c., all his Plate, Jewels, Paintings, and Household Furniture (except Beds and Linen), then in his Mansion-house at Great Hagely, as Heir-looms, as long as the Law would permit, for the Use of the Persons entitled by virtue of the Limitations to his Freehold and Leasehold Estates; and appointed the Earl of Macclesfield, Musgrave, and John Blackall, his Executors.

After the Death of the Testator, in 1786, John Blackall, entered on the Estates; and took Possession of the Heir-looms; which were then and since usually kept and locked up in an Iron Chest. After the Death of John Blackall the Bill was filed by the Surviving Executors, and the Tenant in Tail, alledging, that the Defendant Davis, the Executor of Blackall, in November 1802 took Possession of the Iron Chest and all the Contents, comprising the Heir-looms; and afterwards deposited them with the Defendant Waters; from whom they came to the Defendants Vere and Co.; and charging that the Key was in Da-

[24] The case finally went off on another point, and specific performance was refused.

vis's Possession, prayed, that Waters, or Vere and Co., as his Bankers, may be decreed to deliver to the Plaintiffs the Iron Chest; and in the meantime may be restrained by Injunction from selling the Plate, &c.; and Vere and Co. from parting with the Chest.

The Defendants insisted on a Lien; Davis alledging, that Blackall, the Tenant for Life, had deposited the Chest with him as a Security; and Waters had received it upon a Loan to Davis.

A Motion was made by the Plaintiffs, that the Defendant Davis may be ordered to deliver to the Plaintiffs the Key of the Iron Chest, admitted by the Answer of Vere and Co. to have been deposited with them by Waters, and to be in their Custody, and that they may be ordered to permit the said Box with its Contents to be inspected by the Plaintiffs, or any Person they may appoint, at all seasonable Times, upon Request; and for an Injunction according to the Prayer of the Bill.

Mr. Hart, and Mr. Phillimore, in support of the Motion, observed, that no Action of Trover could be maintained by the Plaintiffs from their Inability to identify the Property; and Blackall had been one of the Executors.

Mr. Barber, for the Defendants.

THE LORD CHANCELLOR [ELDON]. This Bill aims only at another Mode of Discovery, in a Way less expensive than by Answer: and if the Plaintiffs had filed a Bill of Discovery, in aid of an Action of Trover, they must have had it. It is now too late, since the Case of Fells v. Read (3 Ves. 70), following Pusey v. Pusey (1 Vern. 273) to discuss, whether this Court will interfere for the specific Delivery of a Chattel; and, if it will in such a Case, a fortiori the Restitution of Heir-looms must be decreed; upon which there never was any Doubt. By granting this Motion the Interest of the Defendant Waters is not affected; the Plaintiffs, only desiring to know what is in this Box, have a Right to have from him the Information, what those Articles are, the specific Delivery of which they seek by their Bill. With respect to the Bankers, holding merely as Agent of Waters, the Court would, if necessary, order him to take the Box from them, and allow the Inspection. Not having put upon the Record a Plea of Purchase without Notice he could not refuse to discover, what is the Property claimed.

In directing this Inspection the Convenience of the Bankers must be consulted; and with that Observation I shall make the Order.

## DUMONT v. FRY et al.

(Circuit Court of the United States, S. D. New York, 1882. 12 Fed. 21.)

WALLACE, Circuit Judge.[25] * * * In the present case it is apparent on the face of the bill that the remedy is at law.

The bill alleges that the complainants are the owners of 232 bonds, of $1,000 each, issued by the city of New Orleans; that these bonds are in the possession of Fry, the trustee in bankruptcy of Schuchardt & Sons; that, although thereunto requested, Fry refuses to deliver the bonds to complainants; that Fry claims to hold the bonds as security for a pretended indebtedness owing from the assignees in bankruptcy of Caverre & Sons and from the receiver of the New Orleans Banking Association; that in fact the bonds were never hypothecated for any such indebtedness; that a sum of money is now on deposit in the Union Bank of London which belongs either to Fry or to the receiver of the New Orleans National Banking Association, and should be applied to the reduction of the alleged indebtedness for which Fry claims to hold the bonds as security; that several other persons who are made defendants "claim to have liens upon the said bonds or some portion thereof, or claims affecting the said bonds, the exact amount whereof your orators are ignorant, and the validity of which your orators dispute." The prayer of the bill is that Fry shall be adjudged to deliver the bonds to the complainants, and that the rights of Fry and the receiver of the New Orleans Banking Company to the money in bank in London may be settled, and the deposit applied where it may belong.

Inasmuch as the complainants do not allege that they have any interest in the controversy between Fry and the receiver of the New Orleans Banking Association as to the deposit in the London bank, or that their rights are in any manner involved in that controversy, and nothing appears by which such a conclusion is suggested or can be inferred, all the allegations in regard to that controversy, for present purposes, may be deemed eliminated from the bill. The same may be said of the allegations in regard to the claims of the other defendants. It is not alleged, and nothing in the bill authorizes the inference, that such defendants have any control over the bonds, or any apparent or colorable title thereto, or interest therein. No relief is prayed for as to such defendants. If it had been, it can hardly be supposed the court would undertake to adjudicate upon the merits of the naked assertion of these defendants.

The case made by the bill, when analyzed, resolves itself into a controversy between the complainants and the defendant Fry as to Fry's right to withhold from the complainants the bonds to which complainants have the legal title, and Fry no title whatever. This controversy

[25] Parts of the opinion are omitted.

is not of equitable cognizance. An action at law for conversion, or in replevin, is the plain and appropriate remedy. * * *

The bill is dismissed for want of jurisdiction, without costs.

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## PORTER v. FRENCHMAN'S BAY & MT. DESERT LAND & WATER CO.

(Supreme Judicial Court of Maine, 1892. 84 Me. 195, 24 Atl. 814.)

Report from supreme judicial court, Hancock county.

Bill in equity by Margaretta B. Porter against Frenchman's Bay & Mt. Desert Land & Water Company, to which respondent demurred.

LIBBEY, J. Bill in equity, praying for decree for a specific performance of a contract in writing, made by the defendant with the plaintiff, for the purchase of a lot of land in the village of Sorrento.

It comes before this court on a demurrer to the bill by the defendant, and the question to be determined is whether, upon the allegations in the bill, this court has jurisdiction in equity to decree a specific performance. We think it clear that in a proper case the court has jurisdiction to decree specific performance of a contract in writing for the conveyance of land, in a bill brought by the vendor or by the vendee. Rev. St. § 6, c. 77, cl. 3. But the court in this state does not take jurisdiction in equity when the plaintiff has a plain, adequate, and complete remedy in an action at law. Milliken v. Dockray, 80 Me. 82, 13 Atl. 127; Bachelder v. Bean, 76 Me. 370; Alley v. Chase, 83 Me. 537, 22 Atl. 393.

And we think it must appear by the allegations in the bill, where an action at law may be maintained, that the remedy by it is not plain, adequate, and complete; for it is a well-established rule of equity pleading that the bill must contain allegations showing that the court has equity jurisdiction. Story, Eq. Pl. §§ 10, 34; Jones v. Newhall, 115 Mass. 244, pp. 252, 253, 15 Am. Rep. 97.

In this case, we think it perfectly clear that the plaintiff has a right to maintain an action at law for a breach of the contract. That being so, to show jurisdiction in equity, there should be some allegations in the bill showing that the remedy at law would not be adequate and complete. There is nothing of the kind in this bill. After setting out the contract, it alleges that the plaintiff was in possession of the land, and has continued to be in possession of the land, to the time of the filing of the bill; no allegation that her action in regard to the land was in any way changed by the making of the contract; no allegation that anything had been done by either party, in consequence of the making of the contract, which could not be taken into consideration in the assessment of the plaintiff's damages.

Demurrer sustained. Bill dismissed, with costs.

PETERS, C. J., and WALTON, VIRGIN, EMERY, and WHITEHOUSE, JJ., concurred.

## SCARBOROUGH v. SCOTTEN et al.

**(Court of Appeals of Maryland, 1888. 69 Md. 137, 14 Atl. 704, 9 Am. St. Rep. 409.)**

Appeal from circuit court, Cecil county.

Bill by Hugh F. Scarborough against Samuel Scotten and others, executors of William Scotten, to compel a surrender of certain notes and bills placed in the hands of the deceased in his life-time. The bill was dismissed on demurrer, and plaintiff appeals.

Argued before ALVEY, C. J., and MILLER, BRYAN, STONE, McSHERRY, and IRVING, JJ.

IRVING, J. This appeal is from a decree of the circuit court of Cecil county, sustaining a demurrer to the appellant's bill in equity, and dismissing the same. The appellant's bill charges that in the year 1880, being the owner of certain promissory notes and single bills, and desiring to have the same collected, he indorsed and delivered the same to William Scotten, the defendants' testator, with the understanding and agreement that he (William Scotten) would collect the same, from the persons owing the promissory notes and single bills, and would pay over the amount so collected to Francina Scarborough, the wife of the appellant; that this agreement was made with the defendants' testator verbally at the time the promissory notes and bills were indorsed to him. The bill then avers that, after such indorsement and delivery, William Scotten died without having collected any of the notes and bills so indorsed to him, leaving a will by which the defendants were appointed executors, and who have duly qualified as such; that they have, as executors, those promissory notes and single bills now in their possession; that Francina Scarborough, appellant's wife, to whom the proceeds were to be paid when collected, has assigned to the complainant all her interest in the same and their proceeds; that the defendants have not collected the same, nor made any effort to collect the same, and that their inaction is for the purpose of delaying and hindering the complainant in the collection of and receipt of the money due him thereon; that the complainant has demanded of the executors the delivery of the notes and single bills to him, but the defendants have refused, and still refuse, to surrender the same. The bill then charges that the complainant is without adequate remedy at law, and prays for a decree requiring the surrender of the promissory notes and single bills, copies of which are filed with the bill, and for such other relief as his case may require. By the demurrer, of course, all the facts alleged are admitted, and the only question for us to decide is whether the bill makes a case for equitable interference.

In sustaining the demurrer and dismissing the bill the learned judge of the circuit court simply says:

"I am of opinion that the bill presents a case where the plaintiff has a certain, adequate, and complete remedy at law. Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249 [30 L. Ed. 451]; Winner v. Penniman, 35 Md. 163 [6 Am. Rep. 385]."

In this view we do not concur. Judge Story, in his Equity Jurisprudence, (volume 2, 13th Ed. § 703,) says that a court of equity will render remedial justice by decreeing the delivery up of deeds and other instruments of writing to those who are entitled to them. That learned author says it is a very ancient "head of equity jurisdiction." In the same section last cited he says:

"The same doctrine applies to other instruments and securities, such as bonds, negotiable instruments, and other evidences of property, which are improperly withheld from persons who have an equitable or legal interest in them, or who have a right to have them preserved. * * * It is true that an action of detinue, or even of replevin, might in some few cases lie, and give the proper remedy if the thing could be found. But generally, in actions at law, damages only are recoverable; and such a remedy, in most cases, would be wholly inadequate."

Lord Hardwicke, in Jackson v. Butler, 2 Atk. 306, decreed the surrender of a mortgage by a pawnee of it, who had received it from a person who had received it from the owner for the purpose of collecting the interest due on it, and has violated his duty and pawned it. In many other cases the principle had been applied. Duke of Somerset v. Cookson, 1 Lead. Cas. Eq. (Hare & W.) 771–775; Fells v. Read, 3 Ves. 70; Nutbrown v. Thornton, 10 Ves. 163.

There can be no doubt that the true ground of interference by a court of equity is the inadequacy of any legal remedy to give full relief. That is the test. In this case the court below thought the remedy at law was full and adequate; and the court relies on Penniman's Case, 35 Md. 163, 6 Am. Rep. 385, and Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451. In the first-mentioned case this court decided that trover would lie in favor of one joint owner of a note against another joint owner who surrendered it to maker for cancellation. The plaintiff saw fit to rely on the action of trover against his co-owner, and was awarded damages, which were easily and fully measurable. In Houston's Case the supreme court merely decided that, if the paper sought to be restored were restored, the damages recoverable for its breach would be the same as in an action for deceit because of the fraudulent procurement of its surrender. Full relief in those cases could be secured at law. In this case, however, it would not seem that trover or replevin will secure full and adequate relief. Replevin would secure the surrender of the notes if the defendant saw fit to exhibit them to the officer, and allowed him to take them; but the officer could not search his person or the places where the defendant kept his money and securities. From the very nature of the things sought to be recovered they could not be obtained by the officer against the will of the defendant; and having refused to deliver them upon demand, as the demurrer admits the defendants have done, and for the reason assigned, it is plain the action of replevin would be nugatory for the recovery of the specific things sought, and if, after return of eloigned, the writ should proceed as an action for damages, the measure of damages would be the same as in trover,—the value of the prop-

erty taken and detained. In trover the measure of damages is the actual value of the property taken at the time of conversion. Hepburn v. Sewell, 5 Har. & J. 212, 9 Am. Dec. 512; Herzberg v. Adams, 39 Md. 309.

In the present case the ascertainment of the value of the notes would involve inquiry into the solvency of 15 persons; for if the parties were insolvent the notes could not be worth what they promised to pay. The action of trover could, it may be conceded, be brought, but such action could not certainly give him adequate relief. In that action the measure of damages would be the actual value of the notes at the time of the taking of them by the defendants. Hepburn v. Sewell, 5 Har. & J. 212, 9 Am. Dec. 512; Herzberg v. Adams, 39 Md. 309. As we have said, the solvency of 15 persons would be the subject of inquiry; for the defendants in that action could not be bound to pay for those notes more than they were worth, and where the judgment was obtained and paid, by the decision of this court in Hepburn v. Sewell, the defendants would become the purchasers of the notes, and the plaintiff's right to them would cease. It might very well be that some, or even all, of the makers of the notes were insolvent when the conversion of the notes by the defendants took place; but it is not a fair or reasonable presumption that they would always remain so, and the plaintiff in this case ought not to be forced to part with the notes for what they were actually worth when taken from him, when the possibility of large recovery in future existed. He ought to have his notes, and be allowed to bide his time for the collection thereof, as he might find practicable, if the makers should eventually become more prosperous and pecuniarily more responsible. It, at least, is but equitable to allow him his own judgment and discretion whether to have them now, and hold his judgment until there be opportunity to make it, or defer, as he pleases; and it is inequitable to force him, in effect, to sell them for what an action of trover would give him for them. Besides, in an action at law against the defendants, the questions arising upon the solvency of so many persons would involve tedious and protracted litigation, and questions of evidence to which he ought not to be subjected. Such questions could not arise between this appellant and his debtors in a suit between them. A suit at law to give full measure of relief should not involve such delay and expense, nor the uncertainty of a jury's decision on the proof. A legal remedy imposing such a hardship cannot be full, complete, and ample. We think the bill, if its allegations be true, does disclose a case for equitable interference. There was error, therefore, in sustaining the demurrer and dismissing appellant's bill. The defendants ought to have been required to answer, and, if the allegations of the bill are sustained by proof, the appellant should be accorded the relief he asks for.

The decree must therefore be reversed, and the cause remanded, to the end that the demurrer may be overruled, and the case proceed regularly to decree, as the proof may justify.

## WATSON v. SUTHERLAND.

(Supreme Court of the United States, 1866. 72 U. S. [5 Wall.] 74, 18 L. Ed. 580.)

Appeal from the Circuit Court of the United States for the District of Maryland; the case being this:

Watson & Co., appellants in the suit, having issued writs of fieri facias on certain judgments which they had recovered in the Circuit Court for the District of Maryland against Wroth & Fullerton, caused them to be levied on the entire stock in trade of a retail dry goods store in Baltimore, in the possession of one Sutherland, the appellee. Sutherland, claiming the exclusive ownership of the property, and insisting that Wroth & Fullerton had no interest whatever in it, filed a bill in equity, to enjoin the further prosecution of these writs of fieri facias, and so to prevent, as he alleged, irreparable injury to himself. The grounds on which the bill of Sutherland charged that the injury would be irreparable, and could not be compensated in damages, were these: that he was the bona fide owner of the stock of goods, which were valuable and purchased for the business of the current season, and not all paid for; that his only means of payment were through his sales; that he was a young man, recently engaged on his own account in merchandising, and had succeeded in establishing a profitable trade, and if his store was closed, or goods taken from him, or their sale even long delayed, he would not only be rendered insolvent, but his credit destroyed, his business wholly broken up, and his prospects in life blasted.

The answer set forth that the goods levied on were really the property of Wroth & Fullerton, who had been partners in business in Baltimore, and who, suspending payment in March, 1861, greatly in debt to the appellants and others, had, on the 27th October, 1862, and under the form of a sale, conveyed the goods to Sutherland, the appellee; that Sutherland was a young man who came to this country from Ireland a few years ago; that when he came he was wholly without property; that since he came he had been salesman in a retail dry goods store, at a small salary, so low as to have rendered it impossible for him to have saved from his earnings any sum of money sufficient to have made any real purchase of this stock of goods from Wroth & Fullerton, which the answer set up was accordingly a fraudulent transfer made to hinder and defeat creditors.

It further stated that the legislature of Maryland had passed acts staying executions from the 10th of May, 1861, until the 1st of November, 1862; that previous to the 1st November, 1862, Wroth & Fullerton had determined to pay no part of the judgments rendered against them; and that from the 10th May, 1861, until the 1st November, 1862, judgments amounting to between $30,000 and $40,000 had been rendered against them; that between the date of the suspension, March 1861, and the 27th October, 1862, they had sold the greater portion of

their goods, and collected a great many of the debts due them, but had paid only a small portion of those which they owed; secreting for their own use the greater portion of the money collected, and with the residue obtaining the goods levied upon.

It added that there was no reason to suppose that the levy aforesaid, as made by said marshal, would work irreparable injury to the appellee, even if the goods so levied on were the property of the complainant, as property of the same description, quantity, and quality, could be easily obtained in market, which would suit the appellee's purpose as well as those levied upon, and that a jury would have ample power, on a trial at common law, in an action against the respondents, now appellants, or against the marshal on his official bond, to give a verdict commensurate with any damages the said appellee could sustain by the levy and sale of the goods aforesaid.

On the filing of the bill a temporary injunction was granted, and when the cause was finally heard, after a general replication filed and proof taken, it was made perpetual.

These proofs, as both this court and the one below considered, hardly established, as respected Sutherland, the alleged fraud on creditors.

The appeal was from the decree of perpetual injunction.

Mr. Justice DAVIS [26] delivered the opinion of the court.

There are, in this record, two questions for consideration. Was Sutherland entitled to invoke the interposition of a court of equity; and, if so, did the evidence warrant the court below in perpetuating the injunction?

It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, "but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated?

If the appellants made the levy, and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Wroth & Fullerton owned the stock of goods (which they swear to in their answer), and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of damages, if the property were not sold. could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial.

And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would inter-

[26] Part of the opinion is omitted.

fere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. "Legal compensation refers solely to the injury done *to the property taken,* and not to any collateral or consequential damages, *resulting to the owner,* by the trespass." Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law.

Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine; brings the parties before it; hears their allegations and proofs, and decrees either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued. * * *

The decree of the Circuit Court is, therefore, affirmed.

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## FRUE et al. v. HOUGHTON et al.

**(Supreme Court of Colorado, 1882. 6 Colo. 318.)**

BECK, C. J.[27] This was a proceeding to enforce an agreement to transfer and deliver a number of shares of stock in the Sacramento Mining Company. The plaintiffs below, Houghton and Curley, obtained a decree for the delivery of the shares of stock sued for, and to reverse this decree the defendants have sued out this writ of error.

The first proposition laid down by counsel for plaintiffs in error is, that a court of equity will not specifically enforce a contract relating to personal property.

That courts of equity have jurisdiction to decree the specific performance of agreements, whether relating to real or personal property, is well settled. It is true that special circumstances must exist, entitling a party to an equitable remedy, in order to authorize the exercise of the jurisdiction, but the authorities agree that its exercise does not depend upon any distinction between real and personal estate. The ground of the jurisdiction when assumed is, that the party seeking equitable relief cannot be fully compensated by an award of damages at law. When, therefore, an award of damages would not put the plaintiff in a situation as beneficial as if the agreement were specifically performed, or where compensation in damages would fall short of the

[27] Part of the opinion is omitted.

redress to which he is entitled, a specific performance may be decreed. The exercise of the jurisdiction depends upon the fundamental rule of equity jurisprudence, that there is not a plain, adequate and complete remedy at law. 1 Story's Eq. Jur. §§ 716, 717, 724, note 2; Fry on Spec. Perf., p. 47, § 10, note 7; Pomeroy on Spec. Perf. §§ 7, 8, ch. 1.

One of the principal objections urged against the decree is, that the subject matter of the action being stock in a corporation, there was an adequate remedy at law.

In the discussion of this objection, counsel for plaintiffs in error insist that equity will not enforce a contract for the transfer of ordinary mining stocks.

We find the authorities somewhat conflicting upon questions of this character. They are uniform on the proposition that a covenant for the delivery of government stocks and other public securities will not be enforced in equity. Ross v. Union Pacific Railway Co., 1 Woolworth, 26, Fed. Cas. No. 12,080; Pomeroy on Spec. Perf. § 17.

The reasons assigned for the rule respecting public stocks are that these stocks are always for sale, their prices are known, and the damages awarded at law will enable the injured party to make himself whole by purchasing in the market.

The English authorities decline to extend the rule to contracts for the delivery of the stocks of railways and other companies, and the English courts decree specific performance of such contracts, upon the ground that such shares or stocks are of uncertain value, and not always readily obtainable in the market. 1 Story's Eq. Jur. § 724a.

The rulings of the courts of this country have not been uniform upon these questions, some of them following the English rule; others, recognizing the fact that the reasons for that rule do not apply with equal force in this country, have adhered to the rules applicable to equitable remedies in other cases.

In Ross v. Union Pacific Railway Company, supra, Mr. Justice Miller assigns strong reasons why a contract to transfer certain shares of that railway company should not be specifically enforced. He says:

"I see no sound reason for any distinction between them and government stocks. They belong to a class of securities which are generally called stocks; they are the subject of every day sale in the market, and the rates at which they are selling are quoted in the public commercial reports, so that their value is as readily and certainly ascertained as that of government stocks. No especial value attaches to one share over another, and the money which will pay for one will as readily purchase another. The damages, then, for failure to deliver such shares may be awarded at law and be an adequate compensation for the injury sustained."

These views appear to be sustained by the weight of authority, and upon principle seem equally applicable to the shares or stocks of all corporations concerning which the same facts therein recited exist. See Pomeroy on Spec. Perf. § 19, and cases cited.

Does the case at bar come within this rule? Do these same facts exist in respect to the shares of stock of this mining company?

We learn from the record that the entire stock consists of ten thousand shares of $10 per share, and that up to the time of the purchase by plaintiffs in error of the seven thousand three hundred and thirty-three shares, no sales had been made. The five original trustees held and owned up to that date two thousand shares each, which comprised the entire stock.

What were the values of these shares? Plaintiffs allege in their bill that the shares bought were reasonably worth $20 per share. The price paid was $7.50 per share, and a portion of the defendants say that was an adequate and fair price, while the defendant who negotiated the purchase avers in his separate answer that whether the shares are worth $20 per share is unknown to both parties.

It is fair to assume, then, that up to the time that these proceedings were instituted, the number of shares was limited; that these shares had no fixed or marketable value; that they were not selling upon the stock boards, and they were not quoted in the commercial reports. Certainly, then, their value could not have been "as readily and certainly ascertained as that of government stocks."

It is very apparent that there is a wide distinction between the shares of stock of such a mining company and public stocks, government securities, or the stock of corporations which have been placed for sale upon stock boards, and are the subject of every day sale in the financial markets of the country.

This case comes within the principle decided in Treasurer v. Commercial Mining Co., 23 Cal. 391. Here, as in California, we have numerous mining corporations. It may likewise be said as to many of them, that their business and mining operations are in a peculiar condition; their stock is of uncertain value, and difficult to substantiate by competent testimony; yet it may have a peculiar value to those acquainted with their affairs. The risk also of the personal responsibility of individuals and corporations is equally great. * * *

We do not think the remedy at law under such circumstances would be either certain, adequate or complete.

The decree must be affirmed.

Affirmed.

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## GOTTSCHALK v. STEIN.

**(Court of Appeals of Maryland, 1888. 69 Md. 51, 13 Atl. 625.)**

ROBINSON, J. The complainants, we all agree, are entitled to a specific performance of this contract, and this being so, they are entitled also to an injunction to restrain the defendant from collecting the promissory notes which he agreed to sell and transfer to them. Now, what are the facts? The firm of Weiller & Son, composed of Hannah Weiller and her two sons, being in failing circumstances, made an assignment of all their property to Joseph Leopold, in trust for the bene-

fit of their creditors. Afterwards, at a meeting of the creditors, held for the purpose of considering a compromise offered by the firm, Gottschalk, the appellant, who is the father-in-law of one of the members of the firm, with a view of inducing the creditors to accept the compromise, agreed that he and Stein, one of the appellees, who is the father-in-law of the other member of the firm, would indorse the settlement notes to be given to the creditors, in consideration of which Leopold was to surrender his trust, and the property of the firm was to be transferred to them as security on account of their indorsement. On these terms the creditors agreed to accept the compromise, and when it was about to be consummated, Gottschalk, without assigning any reason, refused to indorse the settlement notes, but proposed that they should be indorsed by Stein, and that the property of the firm should be transferred to him by way of indemnity. To this Stein, being anxious to effect the compromise, consented, and he accordingly assumed the liabilities of the firm, amounting to $18,000, a sum exceeding the value of the entire property of the firm. This being done, Leopold surrendered his trust, and the property was transferred to Stein. The firm, it seems, was also indebted to Gottschalk on three promissory notes, amounting to $7,500; but, not supposing there would be any difficulty in effecting a satisfactory settlement with him, this indebtedness was not included in the compromise. Be this as it may, after sundry negotiations between the parties, Gottschalk, by a contract in writing, and under seal, agreed to sell and transfer these notes to Leopold and Stein, upon the payment by them of $3,000. The appellees were induced, the bill alleges, to buy these notes solely for the benefit of Mrs. Weiller, a member of the firm, and who was nearly allied to the appellees by marriage, all of which was known to Gottschalk at the time the contract was made. This bill is filed by Leopold and Stein to restrain Gottschalk from collecting these notes, and also for the specific performance of the contract.

As a general rule courts of equity will not, it is true, decree the specific performance of a contract for the sale of goods and chattels, for the reason that an action at law for a breach of the contract affords as complete a remedy for purchaser as the delivery of the goods, inasmuch as with the damages thus recovered at law he can purchase the same quantity of like goods. Having thus an adequate remedy at law, there is no ground for the interference of a court of equity. But we take it to be well settled that where there is an agreement to buy a specific chattel for a specific purpose, and this purpose can only be answered by the delivery of the chattel itself, or where, from the nature of the subject-matter of the agreement, the measure of damages must necessarily be uncertain; or where damages will not be as beneficial to the purchaser as the performance of the contract, equity will interfere and decree the specific performance of the contract, because, in such cases, an action at law for a breach of the contract will not afford the purchaser a complete and adequate remedy. In the language of

Lord Selborne, "the principle which is material to be considered is that the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice," (Wilson v. Railway Co., 9 Ch. App. 279,) or, in other words, where damages at law fall short of that redress to which one is fairly and justly entitled. Doloret v. Rothschild, 1 Sim. & S. 590; Buxton v. Lister, 3 Atk. 385; White v. Schuyler, 1 Abb. Pr. (N. S.) 300; Ashton v. Corrigan, L. R. 13 Eq. 76; Robinson v. Cathcart, 2 Cranch, C. C. 590, Fed. Cas. No. 11,946; Cutting v. Dana, 25 N. J. Eq. 265.

Now, in this case, the appellant agreed to sell to the appellees the three promissory notes of Weiller & Son, and the appellees agreed to buy these notes for a specific purpose, which was known to the appellant. An action at law for a breach of the contract would not, it is clear, give to the appellees the subject-matter of the contract. And besides, the damages to be recovered must necessarily be uncertain. The face value of the notes is $7,500, and the appellant agreed to sell and transfer them to the appellees upon the payment of $3,000. If the firm of Weiller & Son was perfectly solvent, there would be no difficulty in determining the measure of damages. But the firm, the record shows, was insolvent, the assets being insufficient to pay their debts. And in an action at law the measure of damages would depend upon the personal ability of the members of the firm to pay the amount due on the notes; and, this being uncertain, the damages to be recovered must also be uncertain. The legal remedy under such circumstances would fall short of that redress to which the appellees are justly entitled, and is not, therefore, as beneficial to them as the specific performance of the contract. There is no distinction, it seems to us, between this case and Wright v. Bell, 5 Price, 325. There the assignee in bankruptcy agreed to sell a debt of £550 due the bankrupt for £500. The defendant having refused to pay the £500, a bill was filed for the specific performance of the contract, and it was argued that the remedy of the plaintiff was by an action at law for a breach of the contract. But the lord chief baron held that, although equity would not, as a general rule, enforce the performance of contracts for the sale of chattels, yet a contract to sell a specific debt was an exception to the rule. And then again, in Adderley v. Dixon, 1 Sim. & S. 607, where the plaintiff, being entitled to a dividend in two bankrupt estates, agreed to sell the claim for 2s. and 6d. in the pound, Sir John Leach, vice-chancellor, said:

"Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. The present case being for the sale of uncertain dividends which may become payable from the estate of the two bankrupts, it appears to me that upon the principle established by the cases of Ball v. Coggs, [1 Brown, Parl. Cas. 140,] and Taylor v. Neville, [cited in 3 Atk. 384,] a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel the purchaser to take such damages would be to compel him to sell the dividends at a conjectural price."

So in this case, the damages at law being uncertain on account of the failure of Weiller & Son, the appellees are entitled to the specific performance of the contract. And then, as to the suggestion that equity will not lend its aid to a trustee in the purchase by him of claims against the trust-estate, it is sufficient to say that Leopold had surrendered his trust, and had in fact no connection with the trust-estate at the time the contract was made. In regard to the third and last objection, namely, that the necessary exhibits are not filed in support of the bill, we have but a word to say. Courts of equity never interfere by way of injunction, unless the complainant has made out a clear case, and if he has in his possession papers or instruments of writing on which his equity rests, such papers or instruments must be filed in support of his bill. This is necessary in order that the court may see that he is entitled to the relief prayed. Hankey v. Abrahams, 28 Md. 588; Shoemaker v. Bank, 31 Md. 396, 100 Am. Dec. 73. In this case the contract for the sale of the notes is the ground on which the equity of the appellees rests, and this contract is filed in support of the averments of the bill. Besides this, they also file a copy of the proceedings in the suit brought by Gottschalk on the promissory notes, attested by the clerk, but not authenticated by the seal of the court. Whether this exhibit ought to have been authenticated by the seal of the court, is a question not necessary to be decided in this cause, because it is not an exhibit on which the equity of the bill is based. Speaking for myself, I have no hesitation in saying that the Code only requires the proceedings of a court to be authenticated by the seal of the court when such proceedings are offered as evidence in a case. Code, art. 37, § 58.

For these reasons the order of the court below will be affirmed. Order affirmed, and cause remanded.

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## SECTION 4—EXTENT AND LIMITATION OF EQUITY JURISDICTION THROUGH ITS MODE OF OPERATION

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### MODE OF OPERATION IN EQUITY.

A court of common law never lays a command upon a litigant, nor seeks to secure obedience from him. It issues its commands to the sheriff (its executive officer), and it is through the physical power of the latter, coupled with the legal protection of his acts and the acts of the court, that rights are protected by the common law. Thus, when a common-law court renders a judgment in an action that the plaintiff recover of the defendant a certain sum of money as a compensation for a tort or for a breach of obligation, it follows up the judgment by

issuing a writ to the sheriff, under which the latter seizes the defendant's property, and either delivers it to the plaintiff at an appraised value in satisfaction of the judgment, or sells it, and pays the judgment out of the proceeds of the sale.

Equity, however, has always employed, almost exclusively, the very method of compulsion and coercion which the common law, like most other legal systems, has wholly rejected; for when a person is complained of to a court of equity, the court first ascertains and decides what, if anything, the person complained of ought to do or refrain from doing; then, by its order or decree, it commands him to do or refrain from doing what it has decided he ought to do or refrain from doing; and finally, if he refuses or neglects to obey the order or decree, it punishes him by imprisonment for his disobedience. Even when common law and equity give the same relief, each adopts its own method of giving it. Thus, if a court of equity decides that the defendant in a suit ought to pay money or deliver property to the plaintiff, it does not render a judgment that the plaintiff recover the money or the property, and then issue a writ to its executive officer commanding him to enforce the judgment; but it commands the defendant personally to pay the money or to deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it.

This method was borrowed by the early English chancellors from the canon law, and their reasons for borrowing it were much the same as those which caused its original adoption by the canonists. The canon-law courts had power only over the souls of litigants; they cannot touch their bodies or their property. In short, their power was spiritual, not physical, and hence the only way in which they could enforce their sentences was by putting them in the shape of commands to the persons against whom they were pronounced, and inflicting upon the latter the punishments of the church (ending with excommunication) in case of disobedience. If these punishments proved insufficient to secure obedience the civil power (in England) came to the aid of the spiritual power, a writ issued out of chancery (de excommunicato capiendo) and the defendant was arrested and imprisoned.

When the English chancellor began to assume jurisdiction in equity he found himself in a position similar to that of the spiritual courts. As their power was entirely spiritual, so his was entirely physical. Through his physical power he could imprison men's bodies and control the possession of their property; but neither his orders and decrees, nor any such acts *as such* done in pursuance of them, had any legal effect or operation, and hence he could not effect the title to property except through the acts of its owners. Moreover, his physical power over property had no perceptible influence upon his method of giving relief. Even when he made a decree for changing the possession of property, it took the shape, as we have seen, of a command to the defendant in possession to deliver possession to the plaintiff; and it was only as a last resort that the chancellor issued a writ to his execu-

tive officer, commanding him to dispossess the defendant and put the plaintiff in possession.

Such, then, being the two methods of giving relief, it is easy to understand why that of equity has supplemented that of common law; for the former is strong at the very points where the latter is weak.

From "A Brief Survey of Equity Jurisdiction," C. C. Langdell, Edition of 1905, pp. 24, 25, 26.

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## FEDERAL EQUITY RULES.

(33 Supreme Court Reporter, xix. 1913.)

As illustrative of the mode of operation of courts of equity, note the following appended rules from the recently adopted eighty-one rules of equity practice in the federal courts:

### *Rule 7. Process, Mesne and Final*

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

### *Rule 8. Enforcement of Final Decrees*

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the District Court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of non est inventus, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, be-

sides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

*Rule 12. Issue of Subpœna—Time for Answer*

Whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.

*Rule 13. Manner of Serving Subpœna*

The service of all subpœnas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

*Rule 14. Alias Subpœna*

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpœnas against such defendant, until due service is made.

*Rule 81. These Rules Effective February 1, 1913—Old Rules Abrogated*

These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

## CLOSE et al. v. WHEATON et al.

(Supreme Court of Kansas, 1902. 65 Kan. 830, 70 Pac. 891.)

In banc. Error from district court, Trego county; Lee Monroe, Judge.

Action by George E. Wheaton and others against William B. Close and others. Judgment for plaintiffs, and defendants bring error.

DOSTER, C. J. This was an action of specific performance to compel the execution of a deed to land situated in Trego county. The action was brought in that county, but the defendants of whom performance was asked were nonresidents of the state, and other defendants, of whom relief of an incidental character was asked, though residents of the state, were nonresidents of the county. Seasonable objections to the jurisdiction of the court over the persons of the defendants were made and overruled. A trial was had, and judgment rendered for plaintiffs, to reverse which error has been prosecuted to this court. The jurisdictional subject only need be considered.

There is no doubt that specific performance, looking alone to its nature, operates in personam entirely, and that as a consequence, independently of statute, a suit to compel the execution of title papers can be brought only in the county of the defendant's residence. The case of Spurr v. Scoville, 3 Cush. (Mass.) 578, is a pointed authority on the subject. The endeavor there was to compel a resident of Connecticut, on whom personal service had not been obtained, to execute a contract for the conveyance of lands in Massachusetts. Among other things, including a review of many of the authorities, the court said:

"But this suit is a proceeding in personam merely, in which a decree is sought against the person, and not against the property, and it is wholly immaterial whether the land which was the subject of the complaint be or be not within the jurisdiction of the court. It is sufficient if the parties to be affected and bound by the decree are within the jurisdiction. An inability to enforce the decree in rem would constitute no objection to the right to entertain the suit. If, however, the defendant were within the jurisdiction, and should refuse to perform a decree against him, if the lands also were within the jurisdiction, in addition to the proceedings in personam the court might, perhaps, put the plaintiff in possession of the land. 2 Story, Eq. Jur. § 744. * * * This is a proceeding strictly in personam, and the party must be, not technically or constructively, but actually and really, before the court, and within its jurisdiction. An appearance by attorney to object to the jurisdiction cannot give jurisdiction in a case like this."

The character of an action for specific performance as in personam entirely is so well established that courts having jurisdiction of the parties frequently entertain suits to compel the execution of contracts for the conveyance of lands in other states, in which, of course, their decrees as to the res cannot operate. Lindley v. O'Reilly, 50 N. J. Law, 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802. Sometimes a question may exist as to whether the complaining party may not have such peculiar interest in the property as to entitle him to the enforcement of a trust, and not of contract merely (Merrill v. Beckwith, 163

Mass. 503, 40 N. E. 855), in which event the action might be local and not transitory; but the plaintiffs in this case have neither stated in their pleadings, nor claimed before us, such character of right. We are therefore well convinced that the inherent nature of the ordinary proceeding to compel a vendor to comply with his contract, as contract, by the execution of a deed, makes the action one in personam, which can be brought only where the defendant resides or may be legally served with personal process. Does our statute authorize it to be elsewhere brought? The provisions having relation thereto are sections 46 and 47 of the Civil Code (Gen. St. 1901, §§ 4476, 4477), as follows:

"Sec. 46. Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in section 47: First, for the recovery of real property, or of any estate or interest therein, or for the determination in any form of any such right or interest. Second, for the partition of real property. Third, for the sale of real property under a mortgage, lien, or other incumbrance, or charge.

"Sec. 47. If the real property, the subject of the action, be an entire tract and situated in two or more counties, or if it consists of separate tracts situated in two or more counties, the action may be brought in any county in which any tract or part thereof is situated, unless it be an action to recover possession thereof; and if the property be an entire tract situated in two or more counties, an action to recover the possession thereof may be brought in either of such counties; but if it consists of separate tracts in different counties, the possession of such tracts must be recovered by separate actions, brought in the counties where they are situated. An action to compel the specific performance of a contract of sale of real estate may be brought in the county where the defendants, or any of them, reside."

It is manifest that none of the provisions of section 46 apply. The only possibly applicable words in that section are those in clause 1; but an action for specific performance is not, of course, one for the recovery of real property, or an estate or interest therein. Nor is it "for the determination in any form of any such right or interest." That language would seem at first reading to be quite sweeping and inclusive, but it will be perceived that it is not comprehensive of suits to compel the performance of mere contracts to convey, if it be admitted, as just stated, that such suits operate only in personam. Suits for the performance of agreements are not brought to determine titles, because, if so, they would operate on the res, but they are brought to enforce purely personal contracts. Of course, if the defendant obeys the decree, the title will pass, and the court may, in proper cases, order the decree to stand as a conveyance, in which instance, also, the title will pass; but nevertheless the object of the suit is not to determine the title, but to compel the defaulting party to abide his agreement. However, it is contended that the concluding provision of section 47, above quoted, relating in terms to actions for specific performance, gives to the plaintiff the right to sue either in the county where the land is situated, or in the one where the defendants, or some one of them, reside. Emphasis is placed on the permissive word. The plaintiff "may" sue where the defendants or some one or more of them reside, from which it is implied that he need not sue there, but may sue where the land lies. This is an erroneous view. The option given is

not to be exercised between the venue of the land and the venue of the defendants, but between the respective venues of the different defendants. The provision contemplates the case of several defendants, and authorizes the institution of a suit where any one of them resides. That is all it does.

The judgment of the court below is reversed, with directions for proceedings in accordance herewith. All the justices concurring.

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## PENN v. LORD BALTIMORE.

(In Chancery before Lord Hardwicke, 1750. 1 Ves. Sr. 444, 27 E. R. 1132.)

The bill was founded on articles, entered into between the plaintiffs and defendant 10 May, 1732, which articles recited several matters as introductory to the stipulation between the parties, and particularly letters patent granted 20 June, 2 C. 1, by which the district, property, and government, of Maryland under certain restrictions is granted to defendant's ancestor his heirs and assigns: farther reciting charters or letters patent in 1681, by which the province of Pennsylvania is granted to Mr. William Penn and his heirs; and stating a title to the plaintiffs derived from James Duke of York, to the three lower counties by two feoffments, both bearing date 24 August, 1682. The articles recite, that several controversies had been between the parties concerning the boundaries and limits of these two provinces and three lower counties, and make a particular provision for settling them by drawing part of a circle about the town of Newcastle, and a line to ascertain the boundaries between Maryland and the three lower counties, and a provision in whatever manner that circle and line should run and be drawn; and that commissioners should do it in a certain limited time, the final time for which was on or before 25 December, 1733. There was beside a provision in the articles, that if there should be a want of a quorum of commissioners meeting at any time, the party by default of whose commissioners the articles could not be carried into execution, should forfeit the penalty of £5000 to the other party: and a provision for making conveyances of the several parts from one to the other in these boundaries, and for enjoyment of the tenants and landholders.

The bill was for a specific performance and execution of the articles: what else was in the cause came by way of argument to support, or objection to impeach, this relief prayed.

When the cause came on before, it was ordered to stand over, that the Attorney-General should be made a party; who now left it to the court to make a decree, so as not to prejudice the right of the crown.

The first objection for defendant was, that this court has not jurisdiction nor ought to take recognizance of it; for that the jurisdiction is in the King and council. * * *

LORD CHANCELLOR.[28] I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and the great labour and ability of the argument on both sides; it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman senate rather than of a single judge: and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a Roman senate that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence; which will fall in more naturally, and very intelligibly, under the particular points arising in the cause.

The relief prayed must be admitted to be the common and ordinary equity dispensed by this court; the specific performance of agreements being one of the great heads of this court, and the most useful one, and better than damages at law, so far as relates to the thing in specie; and more useful in a case of this nature than in most others; because no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to arise from this agreement, viz. the settling and fixing these boundaries in peace, to prevent the disorder and mischief, which in remote countries distant from the seat of government, are most likely to happen, and most mischievous. Therefore the remedy prayed by a specific performance is more necessary here than in other cases: provided it is proper in other respects: and the relief sought must prevail, unless sufficient objections are shewn by defendant; who has made many and various for that purpose.

First, the point of jurisdiction ought in order to be considered: and though it comes late, I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in primo die; and answering submits to the jurisdiction: much more when there is a proceeding to hearing on the merits, which would be conclusive at common law: yet a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than where a plain want of equity appears. * * *

Suppose an order by the King and council in a cause, wherein the King and council had original jurisdiction; and the parties enter into an agreement under hand and seal for performance thereof: A bill must be in this court for a specific performance; and perhaps it will appear, this is almost literally that case. The reason is, because none but a court of equity can decree that. The King in council is the proper judge of the original right; and if the agreement was fairly entered into and signed, the King in council might look on that, and allow it as evidence of the original right: but if that agreement is disputed, it is

[28] The statement of facts is abridged and parts of the opinion are omitted.

impossible for the King in council to decree it as an agreement. That court cannot decree in personam in England unless in certain criminal matters; being restrained therefrom by stat. 16 Car. and therefore the Lords of the council have remitted this matter very properly to be determined in another place on the foot of the contract. The conscience of the party was bound by this agreement; and being within the jurisdiction of this court (4 Inst. 213; 1 Ves. sen. 204, 255), which acts in personam, the court may properly decree it as an agreement, if a foundation for it.

To go a step farther: as this court collaterally and in consequence of the agreement judges concerning matters not originally in its jurisdiction, it would decree a performance of articles of agreement to perform a sentence in the Ecclesiastical court, just as a court of law would maintain an action for damages in breach of covenant. * * *

As to the court's not inforcing the execution of their judgment; if they could not at all, I agree, it would be in vain to make a decree; and that the court cannot inforce their own decree in rem, in the present case: but that is not an objection against making a decree in the cause; for the strict primary decree in this court as a court of equity is in personam (4th Inst. 213; 1 Ves. sen. 204, 447), long before it was settled, whether this court could issue to put into possession in a suit of lands in England; which was first begun and settled in the time of James I, but ever since done by injunction or writ of assistant to the sheriff (Note: After service of a writ of execution of a decree for delivery of possession of lands, the court will grant an injunction on a motion of course; and the writ of assistance to the sheriff is founded on it. See in Huguenin v. Bazely, 15 Ves. 180): but the court cannot to this day as to lands in Ireland or the plantations. In Lord King's time in the case of Richardson v. Hamilton, Attorney-General of Pennsylvania, which was a suit of land and a house in the town of Philadelphia, the court made a decree, though it could not be inforced in rem. In the case of Lord Anglesey of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to inforce that decree in rem, but the party being in England, I could inforce it by process of contempt in personam and sequestration which is the proper jurisdiction of this court. And indeed in the present case, if the parties want more to be done, they must resort to another jurisdiction; and it looks by the order in 1735, as if that was in view; liberty being thereby given to resort to that board. * * *

I am of opinion therefore to decree a specific performance of this agreement without prejudice to any right, etc., of the crown. * * *

## CARTERET v. PETTY.

(In Chancery before Lord Nottingham, Chancellor, 1675. 2 Swanst. 323, note [a], 36 E. R. 639.)

* * * [29] The bill set forth, that the Defendant had bargained and sold to the Plaintiff, a moiety of certain lands in Ireland, and that he did there cut down the woods, and commit other waste, and so prayed an account, and a partition: the Defendant demurred, because the freehold and inheritance of lands in Ireland ought not to be settled here. I ordered him to answer as to the account, but allowed the demurrer as to the partition; for wheresoever the Defendant may, by personal coercion, be compelled to perform the act decreed, there after answer put in, the Court shall proceed to a decree though the Defendant be in Ireland, and rely upon the justice of the King to compel him to be sent for over, to yield obedience, as was done in Alderman Preston's case of Dublin, and advised to be done by the council table, in the Earl of Thomond's case; for, otherwise there must be a failure of justice; because, in Ireland they are not bound to execute the decrees of England, upon a bill there preferred to have such execution, as was lately resolved in Ireland, and very justly, in the case of one Savage, and since in the case of the Earl of Thomond. And so it was resolved long since at the common law, that if a man be outlawed in England, and flee into Ireland, no capias utlagatum can follow him thither; of which see some ancient records in my manuscripts of Mr. Noy's Collection, fol. —. And if it be said the Plaintiff may go over into Ireland and exhibit a new original bill against the man there, it is equal to a failure of justice; for by that time the case is well advanced there, the man may flee again out of Ireland into England or Scotland, so that there can never be any certain justice, but in the absolute power of the King which can bring all his subjects into the proper place where they ought to render reason. But all this is to be understood of such cases where the imprisonment of the person is the most proper means to effect that which is decreed to be done, viz. the payment of money, making a conveyance, or the like. But where no obedience of the person imprisoned, or any act of his, can sufficiently execute such a decree, there it is in vain to hold such a plea; and that is this case: For, to a partition in Chancery it is necessary to award a commission to some neighbouring justices to divide the lands; if they refuse, there lies an attachment against them for such refusal; if they execute the commission and return it, then there ought to be a decree, that the lands be accordingly conveyed, and that, till a conveyance, they may be so enjoyed; the consequence thereof is a sequestration, and an injunction for the possession, and a writ of assistance to the sheriff: none of all which can be awarded into Ireland, nor supplied by the obedience of the person imprisoned here. So far the demurrer is good. * * *

[29] Part of the opinion is omitted.

## INNES v. MITCHELL.

(In Chancery, 1857. 4 Drew. 141, 62 E. R. 55.)

The nature of the case made by the bill in this case appears in the report of it on demurrer, 62 E. R. 57.

This was a motion by certain of the Defendants to discharge an order obtained by the Plaintiffs for service on three Defendants resident in Scotland of the amended bill and interrogatories, and affidavits were filed to shew that those Defendants were domiciled in Scotland; and that proceedings were actually going on in Scotland in which the questions before the Court in this suit would be determined.

Mr. Baily and Mr. Cotton, for the motion. The question is whether a party in England can be allowed to bring a suit here which ought properly to be carried on in a foreign Court. The Scotch Courts are, by the Act of Parliament, foreign Courts. The Defendants, against whom the order is made, are all domiciled in Scotland; the subject-matter is the construction of a Scotch will. All the questions in the suit are really upon Scotch law; and there is a suit in Scotland upon those very questions. We are concerned only in the personal estate; and, with a trifling exception, all the personal estate is actually in Scotland. Why, then, should this Court be asked to exercise its extraordinary jurisdiction to draw to itself a purely Scotch litigation? The serving of the bill on the Defendants out of the jurisdiction is not a matter of right in the Plaintiff; the order is not an order of course, but an order obtained on merits, from the discretion of the Court. The Acts, 2 & 3 Will. 4, c. 33; 4 & 5 Will. 4, c. 82, and the Orders of 1845, gave the Court a discretion. And an order obtained under them in Court ex parte, on insufficient merits, may properly be discharged on merits more fully shewn.

[They cited Elliott v. Minto, 6 Mad. 16; Whitmore v. Ryan, 4 Hare, 612.]

Mr. Anderson and Mr. Miller, for the Defendants. This motion is, at least premature; it is, in effect, a motion to stay the suit upon merits, shewing that this Court cannot deal with it so well as the Scotch Court. How can this Court determine that, at least till the merits are confessed by the answer? The Court cannot here, on a few affidavits, know the whole merits of the case, and must assume that all the allegations of the bill may be maintained by evidence. If so, then on the merits the cause ought to be tried here. There is property in England now. There was a large sum in England in the names of two of these very Defendants, which they have sold out. We have a right to know what has become of them. The Scotch Courts have not the same machinery as this Court for extracting admissions from a Defendant. But besides the merits, this motion is irregular. The order is not, it is true, strictly an order of course; but it is an order which it is compul-

sory on the Court to make. The order is obtained under the Acts of Parliament which are compulsory; the Orders of 1845 do not affect the right of the Plaintiff in that respect.

[They cited Preston v. Melville, 15 Sim. 35, 8 Cl. & Fin. 1; Jones v. Geddes, 1 Phil. 724; Kennedy v. Cassillis, 2 Swans. 313; Bushby v. Munday, 5 Mad. 297.]

THE VICE-CHANCELLOR [Sir R. T. KINDERSLEY]. The first question is whether this application is proper. It is said that it ought not to be made at this time. The solution of that question depends on this: whether it is discretionary in the Court to make the order for service out of the jurisdiction; and that it is, I have no doubt whatever. There are two Acts which, under certain circumstances, authorize service of subpœna on Defendants out of the jurisdiction. The first is the 2 Will. 4, c. 33. [His Honor referred to the 1st section, and said that, as to its discretionary character, there could be no doubt.] Then there is the 4 & 5 Will. 4, c. 82. [Referring to the other Act, His Honor read the sections of the Act, and proceeded:]

It is clear that the discretionary power given by the former Act is imported into this Act.

So with regard to the Orders of 1845, it is clear that under them the authority of the Court is discretionary.

If that is so, then what ought the Court to do when an application is made to it to authorize service out of the jurisdiction? The Court clearly must judge when it is fit and proper upon the circumstances to direct service. But when the application is made, as it is ex parte, there may be occasions when the Court cannot have for its information all those arguments upon the circumstances which it ought to hear to determine whether it is fit to direct service or not; and in a case like this, when it has occupied a whole day to argue whether the circumstances render the service fit and proper it is impossible to suppose that where on a mere ex parte application the order was granted, the Court could have had the opportunity of sufficiently considering the grounds of its discretionary exercise of authority; and, therefore, where the order has been so granted, it is quite competent to the Court to discharge it. I am of opinion that it is quite competent to the parties to make this motion now; and then the question becomes this: if all the materials now before me had been so when I made the order, ought I to have made it?

The case presented by the Defendants is very strong; they say, here is a lady domiciled in Scotland, who never even resided in England; she makes a testamentary disposition of her property in the Scotch form, passing her real estate and her personal estate, and using in it terms purely of Scotch law.

She appoints trustees and executors in Scotland, and having large real estates in Scotland and also personal estate, she devises all her real estate to her heir. It does certainly seem strange that in that state

of things the suit should not be in Scotland; and if it were merely a question of withholding the matter from the Scotch Courts, I should agree with the Defendants and refuse this application.

But the case made by the Plaintiffs varies it considerably. They say they are two English persons resident in England, who had a Scotch relative; that she had personal property in England invested in the English funds; that the persons whom she appointed executors came to England; proved her will here; by virtue thereof possessed themselves of her English property; and having so possessed themselves of it, by fraud handed it over to persons who had no right to it. Those are the allegations of the bill, and for this purpose I must assume that they may be true; that they may be made out by evidence. Then they say there are two parties who took possession of the English property; and that, although they handed it over to Mitchell Innes, it is now actually standing in the bank books in the names of Mitchell Innes and A. Mitchell or one of them. So that if that allegation is true, the very property is now in this country; that presents a very different case from the case made by the Defendants. It is founded on the English probate; on the allegation that under that probate the original funded property is now in specie in this country. If that is established, and I repeat I must assume that it may be established, it is impossible to say that this Court is not, so far at least as regards the English property, the proper tribunal.

Then are there not some circumstances strong to shew that I ought to give the Plaintiff the advantage of suing in this country?

First, as to the discovery, I cannot ignore the fact that the Scotch Courts do not give discovery as these Courts do. They have not their process of what is understood by discovery, in the way we have it in the Court of Chancery.

Then, where there are allegations as to the conduct of Defendants, conduct which they, and probably they, only know, the mode of getting discovery is an important ingredient, which renders, I think, this jurisdiction more fitting than that of the Courts of Scotland. Further, this Court has a facility of jurisdiction over or with reference to the Bank of England, I mean for obtaining information from the bank, which in this case, on the allegations, is peculiarly important, and which the Courts of Scotland do not possess.

Then, of the Defendants, one is actually within the jurisdiction; and though he does not claim in respect of the personal estate, he is stated to be a party to the fraud against those who do claim it, and to be in fact one of the two in whose names the fund stands.

But then it is said there is a proceeding going on in Scotland which will determine the questions in this suit. The answer to that is that it may be convenient that that proceeding should go on; but that is no bar to proceedings taking place here also; nor does it appear clearly that the proceedings in Scotland necessarily involve all the questions in

this suit: they may do so, but it does not appear that they necessarily must do so. On the whole, I think the motion must be refused, but, under the circumstances, without costs.[30]

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## PORT ROYAL R. CO. v. HAMMOND.

(Supreme Court of Georgia, 1877. 58 Ga. 523.)

WARNER, C. J. It appears from the abstract of the record in this case, that the Port Royal Railroad Company was incorporated by the state of South Carolina, December 21, 1857, and its charter points out the method of assessing damages for the right of way.

This South Carolina corporation was incorporated by act of the legislature of Georgia, December 19, 1859.

By act of September 22, 1868, the legislature of South Carolina passed a general law granting rights of way to railroads, section 7 of which act provides that whenever the same are abandoned, the soil reverts to the original owners.

On the 22d of May, 1872, Paul F. Hammond, for three thousand dollars, conveyed to the Port Royal Railroad Company, a strip of land two hundred feet wide, running the course as then surveyed, through the Cathwood plantation, a distance of one mile and a half. The deed was attested by H. R. Cook and T. T. Hammond, and recites as follows:

"Provided, always, and this deed is upon the express condition—

"1st. That the right of way is granted under the restrictions of the act of the General Assembly of South Carolina of September 22, 1868, and if abandoned reverts back to the party of the first part. (The land conveyed being in the state of South Carolina.)

"2d. That the system of drainage shall remain the same as now, except that such ditches as have been filled up by the party of the second part, are to be

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[30] In a note to Innes v. Mitchell (1857) 4 Drewry, 99, 62 E. R. 38, analyzing several cases on the extra-territorial jurisdiction of a court of equity, the following statement of Mostyn v. Fabrigas is given: "In Mostyn v. Fabrigas [1774] 1 Cowp. C. B. 161, the question tried was, whether a native of Minorca could bring an action against a governor of Minorca for an injury committed at Minorca; and it was objected (among other objections) that the injury being done out of the realm was not cognizable in the King's Courts; and the whole Court of Queen's Bench overruled the objection. In the judgment, however, occurs this argument: 'There is a formal and a substantial distinction as to the locality of trials; I state them as different things; the substantial distinction is when the proceeding is in rem, and where the effect of the judgment cannot be had if it is laid in the wrong place. That is the case of all ejectments, where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, the officers are county officers; therefore the judgment could not have effect if the action was not laid in the proper county.' It seems plain, from this case, that if a court has only power to act in rem, an action or proceeding cannot be taken in that Court in respect of a subject-matter out of its local jurisdiction; but it does not follow that a court that asserts jurisdiction to act in personam may not exercise that power in respect of a matter, whether land or otherwise, situated out of the jurisdiction."

re-opened by it, and the ditches to remain of such depth as to allow, as heretofore, the drainage of the land the depth of five feet.

"3d. That whenever the road crosses the line of any fence or other enclosure of the party of the first part, the party of the second part shall construct and keep in repair proper and sufficient cattle-guards or stock-gaps.

"And provided further, that whenever it may become necessary for the said railroad to occupy a space wider than the width of said strip of land, by reason of cuttings and fillings, it shall and may be lawful for them to occupy as much land outside the limits of the said strip as may be necessary to deposit waste earth and to construct embankments, and that the said company shall, at all times, have the right to cut down and remove any tree or trees which from the position or condition of it or them, may in any way endanger the track or property of the said company, notwithstanding the said tree or trees may be without the limits of the said strip of land."

To April term, 1874, Paul F. Hammond filed his bill in Richmond superior court, in this state, against the Port Royal Railroad Company, to enforce specific performance of the provisions of the said deed to the right of way, and to recover damages for not performing them.

On April 20th, 1874, the defendant filed its demurrer on the following grounds:

"1. There is no equity in the bill.

"2. Complainant has an adequate remedy at law.

"3. There is no allegation in the bill that such an action would lie under the laws of South Carolina."

At the hearing at April term, 1875, this demurrer was overruled.

On the trial of the case, the jury found a verdict in favor of the complainant for the sum of $3,000 damages up to the time of the filing of the complainant's bill, and that the defendant, the Port Royal Railroad Company, be required to comply with its agreement, as set forth in the deed made by the complainant, within ninety days, under a penalty of five thousand dollars. The defendant made a motion for a new trial, on the ground that the court erred in overruling the demurrer, and on various other grounds therein set forth, which was overruled by the court—on condition that the complainant would write off from the verdict the penalty of five thousand dollars, the defendant paying the $3,000.00 damages assessed within thirty days. Whereupon the defendant excepted.

1. The defendant is a Georgia corporation, created by an act of the general assembly of this state, and its powers and duties are to be exercised and performed within the territorial limits of the state. As an artificial person, it has no extra-territorial existence. Union Branch R. Co. v. East Tennessee & G. R. Co., 14 Ga. 328. The object and prayer of the complainant's bill is, that the defendant may be decreed to specifically execute the contract, alleged to have been made with the defendant, for the right of way for its railroad through the lands of the complainant, situated and being in the state of South Carolina, and to recover damages for the injury already sustained from the non-performance of that contract. The complainant's equity is based upon his alleged right to have the defendant compelled, by a decree of the court of this state, to specifically perform the alleged contract in the state of South Carolina, by keeping the ditches open upon the complainant's

land, situated in that state, to the depth of five feet, and to construct, and keep in proper repair, sufficient cattle-guards or stock-gaps, upon the complainant's land, in the state of South Carolina. There is no doubt that when a court of equity has jurisdiction of the person of a defendant, it may decree the specific performance of a contract for the conveyance of land situated in a foreign state or country, and also restrain a defendant by injunction in certain specified cases, by acting upon the person of the defendant within its jurisdiction; and that is the principle which the complainant insists should be applied to the defendant in this case. Although a court of equity will act upon the person of a defendant within its jurisdiction, and compel the specific execution of a contract in relation to lands in a foreign state, on a proper case being made, still, we are not aware that the court has ever gone to the extent of compelling a defendant, by its decree, to go into a foreign state and specifically execute a contract there, even in the case of a natural person; and, more especially, when the defendant is an artificial person, having no legal existence beyond the territorial limits of the state which created it.

The court of equity of Richmond county, in this state, had no jurisdiction to compel the defendant, by its decree, to go into the state of South Carolina and specifically execute the alleged contract, as set forth in complainant's bill, by opening the ditches on complainant's land there, and keeping the same open to the depth of five feet, and by constructing and keeping in repair proper and sufficient cattle-guards, or stock-gaps thereon, and, upon its failure to do so, to enforce that decree by an attachment and sequestration of its property in this state.

If the acts required to be done on the part of the defendant, by the decree of the court, in the specific execution of the contract in question, were required to be performed in this state, there would not seem to be any well-founded objection to the jurisdiction of the court, notwithstanding the land, the subject matter of the contract, is situated in the state of South Carolina. This, however, is as far as the principle contended for has been recognized. See Wharton on Conflict of Laws, §§ 288, 289, 290. But the specific execution of the contract, as prayed for in complainant's bill, can only be performed by going on the land in South Carolina and cutting ditches upon it there to the depth of five feet, and keeping them open so as to effect the stipulated drainage of the land, and by constructing and keeping in repair proper and sufficient stock-gaps thereon. To hold that the court has jurisdiction to grant the specific relief prayed for against the defendant, would be to decide that a corporation, an artificial person, having no legal existence beyond the territorial limits of the state which created it, can be compelled to go into another state in which it has no legal existence, and there to cut and keep open ditches, construct and keep in repair stock-gaps on the complainant's land in that state, and, upon its failure to do so, that its property, in this state, may be attached and sequestrated to compel the performance of such specific acts by the defendant

in a state and country where it has no legal existence to perform the same.

2. If it should be said that the incapacity of the courts of this state to enforce the decree prayed for in rem, by the defendant, in the state of South Carolina, where the land is situated, would constitute no objection to the right of the complainant to maintain his suit against the defendant in this state, and obtain a decree here for the specific performance of the alleged contract, the reply is, that by a fair interpretation of the act of 1859, incorporating the defendant in this state, no contract for the right of way for its road could have been made with it, except for its right of way over lands in this state, from the boundary line between the two states to the city of Augusta, and that being so, the contract for the right of way over the complainant's land in South Carolina, as alleged in his bill, must necessarily have been made with the South Carolina corporation, in which state the land is situated, and not with the Georgia corporation, in which latter state the land in question is not situated. Whilst it may be true that, for some purposes, the corporation may be treated as an entire corporation in both states, but not for the purpose of decreeing the specific performance of a contract made with the corporation of one state, in which the land is situated, against the corporation of the other state, with which the contract was not made—and in which the land is not situated. It would, therefore, seem to be much more equitable and just that the complainant should seek a specific execution of the alleged contract against the corporation with which it was made, and in the courts of the state in which the land is situated, and obtain his decree in accordance with the laws of that state, and where the court will have jurisdiction to enforce it in conformity therewith.

The specific execution of contracts by a court of equity must always rest in the sound discretion of the court. To compel the Georgia corporation, by a decree of the court, to specifically perform the alleged contract, made by the complainant with the South Carolina corporation, and to enforce its performance in the latter state by an attachment and sequestration of its property situated in Georgia, would be unfair, unjust, and against good conscience, inasmuch as its property in this state may not be more than sufficient to discharge its own contracts and liabilities to its creditors here.

In our judgment the court erred in overruling the defendant's demurrer to the complainant's bill.

Let the judgment of the court below be reversed.

## MASSIE v. WATTS.

(Supreme Court of the United States, 1810. 6 Cranch [10 U. S.] 148, 3 L. Ed. 181.)

This was an appeal from the decree of the circuit court of the United States, for the district of Kentucky, in a suit in equity brought by Watts, a citizen of Virginia, against Massie, a citizen of Kentucky, to compel the latter to convey to the former 1,000 acres of land in the state of Ohio, the defendant having obtained the legal title with notice of the plaintiff's equitable title.

This bill stated that the defendant Massie (the appellant) had contracted with a certain Ferdinand Oneal, to locate and survey for him a military warrant for 4,000 acres in his name, (which the plaintiff afterwards purchased for a valuable consideration,) and to receive for his services in locating and surveying the same, the sum of £50 which the plaintiff paid him. That the defendant located the said warrant with the proper surveyor, and being himself a surveyor, he fraudulently made a survey purporting to be a survey of part of the entry, but variant from the same, and contrary to law, whereby the survey was entirely removed from the land entered with the surveyor, for the fraudulent purpose of giving way to a claim of the defendant's which he surveyed on the land entered for the plaintiff, whereby the plaintiff lost the land, and the defendant obtained the legal title. That the land adjoins the town of Chillicothe, and is worth fifteen dollars an acre. The bill prays that the defendant may be compelled to convey the land to the plaintiff, or if that is not in his power, that he make compensation in damages. * * *

February 28, 1810.

MARSHALL, C. J.[81] delivered the opinion of the court as follows:

This suit having been originally instituted, in the court of Kentucky, for the purpose of obtaining a conveyance for lands lying in the state of Ohio, an objection is made by the plaintiff in error, who was the defendant below, to the jurisdiction of the court by which the decree was rendered.

Taking into view the character of the suit in chancery brought to establish a prior title originating under the land law of Virginia against a person claiming under a senior patent, considering it as a substitute for a caveat introduced by the peculiar circumstances attending those titles, this court is of opinion, that there is much reason for considering it as a local action, and for confining it to the court sitting within the state in which the lands lie. Was this cause, therefore, to be considered as involving a naked question of title, was it, for example, a contest between Watts and Powell, the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its char-

[81] The statement of facts is abridged, and parts of the opinion are omitted.

acter, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

In the celebrated case of Penn v. Lord Baltimore, the chancellor of England decreed a specific performance of a contract respecting lands lying in North America. The objection to the jurisdiction of the court, in that case, as reported by Vesey, was not that the lands lay without the jurisdiction of the court, but that, in cases relating to boundaries between provinces, the jurisdiction was exclusively in the king and council. It is in reference to this objection, not to an objection that the lands were without his jurisdiction, that the chancellor says:

"This court, therefore, has no original jurisdiction on the direct question of the original right of boundaries."

The reason why it had not original jurisdiction on this direct question was, that the decision on the extent of those grants, including dominion and political power, as well as property, was exclusively, reserved to the king in council.

In a subsequent part of the opinion, where he treats of the objection to the jurisdiction of the court, arising from its inability to enforce its decree in rem, he allows no weight to that argument. The strict primary decree of a court of equity is, he says, in personam, and may be enforced in all cases where the person is within its jurisdiction. In confirmation of this position he cites the practice of the courts to decree respecting lands lying in Ireland and in the colonies, if the person, against whom the decree was prayed, be found in England.

In the case of Arglasse v. Muschamp, 1 Vernon, 75, the defendant, residing in England, having fraudulently obtained a rent charge on lands lying in Ireland, a bill was brought in England to set it aside. To an objection made to the jurisdiction of the court the chancellor replied:

"This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must agere in personam only; and when as in this case, you prosecute the person for a fraud, they tell you that you must not intermeddle here, because, the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local, and so wholly elude the jurisdiction of this court."

The chancellor, in that case, sustained his jurisdiction on principle, and on the authority of Archer and Preston, in which case a contract made respecting lands in Ireland, the title to which depended on the act

of settlement, was enforced in England, although the defendant was a resident of Ireland, and had only made a casual visit to England. On a rehearing before Lord Keeper North this decree was affirmed.

In the case of The Earl of Kildare v. Sir Morrice Eustace and Fitzgerald, 1 Vern. 419, it was determined that if the trustee live in England, the chancellor may enforce the trust, although the lands lie in Ireland.

In the case of Toller v. Carteret, 2 Vern. 494, a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the court, the person of the mortgagor being within it.

Subsequent to these decisions was the case of Penn against Lord Baltimore, 1 Ves. 444, in which the specific performance of a contract for lands lying in North America was decreed in England.

Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.

The inquiry, therefore, will be, whether this be an unmixed question of title, or a case of fraud, trust or contract. * * *

If we reason by analogy from the distinction between actions local and transitory at common law, this action would follow the person, because it would be founded on an implied contract, or on neglect of duty.

If we reason from those principles which are laid down in the books relative to the jurisdiction of courts of equity, the jurisdiction of the court of Kentucky is equally sustainable, because the defendant, if liable is either liable under his contract, or as trustee.

The case, then, as presented to the court, gives it jurisdiction, and the testimony must be examined to ascertain how far the bill is supported. * * *

Decree affirmed.

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## BYRNE v. JONES.

**(Circuit Court of Appeals of the United States, Eighth Circuit, 1908. 159 Fed. 321, 90 C. C. A. 101.)**

Appeal from the Circuit Court of the United States for the Western District of Arkansas.

For opinion below, see 149 Fed. 457.

SANBORN, Circuit Judge.[82] On June 2, 1892, Erastus Jones of Worcester county, Mass., made a contract with L. A. Byrne, of Texarkana in the state of Arkansas, concerning a tract of about 2,600 acres of land situated in the states of Arkansas and Texas, to the effect that Byrne, who was an attorney at law, and who held defective titles to the

[82] Part of the opinion is omitted.

land upon which Jones had vendors' liens for $6,117.42, should, without charge for his services, clear the titles to the land, prepare it for market, sell it as opportunity offered, apply the proceeds first to the payment of the expenses of clearing the title and preparing the property for market, second, to the payment of the amount owing Jones, and that the remainder of the land, or of its proceeds, should be owned by them equally. The larger part of the lands were in Arkansas, the titles of Byrne and Jones to the Arkansas land were tax titles, and they owned only an undivided interest in the lands in Texas. Under this agreement Byrne conducted about 15 lawsuits, purchased some outstanding claims, placed some tenants on the land to acquire title thereto by possession under the two years' statute of limitations of Arkansas, erected some small houses, cleared and fenced some of the land, paid some taxes, sold a right of way over some of the land for $725, and 220 acres of the real estate for $880, between June 2, 1892, and March 28, 1905. On the latter day he accepted an offer made by Jones to sell to him his interest in the lands for $7,500, and on the same day, or within two or three days thereafter, he made a contract with the defendants Heilbron, Wade, and Stribling to sell them about 1,600 acres of the real estate in consideration that they would furnish the $7,500 to purchase the interest of Jones.

Within a few days after this contract was made Jones exhibited his bill in the court below to set aside these contracts on the ground that Byrne had induced him to make his offer to sell for $7,500 by withholding material information, which he had acquired while he was acting in a fiduciary capacity, relative to the management, condition, and value of the land. The defendants Heilbron, Wade, and Stribling answered that they made their alleged contract of purchase from Byrne in good faith, that they agreed to pay the full value of the land, that they had rescinded that agreement because they did not care to incur expense in defending it, and they disclaimed all interest in the property. Byrne denied that he had withheld any information to which Jones was entitled, and averred that he had tendered the $7,500, and that his contract of purchase was valid, and he filed a cross-bill to enforce specific performance of it. After the evidence had been taken and a final hearing had been had, the court rendered a decree by which it dismissed the cross-bill, dismissed without prejudice the suit so far as it related to the land in Texas, directed an immediate sale of the land in Arkansas and the return of the proceeds thereof to the court, and appointed a master to take and state an account of the expenses incurred and the moneys received under the contract of 1892, and Byrne appealed.

The first question is, was Byrne entitled to a specific performance of his contract of purchase of March, 1905? * * *

The court below was of the opinion that it had no jurisdiction to decree a sale of the land in Texas, and it dismissed the bill so far as it related to that property, on the authority of Boyce's Executors v.

Grundy, 9 Pet. (U. S.) 275, 288, 9 L. Ed. 127. But this is a suit against a faithless trustee brought by a cestui que trust to execute the trust. That was a suit brought in Tennessee by a vendee against his vendor to rescind a contract concerning lands in Mississippi. The court rescinded the agreement. After this rescission it rendered a personal judgment for $2,100 against Robert Boyce, to whom the lands in Mississippi had been devised by the vendor in the rescinded contract, adjudged the decree for this $2,100 to be a lien upon those lands, and that they should be sold by its master to discharge that lien. The Supreme Court reversed the decree fixing this lien upon the Mississippi lands, and directing their sale upon the ground that neither a court of chancery nor a court of law may by its own power fix liens for the mere personal judgments it renders upon lands beyond its jurisdiction, or subject them to sales to satisfy such judgments.

But a court of chancery has plenary power to affect the title to real estate beyond its jurisdiction by a sale and conveyance thereof by its master or otherwise by its decree in suits to execute trusts, to undo frauds, and to enforce contracts regarding such real estate, whenever it has acquired jurisdiction of the persons of the parties interested therein, for the reason that equity acts through the person. In Boyce v. Grundy the Supreme Court well said that the court below had no jurisdiction to decree a sale to be made of land lying in another state "by a master acting under its own authority." But a master directed by the court below to sell the land in Texas in the suit in hand will act, not by the authority of that court alone, but by the authority of the trust agreement of 1892. That agreement vested in the trustee, Byrne, the power to sell and convey the Texas land, and to apply the proceeds according to its terms, and when Byrne became faithless the court below had plenary power to substitute its master for him as trustee and to direct him to exercise all the powers originally vested in Byrne. Byrne is within the jurisdiction of that court, and it may lawfully require him to make the sale and conveyance as trustee, or it may appoint its master in his place who will be trustee pro hac vice. It may direct him to make the sale and conveyance requisite to completely execute the trust, and may require all the parties to this suit to confirm the title of the purchaser by subsequent deed.

In cases of this nature the court is invested with all the powers of the parties to the agreement of trust of whom it has acquired jurisdiction, and it may by its decree effect any sale or conveyance of lands beyond its jurisdiction which the parties to the suit could make. In Earl of Kildare v. Sir Morrice Eustace and Fitzgerald, 1 Vern. 419, it was held that if a trustee live in England the Chancellor may enforce the trust although the lands lie in Ireland. In Toller v. Carteret, 2 Vern. 495, the defendant pleaded to a bill to foreclose a mortgage that the court was without jurisdiction, because the mortgaged lands were a part of the duchy of Normandy and were under the jurisdiction of Guernsey, but the court overruled the plea, said that the defendant was served

with process in England, and that equity acts in personam. In Penn v. Lord Baltimore, 1 Vesey, 444, specific performance of a contract for lands in North America was decreed in England. In Massie v. Watts, 6 Cranch (U. S.) 148, 157, 159, 3 L. Ed. 181, Watts brought a suit in Kentucky to enforce a trust in lands in Ohio, which had been created by an agreement made by Massie to locate the lands for the complainant's grantor and by his fraudulent location of them for himself. Chief Justice Marshall said:

"Was this cause, therefore, to be considered as involving a naked question of title, was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practiced on the plaintiff, the principles of equity give a court jurisdiction, wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

In Muller v. Dows, 94 U. S. 444, 450, 24 L. Ed. 207, and McElrath v. Pittsburg & Steubenville R. R. Co., 55 Pa. 189, a foreclosure and sale in one district of a railroad which extended into another was sustained. In the former case the Supreme Court said:

"The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made."

In Riverdale Mills v. Manufacturing Company, 198 U. S. 188, 194, 197, 25 Sup. Ct. 629, 49 L. Ed. 1008, in a suit in the Northern District of Georgia, a sale and conveyance of real estate, the larger part of which was situated in Alabama, was made under a decree of foreclosure of a trust deed thereon. The title under the decree to the property in Alabama was subsequently assailed by a suit in chancery in a state court in which the complainant alleged that this property was not advertised in the state of Alabama, nor was any sale or pretense of sale thereof conducted in that state. The United States Circuit Court enjoined the prosecution of that suit in the state court. The United States Circuit Court of Appeals reversed the order for the injunction. The Supreme Court said:

"It must also be remembered that the trust deed described the property conveyed as situated partly in Georgia and partly in Alabama. The federal court sitting in Georgia had jurisdiction to foreclose the trust deed,"—cited Muller v. Dows, supra, and affirmed the order for the injunction.

The contract which created the trust and specified its terms in the case in hand described the trust property as situated partly in Arkansas and partly in Texas, and the court below, which had jurisdiction of all the parties to that contract and of the trust it created, is endowed with ample power to enforce the agreement and to execute the trust by a sale

and conveyance of the property in Texas by the hands of its master and by requiring the parties to this suit to confirm the title of the purchaser by proper deeds of further assurance.

The decree below is accordingly reversed, and the case is remanded to the Circuit Court with instructions to enter a decree avoiding the two contracts of 1905, dismissing the cross-bill, appointing a master and directing him to hear evidence, to state and report speedily the account regarding the receipts and expenditures of the parties on account of the trust property upon a basis not inconsistent with that indicated in this opinion, and after the exceptions, if any, to that report have been ruled, then to enter a decree of sale of all the lands described in the contract of 1892 which have not been sold or lost to the parties, either in one tract, or in such smaller tracts as to the court shall seem fit, and to require the complainants and the defendant by that decree to make deeds to the purchaser or purchasers in confirmation of the master's conveyance or conveyances.

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## MULLER v. DOWS.

**(Supreme Court of the United States, 1876. 94 U. S. 444, 24 L. Ed. 207.)**

Appeal from the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the Court.

Mr. Justice STRONG.[33] * * * The next objection urged against the decree of the court below is, that it is void so far as it directed the usual foreclosure and sale of property not within the territorial jurisdiction of the court. A part of the Chicago & Southwestern Railway is in the State of Missouri, and the mortgage which the bill sought to have foreclosed covered that part, as well as the part in the State of Iowa. The court decreed a sale of the entire property covered by the mortgage, and directed the master, who was ordered to make the sale, to execute a good and sufficient deed or deeds to the purchaser. It also declared that after the sale both the defendant corporations and the complainants' trustees named in the mortgage, as well as all persons claiming under them or either of them, be barred and foreclosed from all interest, estate, right, claim, or equity of redemption of, in, and to the property, reserving, however, the rights of the holders of the bonds and coupons secured by the first mortgage, then remaining outstanding and unpaid. It directed that the two defendant corporations should surrender to the purchaser the property sold and conveyed, upon the execution, approval, and delivery of the master's deed; and that, as further assurance, the Chicago & Southwestern Railway Company should, on the approval and delivery of the master's deed, convey all

[33] Parts of the opinion are omitted.

the property therein described to the purchaser, by their good and sufficient deed.

If such a foreclosure and sale cannot be made of a railroad which crosses a State line and is within two States, when the entire line is subject to one mortgage, it is certainly to be regretted, and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two States. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one State and partly in an adjoining State, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be sold only in fragments; if, as in this case, where the mortgage is upon the whole line, and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the State,—it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division. In view of this, before we can set aside the decree which was made, it ought to be made clearly to appear beyond the power of the court. Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In McElrath v. The Pittsburg & Steubenville Railroad Co., 55 Pa. 189,—a bill for foreclosure of a mortgage,—in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were

the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made. * * *

Decree affirmed.

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## SNOOK et al. v. SNETZER.

(Supreme Court of Ohio, 1874. 25 Ohio St. 516.)

Motion for leave to file a petition in error to the District Court of Licking county.

On the 27th day of December, 1873, the defendant in error commenced an action in the Court of Common Pleas, of Licking county, against the plaintiffs in error, to enjoin them from proceeding in an action then pending in Ohio county, in the State of West Virginia, wherein the plaintiffs in error were plaintiffs, and the defendant in error was defendant, to subject the earnings then due to him from the Baltimore and Ohio Railroad Company for services rendered as the conductor of a freight train of the company, to the payment of the amount due on a judgment recovered by the plaintiffs in error against the defendant in error, before a justice of the peace of Newark township, in the said county of Licking, for the amount due on a promissory note, given by him to the plaintiffs in error, for the sum of eighteen dollars, dated June 2, 1866, and payable one day after date. A temporary injunction was allowed, and the allowance thereof duly indorsed on the summons issued in the action.

It is averred in the petition that the parties to these actions all reside in the city of Newark, in the county of Licking; that the defendant in error is the head of a family; that the action pending against him in Ohio county, West Virginia, was commenced by the plaintiffs in error on the 28th day of November, 1873; that the process served upon the railroad company requires it to answer as garnishee, on the 30th day of December, 1873; that the earnings sought to be subjected in the action to the payment of the judgment, are the earnings due to him for services rendered the railroad company, as the conductor of a freight train on its road, during the months of October and November, 1873; that such earnings are necessary for the support of his family, and that the action is prosecuted against him by the plaintiffs in error in the State of West Virginia, for the purpose of evading the exemption laws of this state and preventing him and his family from having the benefit thereof.

On the 21st of August, 1874, a supplemental petition was filed in the action, of the filing of which the plaintiffs in error were duly notified, in which it is averred, that after the plaintiffs in error had been duly notified of the allowance of the temporary injunction, they, in disregard of the order of the court, prosecuted their action then pending in Ohio county, West Virginia, against the defendant in error, to final judgment, and received of the garnishee, the Baltimore and Ohio Railroad Company, $40.25, the full amount of the judgment. The answer of the plaintiffs in error denies the averments of the original and supplemental petitions.

The issues arising upon the pleadings were found by the court for the defendant in error, and a judgment was rendered in his favor, against the plaintiffs in error, for the amount received by them of the railroad company, with interest and costs.

A motion for a new trial was filed and overruled, to which ruling the plaintiffs in error excepted, and presented their bill of exceptions, which was allowed, signed, and sealed by the court.

The judgment of the Court of Common Pleas was afterward affirmed by the District Court, on a petition in error filed therein by the plaintiffs.

REX, J.[34] * * * The remaining question to be determined is: Have the courts of this state authority, upon the petition of a resident who is the head of a family, by injunction, to restrain a citizen of the county in which the action is commenced from proceeding in another state to attach the earnings of such head of a family, with a view to evade the exemption laws of this state, and to prevent such head of a family from availing himself of the benefit of such laws?

The authority of the courts in such a case to restrain a citizen from thus proceeding for the purpose named, is, in our opinion, clear and indisputable.

In exercising this authority, courts proceed, not upon any claim of right to control or stay proceedings in the courts of another state or country, but upon the ground that the person on whom the restraining order is made resides within the jurisdiction and is in the power of the court issuing it. The order operates upon the person of the party, and directs him to proceed no further in the action, and not upon the court of the foreign state or country in which the action is pending. On this subject, Mr. Justice Story, in his Commentaries on Equity Jurisprudence, section 899, says:

"Although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act in personam upon those parties, and direct them, by injunction, to proceed no further in such suit."

[34] Part of the opinion is omitted.

In such a case, these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of dispute, they consider the equities between the parties and decree in personam according to those equities, and enforce obedience to their decrees in personam. Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Dehon v. Foster, 4 Allen, 545; Vail v. Knapp, 49 Barb. (N. Y.) 299; Baltimore & Ohio R. R. Co. v. May, 25 Ohio St. 347. Regarding these principles as decisive of the questions presented for determination in this case, the motion must be overruled.

Leave refused.

McILVAINE, C. J., WELCH, WHITE, and GILMORE, JJ., concurred.

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## ROURKE v. McLAUGHLIN.

**(Supreme Court of California, 1869. 38 Cal. 196.)**

SANDERSON, J.,[35] delivered the opinion of the Court:

This is an action upon a contract to sell and convey real estate. The contract is set out in full in the complaint. It appears that the estate in question was sold by the defendant and his wife, and conveyed by them to the plaintiff upon the 15th of September, 1866, and that upon the same day the contract in suit was executed. That the consideration for both sales was the same, to wit: $1,000. That by the contract in suit, the defendant agreed to pay the sum of $1,000, in coin, with interest at the rate of one and one half per cent. per month, to be paid by instalments, as follows: $400, with interest, on the 15th of October, 1867; $400, with interest, on the 15th of October, 1868, and the remainder on the 15th of October, 1869. That, upon the payment of the price, the plaintiff was to make "a good and lawful deed." That if the defendant at any time, should fail to make his payments, he was to surrender possession. That the defendant was to have immediate possession under the contract. That this action was brought for the first instalment.

In his answer, the defendant admits the making of the contract, and his failure to pay the first instalment; but alleges: * * *

Third—That, at the time said contract was made, the plaintiff resided in this State, but since then he has removed to Ireland, and is no longer a resident or citizen of the United States, but has become a subject of the Queen of Great Britain; and hence, if this defendant is made to pay the purchase money, he will, for the reasons stated, be unable to enforce the contract as against the plaintiff, or compel him to convey. * * *

Nor does the fact that since the transaction in question the plaintiff has removed from the State to a foreign country, constitute a de-

[35] Parts of the opinion are omitted.

fense. The claim that it does, seems to be founded upon the idea that, in view of the facts stated, the defendant will be unable, when the time comes, to compel the plaintiff to perform, on his part, by making a deed. So far as the first and second instalments are concerned, the promises of the defendant are independent, and performance by the plaintiff is not a condition precedent, and therefore, a willingness on his part to perform need not to have been averred. Bean v. Atwater, 4 Conn. 3, 10 Am. Dec. 91; Osborne v. Elliott, 1 Cal. 337; Folsom v. Bartlett, 2 Cal. 163; Barron v. Frink, 30 Cal. 486; 2 Smith's Leading Cases, note to Cutter v. Powell, p. 22; Hill v. Grigsby, 35 Cal. 656.

But, independent of this consideration, the fact that the plaintiff may be beyond the jurisdiction of the Courts of this State when the defendant may become entitled to a deed is wholly immaterial. His absence will neither prevent his making a deed voluntarily, nor prevent the Courts of this State from compelling a deed to be given by the plaintiff himself, or by a commissioner appointed to act in his place. The rule seems to be that specific performance will be decreed whenever the parties, or the subject-matter, or so much thereof as is sufficient to enable the Court to enforce its decree, is within the jurisdiction of the Court. Thus, in the case of Penn v. Lord Baltimore, specific performance of a contract for lands lying in America was decreed in England. 1 Ves. 444. So in the case of the Earl of Kildare v. Sir Morrice Eustace and Fitzgerald, it was held that a trust in relation to lands lying in Ireland may be enforced in England if the trustee live in England. 1 Vern. 419. So if the subject of the contract or the trust be within the jurisdiction, but the parties are not. In an anonymous case in 1 Atkyns, 19, which was a bill for an allowance for the support of children out of stocks in England, and the parties were out of the kingdom, the Lord Chancellor said that he had no power over the parties, because they were in foreign countries; but, though he could not come at their persons, he could lay his hand upon any stocks they had in England. So in the case of Ward v. Arredondo, a contract for the sale of lands lying in Alabama, made by a citizen of New York at Havana, with the defendant, a Spanish subject, was enforced in New York, although the defendant was not in New York, and there was nothing connected with the parties or the subject-matter within the jurisdiction of the Court, except the deed for the land, which was in the custody of defendant's agent, who was made a party to the suit. Hopk. Ch. 213, 14 Am. Dec. 543. In the present case, though the plaintiff be in Ireland when the time comes for performance on his part, the defendant may compel a specific performance for the land—the whole subject-matter of the contract, is within the jurisdiction of the Courts of this State. * * *

Judgment affirmed.[35]

[35] Quære—Would the conclusion be different if no statute gave a commission to transfer title?

## ROYAL LEAGUE v. KAVANAGH.

(Supreme Court of Illinois, 1908. 233 Ill. 175, 84 N. E. 178.)

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; J. W. Mack, Judge.

Suit for injunction by the Royal League against Anna Sexton Kavanagh. From a decree dismissing the bill for want of equity, plaintiff appeals.

DUNN, J.[37] The appellant filed its bill in the circuit court of Cook county for an injunction to restrain the appellee from bringing an action in the state of Missouri against the appellant upon a benefit certificate issued by it to Thomas W. Kavanagh, in which the appellee was named as beneficiary. The circuit court sustained a demurrer to the bill, which was thereupon dismissed for want of equity, and, that decree having been affirmed by the Appellate Court, this further appeal is prosecuted by the appellant. * * *

The bill further alleged that by the opinion and decision of the Court of Appeals of the state of Missouri in the case of Morton v. Supreme Council of the Royal League, 100 Mo. App. 76, 73 S. W. 259, it has been settled as the rule of law in that state that suicide by-laws adopted subsequent to the date when the member joins the order are not binding upon him or his beneficiaries, although by the terms of the contract of membership there is an agreement contained therein that such member and his beneficiary shall be bound thereby, so that the rule of law which obtains in the state of Missouri is directly contrary to the rule of law of the state of Illinois; that appellant is licensed to do business in the state of Missouri, and has there subordinate councils and agents upon whom service may be had, so that the appellee would be able to procure service upon appellant if she went into that jurisdiction and began a suit upon the benefit certificate; that the contract entered into was made between two citizens of Illinois; that the certificate was delivered in Illinois; that the assessments were paid in Illinois; that under the law the place of performance was and is Illinois, and therefore said contract is an Illinois contract, into which the laws of Illinois entered and formed a part, and the appellant is therefore entitled to have its rights and liabilities under said contract adjudicated and determined under and in accordance with the laws of Illinois; that if the appellee begins proceedings in the state of Missouri the appellant cannot obtain the benefit of the laws of Illinois, where said contract was made, by pleading such laws in any suit begun in Missouri, for the reason that the rule of law in that regard in Illinois does not rest upon a statute of the state of Illinois, but is a rule of the common law, which obtains in Illinois, and it has been determined and settled to be the rule of law in the state of Missouri by the Court of Appeals that where the courts of said state are called upon to consider

[37] Part of the opinion is omitted.

and construe a contract entered into in a sister state, and the rule of law which obtains in the state where the contract was made or was to be performed is different from the rule of law which obtains in the state of Missouri, and the rule which obtains in the state where the contract was made or was to be performed is a rule of the common law of that state and not based upon the statutes thereof, the courts of Missouri will not follow the rule which obtains in the state where the contract was made or was to be performed, but will construe said contract according to the rule which obtains in the state of Missouri, as will appear from the decision of the Court of Appeals of Missouri in the case of Campbell v. American Benefit Club, 100 Mo. App. 249, 73 S. W. 342.

The bill further alleged that the appellee, in order to evade the law of Illinois, by which her rights should be determined, and in order to avail herself of the law of Missouri, now threatens to bring legal proceedings in Missouri on the benefit certificate to compel the appellant to pay the sum of $4,000, whereas in truth and in fact it is liable for no more than $322.84, which action and conduct on the part of the appellee, unless restrained will be a fraud upon the appellant and will result in depriving it of its rights under the laws of this state; that it has a membership of a little more than 27,500, of which about 20,000 are in Illinois, holding contracts of membership made and entered into in this state, to be performed in this state, where the certificates were delivered and the dues and assessments paid, so that the contracts are Illinois contracts and governed and controlled by the laws of Illinois, and to permit the appellee to begin a suit in the courts of Missouri, or of any other state where the laws governing and controlling such contracts as the one here involved in regard to the questions here involved are different from the laws of Illinois, and where the courts of such state or states refuse to be governed and controlled by the laws of Illinois, will be to permit the appellee not only to work a fraud upon appellant, but likewise upon those members of the order residing in the state of Illinois and holding Illinois contracts; that appellant is able, ready, and willing to pay to the defendant whatever sum may be determined to be due under its contract, and tenders into court, to be held subject to the order of the court, $322.84, and avows its readiness to pay any sum in addition thereto for which it may be determined to be liable, if it should be held to be liable for any additional sum.

There is no question as to the right to restrain a person over whom the court has jurisdiction from bringing a suit in a foreign state. Harris v. Pullman, 84 Ill. 20, 25 Am. Rep. 416. The courts do not in such cases pretend to direct or control the foreign court, but the decree acts solely upon the party. The jurisdiction rests on the authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process to stay acts contrary to equity and good conscience. The state has power to compel its own citizens to respect

its laws even beyond its own territorial limits, and the power of the courts is undoubted to restrain one citizen from prosecuting in the courts of a foreign state an action against another which will result in a fraud or gross wrong or oppression. Snook v. Snetzer, 25 Ohio St. 516; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Teager v. Landsley, 69 Iowa, 725, 27 N. W. 739; Wilson v. Joseph, 107 Ind. 490, 8 N. E. 616; Dehon v. Foster, 4 Allen (Mass.) 545. But the court will not restrain the prosecution of a suit in a foreign jurisdiction unless a clear equity is presented requiring the interposition of the court to prevent a manifest wrong and injustice. It is not enough that there may be reason to anticipate a difference of opinion between the two courts, and that the courts of the foreign state would arrive at a judgment different from the decisions of the courts in the state of the residence of the parties. Carson v. Dunham, 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 202, 14 Am. St. Rep. 397. It is not inequitable for a party to prosecute a legal demand against another in any forum that will take legal jurisdiction of the case, merely because that forum will afford him a better remedy than that of his domicile. To justify equitable interposition it must be made to appear that an equitable right will otherwise be denied the party seeking relief. Thorndike v. Thorndike, 142 Ill. 450, 32 N. E. 510, 21 L. R. A. 71, 34 Am. St. Rep. 90.

A person has the right to select such tribunal having jurisdiction as he chooses for the prosecution of his rights, and the court which first obtains jurisdiction will retain it. Such jurisdiction cannot be defeated because the defendant may prefer another tribunal in which he supposes the decision will be more favorable to him. In this case it is not averred that the Supreme Court of Missouri has laid down any rule of law different from that of this court. The averment is that in two cases mentioned the Court of Appeals of Missouri has settled the rule of law in that state in accordance with the statement thereof in the bill. It is not averred that the Court of Appeals of Missouri is the court of final appellate jurisdiction in the state, or that the court of final appellate jurisdiction has made any decision of any question involved in this case. While the law of another state is matter of fact of which we cannot take judicial notice, yet the allegations of the bill in that regard are entirely consistent with the hypothesis that the Court of Appeals, whose decisions are alleged to have established the law of Missouri, may be an inferior court of that state of limited territorial jurisdiction, whose decisions are subject to review by the Supreme Court. This court cannot, in advance of its announcement by the Supreme Court of Missouri, assume that the common law in that state will be declared to be different from the common law as construed in this state. Allegation and proof that a court of a state not having final appellate jurisdiction has settled a particular rule of law does not constitute allegation or proof that such rule is the law of the state. So far as appears, if the appellee should bring an action in the state of

Missouri against appellant on this benefit certificate, and if the nisi prius and Appellate Courts should decide against appellant, it would be entitled to have such decision reviewed by the Supreme Court of the state of Missouri, and we have no reason to suppose that that court will not do justice between the parties and give effect to the rules of law applicable to the case. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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## SUTPHEN v. FOWLER.

**(Court of Chancery of New York, 1841. 9 Paige, 280.)**

The bill in this cause was filed against the infant child and heir of Coenrad Fowler, deceased, for the specific performance of a contract for the sale and conveyance of lands in the state of Michigan. In May, 1836, the decedent entered into a written agreement to sell and convey to the complainant, the eighth of a section of land in the state of Michigan, for the consideration or price of $250; of which sum $200 was paid down. The residue of the consideration was to be paid on the first of January thereafter; upon payment of which the decedent was to convey the premises to the complainant, with warranty. The decedent, at the same time, received from the complainant the further sum of fifty dollars for the purpose of buying or locating forty acres of land adjoining the other eighty acres, in the name and for the benefit of the complainant. But a few months after the receipt of this money, and the making of the contract of sale C. Fowler died, without having conveyed the premises to the complainant, and without applying the fifty dollars to the object for which it was received. He left the defendant, then an infant about three years of age, his only heir at law; which infant, then and at the time of filing the bill in this cause, was a resident of this state. And the decedent being entitled to a conveyance of the legal title to the premises, at the time of his death, such title was subsequently conveyed to the defendant in fee, as such heir at law, by the person who then held the same. The complainant thereupon filed his bill for a specific performance; and to have the $50, which was in the hands of the decedent at the time of his death, offset or applied to the extinguishment of the residue of the purchase money due on the contract. The infant put in a general answer by her general guardian; and upon a reference to ascertain the truth of the allegations set forth in the complainant's bill, the master reported them as above stated. The cause was submitted upon the pleadings and master's report.

THE CHANCELLOR [WALWORTH]. The complainant is clearly entitled to a decree for a specific performance. And as the personal estate of the decedent is not sufficient to pay the debts, it is proper that the $50 received by him for another purpose, and not applied as intended, should be set off or applied in satisfaction of the same amount which

remained due on this contract. The only difficulty, therefore, in making a perfect title to the premises, to the complainant, immediately, arises from the fact that the heir at law is an infant, and that the lands to be affected by the decree are not within the jurisdiction of the court. But it is perfectly well settled that this court has jurisdiction to decree the specific performance of a contract for the sale of lands in another state, where the person of the defendant is within the reach of its process. The Earl of Arglassee v. Muschamp, 1 Vern. Rep. 77, 135; Farley v. Shippen, Wythe (Va.) 254; Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Penn v. Lord Baltimore, 1 Ves. Sen. 444.

In this case the heir at law is not only within the jurisdiction of the court but she appears to be domiciled here. If she was of age, therefore, there would be no difficulty in compelling a specific performance of the contract; by a decree directing her to give such a conveyance of the premises as would be effectual to transfer the legal title to the complainant according to the lex loci rei sitæ. Considering the age of the defendant, a decree by the court of chancery of the state of Michigan, where the land is situated, would perhaps have been more beneficial to the complainant; as this court cannot sequester the property, or put him in possession thereof by its process. But the court may decree a specific performance of the contract, and direct a conveyance by the infant when she arrives at the proper age to enable her to transfer the legal title according to the laws of Michigan; and may authorize him to take and to retain the possession of the premises until that time, if he can obtain possession thereof without suit. In the meantime the court may grant a perpetual injunction, restraining the defendant from disturbing the complainant in such possession; or from doing any act whereby the title shall be transferred to any other person, or in any way impaired or incumbered.

The complainant is entitled to a decree accordingly. But the bill shows there is no property which has come to the infant, whereby she ought to be charged personally upon the contract of her father or subjected to costs, and as she holds the premises in question as a mere trustee for the complainant, the costs of the guardian ad litem of the defendant must, of necessity, be borne by the complainant. In this respect it is like the case of an infant trustee, who is called upon to convey, under the statute; in which case the cestui que trust must pay the necessary expenses of the proceedings.[38]

[38] The well-settled rule as to specific performance against infants is stated in Tillery et al. v. Land et al. (1904) 136 N. C. 537, 48 S. E. 824, 826: "If the infant defendant and Mrs. Perry had authorized the defendant Land to convey their interests in the property, specific performance could not be enforced as to them. The contracts of infants to sell their real estate may be ratified after they become of full age, and the courts might, and would in proper cases, compel them to specifically perform their contracts. But as long as they remain infants, they could not be made to execute such contracts."

## PEGGE v. SKYNNER and Richardson.

(In Chancery, 1784. 1 Cox, 23, 29 E. R. 1045.)

Bill for specific performance of an agreement for a lease from plaintiff to defendants. It was objected that the defendant Richardson had since become incapable of doing any act in consequence of a paralytic stroke. It was ordered that the defendant Skynner should execute a counterpart of a lease, and also the defendant Richardson, when he should be capable of so doing.

LORD THURLOW refused to give plaintiff costs.

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## OWEN v. DAVIES.

(In Chancery before Lord Hardwicke, 1747–48. 1 Ves. Sr. 82, 27 E. R. 905.)

The bill for a specific performance of an agreement with one, since become a lunatic, for the sale of a reversion upon an estate for life.

LORD CHANCELLOR.[39] From the opening the cause I doubted, whether under the circumstances attending the defendant I should decree a performance; but upon the equitable circumstances of the case I must. It is certain, that the change of the condition of a person entering into an agreement, by becoming lunatic, will not alter the right of the parties; which will be the same as before, provided they can come at the remedy. As if the legal state is vested in trustees a court of equity ought to decree a performance; and the act of God should not change the right of the parties: but if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and leave it at law. * * *

If therefore, the plaintiff will have a specific performance, it must be on such a proper application of the money, and payment of interest from the time of that instrument. No costs on either side.[40]

[39] Part of the opinion is omitted.

[40] In Hall v. Warren (1804) 9 Ves. 608, 612, Sir William Grant, M. R., said: "So, as to the objection from the difficulty of making the conveyance, the difficulty that struck Lord Hardwicke, in Owen v. Davies, was avoided there; as there were trustees. But it does not appear to me, that, if the plaintiff is satisfied with that which is in truth no title, but only an enjoyment under this court, he ought not to have all the court can give him. It is a disadvantage to him, of which the other cannot complain, that he cannot get a good title; but must rest an indefinite period, without a title, having only the enjoyment. These difficulties are not so strong as to preclude the previous inquiry, before we can ascertain the precise mode, in which the subsequent parts are to be carried into execution. Therefore take an issue."

## MATTESON v. SCOFIELD.

(Supreme Court of Wisconsin, 1871. 27 Wis. 671.)

Appeal from the Circuit Court for St. Croix County.

Action to compel a specific performance of a contract to sell and convey land.

On the 1st of December, 1867, defendant was the owner in fee of the northeast quarter of S. 5, T. 28 N., R. 19 W., in said county. He was then, and continued to the trial of this action to be, an unmarried man, and residing in the State of Connecticut. On the 29th of January, 1868, at Darien, in said State of Connecticut, he mailed the following letter, directed to the plaintiff at Hudson, Wisconsin:

"Sir: I received your letter stating that you did not feel disposed to pay $3,500 for my land. * * * The lowest I will take for it is $3,200. That is what you offered last year. If I can get one thousand dollars down and five hundred per year until the balance is paid, with interest and security on the money by mortgage, I have made up my mind to sell it. If this meets your favor you can write and let me know. [Signed by the defendant.]"

This letter was received by the plaintiff about the 5th of February, 1868, and on the 8th of the same month he mailed an answer at Hudson, Wisconsin, addressed to the defendant at Darien, Connecticut, as follows:

"Dear Sir: I received your letter of the 29th of January last, stating that you would take $3,200 for your land here, with one thousand down, and the balance in yearly payments of five hundred dollars a year until the balance is paid, with interest, and secured by mortgage. I will take the land at the price and terms above stated. I have six hundred dollars in the First National Bank of Hudson, and will deposit the other four hundred to-morrow. You can make out a deed and send it to the bank with instructions and draw your money, and I will execute the mortgage and hand to them. I suggest this method of making the transfer as it saves time and expense. * * *

"P. S. I have already deposited the one thousand dollars. [Signed by the plaintiff.]"

The $1,000 was deposited in the bank as stated in said letter, and placed to the plaintiff's credit on the books of the bank; and the cashier of the bank notified defendant that said sum was deposited to be paid to him (defendant) by the bank on receipt of the title papers to said land. On the 20th of February, 1868, the defendant, by letter, informed the plaintiff that he had received his letter stating he would give the defendant what he asked for the land in question, and that plaintiff had deposited the sum of $1,000 for the first payment, in the bank, subject to his (defendant's) order; that he (defendant) had made up his mind to come to Hudson and do the business himself, and thought he should be there in about two weeks from that time. The defendant came to Hudson in about five weeks from the date of this letter; thereupon plaintiff (by his agent) tendered to defendant $1,000 as the first payment for the land, and also notes for the balance in accordance with the terms of the letters above recited, and a mortgage of the land securing said notes; and at the same time plaintiff de-

manded a deed of the land, "which the defendant refused to deliver at that time;" and immediately thereupon the summons in this action was served.

The answer of the defendant does not allege any willingness to perform on his part, but avers that he had been misled as to the value of the land by false and fraudulent representations of the plaintiff, made while the latter was employed by him as an agent to make sale of the land. The printed case does not show that any evidence was offered to sustain these allegations of the answer, or that there was any finding in regard to them.

The court held: 1. That plaintiff was entitled to the usual judgment that defendant perform specifically the agreement on his part. 2. That as defendant was a non-resident of this state, and out of the jurisdiction of the court, plaintiff was entitled to a judgment vesting in him all the right, title and interest which the defendant had in the land at the commencement of the action and filing of notice of lis pendens therein; plaintiff being required, before or at the time of the entry of said judgment, to deposit with the clerk of the court $1,000, and all other sums with interest from February 8, 1868, which might be due defendant by the terms of said agreement, with his note and mortgage for any sum of money not so due with interest from the same date. 3. That after obtaining the receipt of the clerk showing compliance with these conditions, plaintiff should have a judgment vesting in him the title of the defendant as aforesaid.

Judgment was afterwards entered, which recited, inter alia, that plaintiff had "obtained the receipt of said clerk required by said decision," and had "complied with the conditions of said decision," and that "said receipt had been read and filed;" and thereupon declared that all the defendant's right, title and interest in the premises in controversy, at the time of the filing of the lis pendens, was thereby passed to and vested in the plaintiff. From this judgment the defendant appealed.

COLE, J.[41] * * * It is said there was nothing to warrant the court in passing title to the property to the plaintiff. The court found that the defendant was a non-resident, and out of the jurisdiction of the court. It is true, he had been served with process while temporarily within the jurisdiction of the court, had put in an answer and contested the suit upon its merits. But he was not a resident within the territorial jurisdiction of the court, so that it could compel him to perform his agreement and execute a deed. Even if the court had not the right to pass the title to the land within its jurisdiction by virtue of the inherent powers vested in it as a court of equity, still the last clause of section 15, chap. 129, R. S., would seem to give it ample authority to "pass title to real estate by its judgment without conveyance." This clause of the section is certainly a clear recognition of the power of a

[41] Part of the opinion is omitted.

court of equity to pass title to real estate when essential to the complete exercise of its jurisdiction.

A still further objection is taken, that the entry of judgment was made dependent upon the plaintiff depositing with the clerk $1,000, and such other sums as might then be due to the defendant by the terms of the agreement, and his notes and mortgage for such sums as were not due. This, it is said, was requiring the clerk to judicially determine matters which should be settled by the court. But there is no pretense that the clerk has made any mistake in executing the directions of the court, or that the defendant has been in any way prejudiced by anything the clerk has done.

Upon the whole record we think the judgment of the circuit court is right, and must be affirmed.

BY THE COURT.—Judgment affirmed.

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## LANGDON v. SHERWOOD.

**(Supreme Court of the United States, 1888. 124 U. S. 74, 8 Sup. Ct. 429, 31 L. Ed. 344.)**

At law, in the nature of ejectment. The land was in Nebraska. As to one part of the tract the plaintiff relied upon the decree of a court of competent jurisdiction for the conveyance of the land to his privy in estate, claiming that under the operation of section 429 of the Code of Nebraska, set forth in the opinion of the court, infra, the decree operated as a conveyance. As to the remainder, he relied upon a certificate of the register of the land-office at Omaha, claiming that under the provision of section 411 of the Civil Code of Nebraska, also set forth infra, that was evidence of a legal title. Judgment for the plaintiff. Defendants sued out this writ of error.

MILLER, J.[42] This is a writ of error to the circuit court of the United States for the district of Nebraska. The defendant in error brought in that court a suit in the nature of an action of ejectment to recover several tracts or parcels of land then in the possession of the plaintiffs in error. The case was first tried before a jury, and the verdict afterwards set aside. By a written agreement of the parties, it was then submitted to the court without a jury. That court made a general finding in favor of the plaintiff, Sherwood, and certain special findings, and upon both of these rendered a judgment for him, for all the land claimed in his petition. A bill of exceptions was taken, which related to the introduction of evidence and the findings of the court. On this bill of exceptions and the special findings of fact, the plaintiffs here assign two principal errors.

The first one of these, which affects all the land embraced in the suit, has reference to the introduction and effect of a decree in chancery,

[42] Parts of the opinion are omitted.

rendered in the circuit court of the United States for the district of Nebraska, April 9, 1883, in which Sherwood was complainant, and the Sauntee Land & Ferry Company was defendant. The plaintiff in the action of ejectment, having given evidence which he asserted showed title to all the land in controversy in the Sauntee Land & Ferry Company, introduced the record of this suit in chancery to establish a transfer of the title by means of the proceedings in that suit from that company to himself. The bill of complaint set out that this company, while owner of the land, had made a verbal agreement with William A. Gwyer that the latter should take, have, and hold the real estate mentioned, as his own property, and, as consideration for the same, should pay off, settle, and discharge the indebtedness of the company. The decree of the court established the fact that Sherwood had acquired the interest of Gwyer in the property, whereby he became the equitable owner of it all, and that he was entitled to have a conveyance of the legal title from the Sauntee Land & Ferry Company. The decree then proceeded in the following language:

"It is further ordered and decreed that the respondent, the Sauntee Land & Ferry Company, shall, within twenty days after the entry of this decree, execute, acknowledge, prove, and record, in the manner provided by law, a good and sufficient deed of conveyance to the complainant of all said real estate, to vest the entire legal title thereof in the respondent, and to deliver said deed of conveyance, so executed, acknowledged, proved, and recorded, to the complainant. It is further ordered and decreed that, in case said respondent shall fail, neglect, or refuse to make, execute, acknowledge, prove, record, and deliver to the complainant such deed of conveyance within the time hereinbefore fixed, then and in that case, this decree shall stand and be a good, sufficient, and complete conveyance from the respondent, the Sauntee Land & Ferry Company, to the complainant, Willis M. Sherwood, of all the right, title, and estate of said respondent in and to said real estate, and shall be taken and held as good, complete, and perfect a deed of conveyance as would be the deed of conveyance hereinbefore specified. And that the respondent, and all persons claiming through, from, or under it, be, and they are hereby, perpetually barred, restrained, and enjoined from asserting any right, title, ownership, or interest in or to said real estate adversely to the complainant, and from in any manner interfering with the peaceable and quiet possession of complainant in and of the same."

No conveyance was ever made under this decree by that company, and it is objected that for this reason Sherwood did not acquire by that proceeding the strict legal title, but only obtained an equitable one, and the quieting of that title as against the Sauntee Land & Ferry Company. Section 429, Code Neb., is, however, relied upon by Sherwood's counsel as giving to the decree in his favor in the chancery suit the effect of an actual conveyance of the title. That section is as follows:

"When any judgment or decree shall be rendered for a conveyance, release, or acquittance in any court of this state, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformable to such judgment or decree."

We are of opinion that, if this section of the Code be valid, it was the intention of the makers of it that a judgment and decree such as

the one before us should have the same effect, where the parties directed to make the conveyance fail to comply with the order, as it would have had if they had complied, in regard to the transfer of title from them to the party to whom they were bound to convey by the decree. The language of this section of the Code hardly admits of any other construction. When the party decreed to make the conveyance does not comply therewith within the time mentioned in the judgment or decree, such judgment or decree shall have the same effect and operation, and be as available, as if the conveyance had been executed. The operation or effect here meant was the transfer of title, and it could not have been made any clearer if it had said that it should have the effect of transferring the title from the party who fails to convey to the one to whom it ought to be conveyed. This must have been the meaning of the minds of the legislators. It was undoubtedly the ancient and usual course, in such a proceeding, to compel the party who should convey to perform the decree of the court, by fine and imprisonment for refusing to do so. But inasmuch as this was a troublesome and expensive mode of compelling the transfer, and the party might not be within reach of the process of the court so that he could be attached, it has long been the practice of many of the states, under statutes enacted for that purpose, to attain this object, either by the appointment of a special commissioner who should convey in the name of the party ordered to convey, or by statutes similar to the one under consideration, by which the judgment or decree of the court was made to stand as such conveyance on the failure of the party ordered to convey. The validity of these statutes has never been questioned, so far as we know, though long in existence in nearly all the states of the Union. There can be no doubt of their efficacy in transferring the title, in the courts of the states which have enacted them; nor do we see any reason why the courts of the United States may not use this mode of effecting that which is clearly within their power.

The question of the mode of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the state in which the land lies. As this court has repeatedly said, the mode of conveyance is subject to the control of the legislature of the state; and as the case in hand goes upon the proposition that the title had passed from the government of the United States, and was in controversy between private citizens, there can be no valid objection to this mode of enforcing the contract for conveyance between them according to the law of Nebraska. U. S. v. Crosby, 7 Cranch, 115, 3 L. Ed. 287; Clark v. Graham, 6 Wheat. 577, 5 L. Ed. 334; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192; Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858; Insurance Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. 236, 27 L. Ed. 648. We cannot see, therefore, any error in the circuit court in permitting the proceedings in the chancery suit to be given in evidence, nor in giving to them

the effect of transferring from the Sauntee Land & Ferry Company such legal title as it had to any of the property in controversy.

The plaintiff, in order to sustain his right of action in this suit, offered in evidence, first, a certificate of the register of the land-office at Omaha, Nebraska, of the date of August 14, 1857, of the location by John Joseph Wright of a military land-warrant. * * *

It has been repeatedly decided by this court that such certificates of the officers of the land department do not convey the legal title of the land to the holder of the certificate, but that they only evidence an equitable title, which may afterwards be perfected by the issue of a patent, and that in the courts of the United States such certificates are not sufficient to authorize a recovery in an action of ejectment. * * *

There was error, therefore, in the decision of the court admitting these certificates from the land-office as evidence of title, and in the finding that there was such evidence of title in the plaintiff as justified the recovery. The judgment of the court on the facts found in regard to the remainder of the land is correct. It must, however, be reversed for the error in regard to the 156 acres and 40-100 included in the two certificates of the land-office. It is therefore remanded, with instructions to render judgment against the plaintiff for the 156 acres and 40-100, and in his favor for the remainder of the land.[43]

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## WAIT v. KERN RIVER MINING, MILLING & DEVELOPING CO. et al. (L. A. 2,435.)

(Supreme Court of California, 1909. 157 Cal. 16, 106 Pac. 98.)

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by L. E. Wait against the Kern River Mining, Milling & Developing Company and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals.

ANGELLOTTI, J.[44] This action was brought to obtain a decree that plaintiff is the owner of 245,000 shares of stock of the defendant corporation, and that the defendants have and hold the same in trust for the use and benefit of plaintiff, and requiring said corporation to issue to plaintiff said 245,0000 shares. Defendant Latham having, prior to the institution of the action, absconded and left the state of California and his whereabouts being absolutely unknown, the only service of summons had upon him was by publication. He did not appear in the action. Defendant corporation answered, and the trial of the action

[43] As an illustration of the operation in rem of equity decrees under the modern practice, see rule 8 of the recent Rules of Practice for Equity Courts of the United States. See page 49, supra.

[44] Parts of the opinion are omitted.

was had as between it and plaintiff. The findings were substantially in favor of plaintiff upon all material issues except that of ownership of the stock, the court finding that it is not true that plaintiff is now, or ever was, the owner of said 245,000 shares of stock. The court concluding, as matter of law, that plaintiff was not such owner, and, further, that the court had never acquired jurisdiction of the person of defendant Latham, adjudged that plaintiff take nothing by his action, and that defendant corporation recover its costs of action. A motion for a new trial on the part of the plaintiff was denied. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. The motion to dismiss the appeals was denied by the court when the case was called for oral argument.

Defendant corporation is a corporation organized and existing under the laws of the territory of Arizona, but all of its property is situate and all of its business carried on in this state, and it has its office in the city of Los Angeles. It was organized by Latham, the purpose thereof being the development and handling of certain mining claims in Kern county owned by him, and upon the facts set forth we are warranted in assuming that the sole purpose of its formation as stated in its articles of incorporation was the carrying on of business in the state of California. These mining claims were transferred by him to the corporation upon the understanding that 1,000,000 of the 2,000,000 of the shares of stock thereof should be owned and held by him and his associates, while the other 1,000,000 should be set aside as treasury stock, to be sold for the purpose of raising a fund with which to develop the property. Of his 1,000,000 shares 500,000 were to be issued as demanded by him to himself or any other person, and the other 500,000 were issued to certain persons at his request. In May or June, 1903, Latham employed plaintiff to go to Chicago and endeavor to sell 50,000 shares of the treasury stock at ten cents per share, and promised that if he sold the same or any considerable portion thereof at that price "he would pay to plaintiff for his services" in making said sales 250,000 shares of his own stock, and also would see that the corporation paid him a certain commission on all stock sold. Latham thereupon caused 5,000 shares of his 250,000 to be issued to plaintiff, and the corporation agreed to pay him certain commissions and his expenses, a portion of which he had received. Plaintiff thereupon went to Chicago, and remained there until February, 1904, when he was recalled to California, and thereafter remained in California in the performance of service for the corporation. He had then obtained purchasers for about 17,000 shares at the designated price, and the sales thereof had been made and the proceeds sent to Latham, who was the president of the corporation. What plaintiff had done in Chicago was entirely satisfactory to Latham, and was "accepted by him as full performance of said agreement." Latham subsequently absconded and left the state, without having caused any of the 245,000 shares due plaintiff to be issued to him, and without having delivered to him any of the stock agreed to be deliv-

ered except 5,000 shares. Of Latham's original 500,000 unissued shares, more than 245,000 shares have never been issued by the corporation to Latham or anyone else. These facts were found by the trial court, and there is no sufficient specification of insufficiency of evidence as to any of them. * * *

While Latham was undoubtedly a necessary party to this action, we are of the opinion that the constructive service of summons upon him was effectual to give the lower court jurisdiction to determine the rights of plaintiff against him so far as the disposition of any of the shares of the stock in question is concerned.

It does not appear to be questioned that the legal situs of the shares of stock constituting the subject-matter of this action is, for all purposes material here, in this state. It is well settled that, for purposes of execution or attachment, the situs of shares of stock is within the state where the corporation resides, and that they may lawfully be levied on in such state though owned by a nonresident. We can perceive no reason why the rule as to situs should not be the same as to any authorized proceeding to subject the stock to the lawful claim of another, whether that claim be one of ownership of the property or of a right to specific enforcement of a contract relative to it. In other words, wherever such stock constitutes the subject-matter of an action, we see no reason why it should not be held to be within the state where the corporation resides. * * *

The relief sought by plaintiff against Latham is in the nature of specific performance of a contract for the delivery of certain mining stock, in a case where all the conditions to be performed by him have been performed, and nothing remains to be done other than the mere delivery by Latham of the stock. If we are correct in what we have said as to the situs of this stock, we have an action for specific performance as against a party who is a nonresident and cannot be personally served with summons, in a case where the whole subject-matter of the contract is within this state, and nothing remains to be done but to compel a transfer thereof. While it is well settled that a decree for specific performance of a contract operates primarily in personam, yet in a limited and qualified sense it may also be said to operate in rem when property to be transferred under the contract is within the jurisdiction of the court, but the defendant is absent therefrom. See 26 Am. and Eng. Ency. of Law, p. 132. Where the whole relief sought consists in the mere delivery of property within the jurisdiction of the courts of a state to the party entitled thereto under a contract, the proceeding is in a sense one in rem, sufficiently so, in our judgment, to give such courts jurisdiction to effectuate a delivery as against a nonresident defendant. In the leading case of Pennoyer v. Neff, 95 U. S. 727, 24 L. Ed. 565, speaking of substituted service by publication, the United States Supreme Court, after saying that such service may be sufficient where property is once brought under the control of the court by seizure or some equivalent act, said:

"Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same."

See, also, Boswell's Lessee v. Otis, 9 How. 348, 13 L. Ed. 164.

In the case of Rourke v. McLaughlin, 38 Cal. 196, it was held, as one of the grounds of the decision, that specific performance would be decreed "whenever the parties, or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court." The contract there involved was one for the sale of land situate in this state, and the claim was that as the vendor was a resident of Ireland and beyond the jurisdiction of the court he could not be compelled to execute a conveyance. The court said that his absence will neither prevent his making a deed voluntarily, "nor prevent the courts of this state from compelling the deed to be given by the plaintiff himself, or by a commissioner appointed to act in his place," and that "specific performance" could be compelled, the whole subject-matter of the contract being within the jurisdiction of the courts of this state. Where nothing remains to be done under the contract but the transfer of property within this state by the nonresident, there is no difference in substance between the position of the plaintiff and the position of a creditor seeking to subject property of a nonresident by attachment proceedings to the payment of his asserted claim against such nonresident. In each, the plaintiff asserts his claim against the nonresident, the validity of which must be established in the proceeding. It is elementary that the claim may be so established in the latter case against a nonresident only constructively served with summons to an extent sufficient to enable plaintiff to devote the property of the defendant that is in this state and has been seized on attachment, to the payment of his claim. As to that property, his proceeding is one in rem. In the former case, the claimant is doing substantially the same thing. Specific property in this state is sought by the complaint, property in which by his full performance of his contract plaintiff has acquired an equitable interest, and the mere bringing of his action is equivalent to a seizure of the property for the purposes of the suit. See Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 301, 5 Sup. Ct. 135, 28 L. Ed. 729. No claim has been made in this case that the court was without jurisdiction as to Latham if a proper case for specific performance has been made to appear. * * *

We are of the opinion that the complaint and the findings showed a sufficient case for specific performance as against Latham. If this be so, in view of what we have said, the judgment in favor of defendant corporation cannot be sustained.

The judgment and order denying a new trial are reversed.

We concur: SLOSS, J.; SHAW, J.

# CHAPTER II

# SPECIFIC PERFORMANCE OF CONTRACTS

## SECTION 1.—CONTRACTS SUBJECT TO SPECIFIC PERFORMANCE

### I. Positive Contracts

### ENFORCEMENT OF CONTRACTS IN EQUITY.

A court of equity is asked to enforce a covenant by decreeing specific performance or granting an injunction, in other words when equitable, as distinguished from legal relief, is sought, etc.

Lindley, L. J., in Knight v. Simmonds, [1896] 2 Ch. Div. 294, at 297.

#### *(A) Grounds of Equity Jurisdiction*

#### FALCKE v. GRAY.

(In Chancery, 1859. 29 Law J. Ch. 28.)

This was a suit for the specific performance of a contract, giving the plaintiff the option of purchasing two valuable china jars.

The circumstances were as follows:

The defendant, Mrs. Gray, the occupier of a house in Gloucester Terrace, Hyde Park, was desirous, in January last, of letting the house furnished, and she employed Messrs. Boyde & Bryden, house-agents, to procure her a tenant.

The plaintiff, Mr. Falcke, being in want of a house, went to look at it, and an appointment being subsequently made, Mrs. Gray, Mr. Falcke and Mr. Brend, the managing clerk of Messrs. Boyde & Bryden, met upon the premises, when Mr. Falcke agreed to rent the house for six months, at the price of seven guineas per week.

It was also agreed between the parties that the plaintiff should have the option of purchasing at the end of the term certain articles of furniture, at a valuation, comprising, among other things, two china jars. Some of the articles being ordinary furniture a valuation was put upon them at once by J. Brend, but with regard to the jars he admitted that he was ignorant of their value, and at the request of Mrs. Gray he

named to her Messrs. Watson, dealers in articles of this nature, as persons competent to place a value upon them. Some further discussion took place, when the jars were valued by Brend, by assent of all parties, at £25, which sum he afterwards raised to £40. The plaintiff then went away with Brend, and an agreement was drawn up and brought back to Mrs. Gray for signature. The document concluded in these terms:

"And it is also agreed that the said David Falcke shall have the option of purchasing the whole or any of the under-mentioned articles at the sums thereunto affixed to each, viz., one sideboard, £18. 18s.; dinner wagon, £5; twelve chairs, £15; dining table, £20, and two large Oriental china jars in drawing room, £40."

This agreement was then signed by Mrs. Gray, who shortly afterwards applied to Messrs. Watson to inspect the jars, and having done so, they offered her £200 for the articles, which sum she agreed to take, and the money was immediately paid to her by cheque, and the jars were removed at once by Messrs. Watson.

The evidence as to whether Messrs. Watson knew of the previous contract for the sale of the jars before they bought them was rather contradictory.

Mr. Watson deposed that Mrs. Gray at first stated that a gentleman was in treaty to rent her house, and wished to purchase the jars. That she did not object to sell them, but was dissatisfied with the value put upon them by her agent. That he, deponent, then told her she had fallen into bad hands, and that they were worth much more. He asked the name of the purchaser, and when informed of it he told her he knew the plaintiff as a dealer in the same line as themselves, and he must be a person who was well acquainted with the value of such articles. This deponent, however, denied that he had any knowledge at the time he paid for the jars that there had been actually a contract signed by Mrs. Gray, giving the plaintiff the option of purchasing the articles. And Mrs. Gray also made an affidavit to the same effect, and she further stated that the jars were originally left to her by a lady who, she understood, had been offered £100 for them by King George the Fourth.

The plaintiff, in his affidavit, admitted that the jars were worth £100 to the trade, and probably £25 more as between persons who were not dealers.

An ex parte injunction was obtained against Mrs. Gray and against Messrs. Watson, who were also defendants to the suit, to restrain the sale of the jars.

The bill was afterwards amended, and the case now came on upon motion for a decree seeking a specific performance of the contract by Mrs. Gray for the sale of the jars to the plaintiff.

Mr. Baily and Mr. Waller, for the plaintiff, contended that there was nothing unfair in the circumstances attending this contract, and that inadequacy of price was not a ground for refusing specific performance

of a contract. It was well known to Mrs. Gray that the person who valued the jars was ignorant of their worth. She herself knew that a sum of £100 had been offered for them, but as the offer came from so high a source, it was reasonable to suppose that this was an outside value, although the owner might not have been disposed to part with them. It was true that Messrs. Watson had given £200 for the jars, but such articles could not be said to have any marketable value, and another person might not have been inclined to give 200 pence for them. Besides this, it was not every day that a purchaser could be found for a couple of large Oriental jars, with great ugly Chinese pictures upon them, and it was evident that at the time of the contract being executed Mrs. Gray was very well contented with her bargain.

KINDERSLEY, V. C.,[1] after stating the facts of the case, said: The defendants insist, in the first place, that this bill can not be maintained, on the ground that the plaintiff can have no right to the specific performance of a contract relating solely to chattels. On this question, my opinion is entirely in favour of the plaintiff, that the court will not refuse such relief. In the eye of this court, there is no difference between real and personal estate in the performance of a contract; and a contract for one stands in no position different from a contract for the other. The principle upon which this court decrees specific performance, as enunciated by Lord Redesdale, in Harnett v. Yielding, is, that a court of law deals with the contract, and gives such a decree as it is competent to give in consequence of nonperformance—that is, by giving compensation in the shape of damages for the nonperformance. But a court of equity says, that is not enough; and in many cases the mere remuneration and compensation in damages is not sufficient satisfaction. Apply that principle to chattels—and why is it less applicable to them than to real estate? In ordinary contracts, as for the purchase of ordinary articles of use and consumption, such as coals, corn or consols, this court will not decree specific performance. And why? Because you have only to go into the market and buy another equally good article, and so can get your compensation. It is not because it is a chattel, but because you can get adequate compensation for it. Now, here these articles are of unusual distinction and curiosity, if not unique; and it is altogether doubtful what price they will fetch. I am of opinion, therefore, that this is a contract which this court can enforce; and if the case stood alone upon that ground I would decree specific performance. * * *

The bill was dismissed on another ground.

[1] The omitted parts of the opinion appear on page 579, infra.

## GARTRELL v. STAFFORD.

(Supreme Court of Nebraska, 1882. 12 Neb. 545, 11 N. W. 732, 41 Am. Rep. 767.)

MAXWELL, J.[2] This is an action to enforce the specific performance of an alleged contract for the conveyance of real estate. The land in controversy is situated in Gage county, and the plaintiff is a resident of that county, while the defendant is a resident of California. The contract was made by certain real estate agents on behalf of the defendant, upon the authority of certain letters signed "Mrs. Julia A. Stafford." A decree was rendered in the court below in favor of the plaintiff. The defendant appeals to this court. It appears from the evidence that during the summer of 1870 a letter, of which the following is a copy, was delivered to Messrs. Somers & Schell, real estate agents, Beatrice:

"Monticello, Napa Co., Cal., June 11, 1879.

"Real Estate Agent, Beatrice, Nebraska—Dear Sir: Not being acquainted with the name of a real estate agent in your place, you will excuse the omission. I have a farm in Gage county, Nebraska, which I am very desirous to sell, and want to put it into the hands of some agent who will attend to it promptly. I will sell it very cheap, as I am in California sick and need the money. It is known as the "Stafford farm," and has belonged to me and my husband, now deceased, over 20 years. You can see the deed recorded in the Beatrice clerk's office. It is situated on the Little Nemaha river. It is a fine farm, well watered and well timbered, with plenty of rich bottom land. Several years ago C. E. Moore, residing in the same neighborhood, offered me $2,000 for it, but I did not then wish to sell. I have lately offered it for $1,800, but if you take it in hand I would like for you to do the best that you can. G. Hillman, of Hooker, eight miles distant from my place, has charge of it, and has rented it to Peter Stockhouse. I would like to hear from you immediately, and if you will attend to this promptly it is all that I can desire.

"Yours, very respectfully, Address, Mrs. Julia A. Stafford,
"Monticello, Napa Co., California."

* * * * * * * * * *

In reply, Somers & Schell sent the following:

"September 6, ——9.

"Mrs. Julia Stafford, Monticello, California—Dear Madame: We have an offer from M. H. Gartrell of $2,500 for your N. W. one-fourth 1-6-8, in this county. Will pay $1,500 cash; balance in five annual payments of $200 each, with 8 per cent., interest. We tried to get better offer out of him, and told him what your price was. We, however, write to you in regard to the matter. Write us by return mail.

"Yours, truly, Somers & Schell."

The letter received in answer to the above is as follows:

"Monticello, Napa Co., Cal., September 12, 1879.

"Messrs. Somers & Schell, Beatrice, Nebraska—Sirs: Yours of September 6th is just received. I think the price too low, but as I am in very needy circumstances, and must have money, I have, after much deliberation, concluded to take it. I am anxious for you to sell it and close the affair as soon as possible, because I need the money at present very much.

"Yours, truly, Mrs. Julia Stafford,
"Monticello, Napa Co., California."

* * * * * * * * * *

[2] Parts of the opinion are omitted.

No deed for the land in controversy has been received and this action was brought by the purchaser to enforce the contract. * * *

The second objection of the appellant is that the plaintiff has an adequate remedy at law in an action for damages. The rule contended for by the appellant undoubtedly applies to contracts for the sale of personal property, the reason being that damages in such case are readily calculated on the market price of property such as wheat, corn, wool, etc., like quantities of the same grade being of equal value, and thus afford as complete a remedy to the purchaser as the delivery of the property. Adderly v. Dixon, 1 Sim. & S. 607. But the rule is a qualified one, and is limited to cases where compensation in damages furnishes a complete and satisfactory remedy. Story, Eq. § 718, and cases cited in note 3. The jurisdiction of courts of equity to decree specific performance of contracts for the sale of real estate is not limited as in cases respecting chattels to special circumstances, but is universally maintained; the reason being that a purchaser of a particular piece of land may reasonably be supposed to have considered the locality, soil, easements, or accommodations of the land generally, which may give a peculiar or special value to the land to him, that could not be replaced by other land of the same value, but not having the same local conveniences or accommodations. Adderly v. Dixon, 1 Sim. & S. 607; Story, Eq. § 746; Willard, Eq. 279. An action for damages would not, therefore, afford adequate relief.[3] * * *

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## PADDOCK v. DAVENPORT.

**(Supreme Court of North Carolina, 1890. 107 N. C. 710, 12 S. E. 464.)**

Appeal from superior court, Clay county.

Action for specific performance and damages based on a contract by which defendant, Davenport, gave plaintiff the exclusive privilege for 60 days of buying at a certain price all the trees on said defendant's land which plaintiff might select and mark. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

SHEPHERD, J.[4] Two causes of action are set out in the complaint,—one for damages for breach of the contract, and the other for its specific performance. The court held, upon demurrer, that neither of the said causes of action could be maintained. * * *

The second cause of action is for specific performance, both against Davenport, who executed the contract, and Thrash, who purchased of him with notice of the claim of the plaintiff. The true principle upon which specific performance is decreed does not rest simply upon a mere arbitrary distinction as to different species of property, but

[3] The case was reversed and remanded on another point.

[4] Part of the opinion is omitted.

it is founded upon the inadequacy of the legal remedy by way of pecuniary damages. This principle is acted upon (1) where there is a peculiar value attached to the subject of the contract which is not compensable in damages. The law assumes land to be of this character "simply because," says Pearson, J., in Kitchen v. Herring, 42 N. C. 191, "it is land,—a favorite and favored subject in England, and every country of Anglo-Saxon origin." The law also attaches a peculiar value to ancient family pictures, title-deeds, valuable paintings, articles of unusual beauty, rarity, and distinction, such as objects of vertu. A horn which, time out of mind, had gone along with an estate, and an old silver patera, bearing a Greek inscription and dedication to Hercules, were held to be proper subjects of specific performance. These, said Lord Eldon, turned upon the pretium affectionis, which could not be estimated in damages. (Not reported.) So, for a faithful family slave, endeared by a long course of service or early association, Chief Justice Taylor remarked that "no damages can compensate, for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart." Williams v. Howard, 7 N. C. 80.

The principle is also applied (2) where the damages at law are so uncertain and unascertainable, owing to the nature of the property or the circumstances of the case, that a specific performance is indispensable to justice. Such was formerly held as to the shares in a railway company, which differ, says the court in Ashe v. Johnson, 55 N. C. 149, from the funded debt of the government, in not always being in the market and having a specific value; also a patent, (Corbin v. Tracy, 34 Conn. 325;) a contract to insure, (Carpenter v. Insurance Co., 4 Sandf. Ch. (N. Y.) 408;) and like cases. The general principle everywhere recognized, however, is that, except in cases falling within the foregoing principles, a court of equity will not decree the specific performance of contracts for personal property; "for," remarks Pearson, J., in Kitchen v. Herring, supra, "if, with money, an article of the same description can be bought, * * * the remedy at law is adequate." See, also, Pom. Spec. Perf. 14.

Applying these principles to the facts alleged in the complaint, it must follow, we think, that this is not a case which calls for the exercise of the equitable power of the court. The trees were purchased with a view to their severance from the soil, and thus being converted into personal property. It is not shown that they have any peculiar value to the plaintiff, nor does there appear any circumstances from which it may be inferred that the breach of the contract may not be readily compensated for in damages. Neither is it shown that other trees may not be purchased, but it is simply alleged that they are scarce at the contract price. The simple fact that they are near a water-course does not alter the case, for the convenience of transportation are elements which may be considered in the estimation of the damages. Neither is the circumstance that the plaintiff purchased "a

few trees of like kind," in the vicinity, sufficient to warrant the equitable intervention of the court. We can very easily conceive of cases in which contracts of this nature may be specifically enforced, but we can see nothing in this complaint which calls for such extraordinary relief. The ruling of the court as to this branch of the case is sustained. As to the other cause of action, it is reversed.

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### *(B) Equity Jurisdiction from Nature of the Contract: Subject-Matter*

## EMERZIAN v. ASATO.

(District Court of Appeal of California, Third District, 1913. 23 Cal. App. 251, 137 Pac. 1072.)

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Suit for specific performance by Karl Emerzian against Sosei Asato. Judgment for plaintiff, and defendant appeals.

CHIPMAN, P. J.[5] This is an action to enforce the specific performance of a written contract to deliver certain (nursery) orange trees; to enjoin defendant, during the pendency of the action, from disposing of said trees otherwise than as provided in said contract; for damages resulting from defendant's failure to properly care for said trees; and for such further relief as may be proper in the premises.

A jury, called to try the issues of fact, returned a general verdict for the defendant. On motion of plaintiff the court set aside the verdict and gave its decision in favor of plaintiff.

The contract of which specific performance was sought was entered into June 8, 1909, by which first party (plaintiff) agreed to buy and second party (defendant) agreed to sell—

"4,000 Washington orange trees more, or less, for the sum of twenty-five cents per tree as follows, to wit: Party of the second part will immediately at his place of business in the town of Centerville, Fresno county, California, proceed to put, cultivate and care for said orange trees for a period of one year from date, whereon, and of which time, party of the first part will select from the body of the orange trees, so grown by the party of the second part 4,000 orange trees, all of which must be good strong healthy trees and over two feet high, after which time party of the first part shall pay the party of the second part reasonable value for any services necessary to care for said trees for one year more, whereby on and in the month of June, 1911, said party of the second part agrees carefully and in a workmanlike manner to ball the said trees and place the same in proper condition to be delivered to party of the first part. Party of the first part to arrange the sacks sufficient for said balling and party of the first part agrees to pay party of second part sum of twenty-five dollars cash on execution and delivery of this agreement, the sum of one hundred dollars, on or before ninety days from date, the re-

[5] Parts of the opinion are omitted.

mainder of the purchase price to be paid when the said trees are accepted and delivered to the party of the first part."

* * * * * * * * * *

In its decree the court adjudged as follows:

"First. That plaintiff is entitled to have and receive from defendant the 2,600 orange trees selected by plaintiff in June, 1911, from the body of the orange trees being grown by defendant in or near the town of Centerville, county of Fresno, state of California, as specified in the written contract set forth in the complaint. Second. That plaintiff furnish sacks sufficient to ball said trees. Third. That defendant thereupon ball the same in careful and workmanlike manner, and place the same in proper condition to be delivered to plaintiff and deliver the same to him. Fourth. That thereupon plaintiff pay to defendant the sum of 25 cents for each tree delivered, and the further sum of $40 for expenses incurred in the care of said trees from June, 1911, and the sum of $10 being the rental value of the land upon which the same were being grown, from June, 1911. Fifth. In the event that the defendant shall be unable to deliver 2,600 trees by reason of any injury which has been suffered since June, 1911, the defendant shall deliver other trees of a quality and size equal to those selected by plaintiff in June, 1911, instead thereof, or shall pay to plaintiff for such shortage at the rate for which similar trees can be bought at or near the same place. Sixth. In the event that the parties hereto cannot agree as to the number of trees injured, or the amount of injury done, if any, or the size or quality of trees offered in lieu of injured trees, or the price of such trees as defendant shall fail to deliver, an application may be made to this court for the appointment of a referee to hear and determine such matters, and this case is left open for such purpose. Seventh. The defendant is enjoined from disposing of, or dealing with said trees in any manner other than herein provided."

* * * * * * * * * *

It seems to us that, in view of the undisputed facts and on the face of the pleadings, findings, and decree, it is apparent that plaintiff may be fully compensated in damages, and that his remedy is at law only. There is a presumption that the breach of an agreement to transfer personal property can be relieved by pecuniary compensation. Civ. Code, § 3387. And where the breach of a contract to transfer personal property can be thus compensated, an injunction cannot be granted to prevent the breach. Code Civ. Proc. § 526, subd. 4. Performance of an obligation to render personal service cannot be specifically enforced. Civ. Code, § 3390. Commenting upon sections 3387 and 3389 of the Civil Code, Mr. Justice Henshaw said, in Glock v. Howard & Wilcox Colony Co., 123 Cal. 1, 6, 55 Pac. 713, 714 (43 L. R. A. 199, 69 Am. St. Rep. 17):

"It is to be remembered that equity, designed but to supplement the deficiencies of the law, will withhold its aid where the law affords full redress. For both these classes of cases, then—that is to say, for those where the law is sufficient, and for those where equity is powerless to aid—the injured party must seek legal redress."

"In general a court of equitable jurisdiction will not decree the specific performance of contracts relating to chattels because there is not any specific quality in the individual articles which gives them special value to the contracting party, and their money value recovered as damages will enable him to purchase others in the market of the like kind and quality." Pomeroy on Contracts, Specific Performance, § 11.

If the personal property has a market value, is bought and sold in the open market, and has no special or unique value, the remedy at law is sufficient, since with the unpaid purchase money and the moneys re-

covered by action the vendee can buy in the open market property of the same character as that contracted for, if the vendor is in fault; likewise, where the vendee is in fault, the vendor may sell in the open market and the purchase price obtained, together with his damages, will furnish full compensation. * * *

Plaintiff's right was simply to go into the open market and buy the trees required by him and bring his action against defendant for damages. If there had been no Washington (navel) orange trees available, and plaintiff could not therefore supply his needs of this particular kind of tree, and it had appeared that defendant could supply them, there might have been some ground for holding defendant to the specific performance of his agreement. But no such state of facts was alleged nor proven. We cannot see that this case is any different from that where a farmer agrees to sell, but afterwards refuses to deliver, a certain number of tons of alfalfa hay or other product of his farm of which there is an abundance to be purchased in the open market. In such a case we do not think it would for a moment be contended that the vendee could go into an equity court and restrain this farmer from selling his hay to some other person, compel him to irrigate or otherwise care for it, and bale and deliver it to the vendee at some future time. * * *

Attention has been called to the failure to find upon the issue of insolvency. In the cases cited by respondent insolvency was a material factor. Insolvency of itself is not a ground of equitable interference, but, as said by Mr. Justice Thompson, in Heilman v. Union Canal Co., 37 Pa. 100, referred to in Lively v. Johnston, 45 Or. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647, cited by respondent:

"In balancing cases, it is a consideration that gives preponderance to the remedy."

In the present case it was alleged, and, we think, was a controlling factor and should have been proven and found by the court. * * *

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

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## TEXAS CO. v. CENTRAL FUEL OIL CO. et al.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1912. 194 Fed. 1, 114 C. C. A. 21.)

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

Suit in equity by the Texas Company against the Central Fuel Oil Company and others. From a decree dismissing the bill on demurrer, complainant appeals.

The appellant, a corporation created by and having its domicile in the state of Texas, filed its bill in the court below against the defendants,

seeking specific performance of a contract made by it with the defendant Central Fuel Oil Company. A temporary restraining order was granted on an ex parte hearing on the bill and affidavits filed with it. * * *

The defendant the Central Fuel Oil Company, hereafter called the "Central Company," was a holding company. It held a majority of the stock of numerous corporations which had subleases of lands, some of which originally belonged to the Osage Indians, the Creek Indians, and the Cherokees, under which those companies were entitled to drill for and take oil from the land. Some of these leases were subject to restrictions, and others were free from such restrictions. The Central Company by virtue of its ownership and control of these subsidiary companies and the leases was enabled to produce large quantities of oil in the Bartlesville field, but there was only one method by which it could get this oil to the market, and that was by sale to the Prairie Oil & Gas Company, a subsidiary company of the Standard Oil Company, that being the only company which had a pipe line in that territory. It was desirous of getting a pipe line into the Bartlesville field, so that it might transport its oil out without paying tribute to the Prairie Oil & Gas Company. The complainant, the Texas Company, was a refining company and the owner of pipe lines piping oil from Tulsa, Okl., and other regions to the Gulf of Mexico in the state of Texas, and the Central Company entered into negotiations with the Texas Company to procure an outlet for its oil.

The result of these negotiations was a contract between the two companies, the Texas Company and the Central Fuel Oil Company, made on June 13, 1910, by the terms of which it was agreed:

(1) The Central Company was to deliver to the Texas Company, and the latter agreed to receive, all crude petroleum which might be tendered by the Central Company from the property it owned or controlled by corporations, which were fully described, and also from other properties which the Central Company might then own, or thereafter acquire during the term of the contract in the Bartlesville or northern Oklahoma field, either directly or through ownership of a majority of the outstanding stock.

(2) The crude petroleum was to be of merchantable quality, and be delivered from the tanks owned or designated by the Central Company in the north Oklahoma field and subject to the customary and usual deduction in determining the quantity, and be of gravity not less than 30 degrees Beaumé, but the Texas Company was not to be required to receive more than 20,000 barrels in any one day nor more than 540,000 barrels in any one month of 30 days. The Central Company also agreed that it would operate or cause to be operated all of the properties covered by the contract, and would tender all of the products realized from these properties up to the maximum stated. * * *

Before SANBORN and HOOK, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge [6] (after stating the facts as above). If the sole object of the bill of complaint is to obtain a decree for specific performance of the contract for the delivery of the oil, the proceeding would be one in personam, and such an action, in the absence of a statute conferring jurisdiction in rem, would not be local, but transitory, and could be maintained in any court having jurisdiction of the person of the defendant. * * *

An action at law for damages would not enable complainant to recover all damages it may suffer by reason of the breach of contract. The damages in this case are impossible of proof. No one can say what amount of oil the Central Company will or can produce during the life of the contract by a conscientious attempt to comply with it. It is a well-known fact, of which courts are bound to take judicial notice, that oil is fugacious, and may be drawn away by strangers through other wells. The flow of the wells decreases in the course of years, and long before the expiration of this contract these wells may become entirely dry. Any damages awarded would be wholly speculative and uncertain, and without any possibility of sufficient legal proof to sustain the judgment. Wilkinson v. Colley, 164 Pa. 43, 30 Atl. 286, 26 L. R. A. 114; McCornick v. United States Mining Co., 185 Fed. 748, 108 C. C. A. 86, and authorities there cited; Peale v. Marian Coal Co. (C. C.) 190 Fed. 376, 388.

If, as suggested, successive actions for the damages suffered may be instituted upon the expiration of certain fixed periods, when the amount of oil taken from the wells during the preceding period has been ascertained, there would necessarily have to be a multiplicity of suits, to avoid which the intervention of a court of equity is certainly proper. Bank of Kentucky v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180; Peale v. Marian Coal Co. (C. C.) 172 Fed. 639.

In addition to these considerations, it appears from the bill, and the contract between the parties establishes it, that one of the main inducements to this contract was to enable the complainant, by obtaining the crude oil, to utilize the three refineries it then owned and had in operation in the state of Texas and one it was then constructing in the state of Oklahoma; and to enable the Central Company, which at that time could only dispose of the oil produced from its wells through a sale to the Prairie Oil & Gas Company, to make sales of its products to other companies and obtain the benefit of competitive prices. For this purpose, it was necessary for the Central Company to have pipe lines extended to its oil fields and to be connected with lines extending to places where there was a market for its crude oils. One of the provisions of the contract was:

"The Texas Company agrees that it will promptly and with all reasonable speed extend its pipe line system to Bartlesville or the north Oklahoma field, as above described, and will establish an adequate gathering system and re-

[6] The statement of facts is abridged and parts of the opinion are omitted. Much of the opinion that is here omitted is printed at page 166, infra.

**lated facilities as will enable it to perform the duties of this contract, such to be completed not later than January 22, 1911."**

The bill charges that complainant built this pipe line and erected tanks and installed pumping stations necessary to carry out the provisions of the contract at an expense of $700,000, that these improvements are of a permanent nature, and, unless the oil thus contracted for is delivered to it, this pipe line and pumping stations are of but little value, if any, and the cost thereof practically lost. These facts clearly exclude a conception that an action at law will afford a complete and adequate remedy. * * *

It is also contended that specific performance is not the proper remedy to enforce a contract affecting personal property. When an action for damages is adequate, a court of equity is without jurisdiction. As hereinbefore shown, however, such an action would not afford complainant in this case adequate relief. It is now well settled that, when the chattels are such that they are not obtainable in the market, or can only be obtained at great expense and inconvenience, and the failure to obtain them causes a loss which could not be adequately compensated in an action at law, a court of equity will decree specific performance. Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co., 63 Md. 285; Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214; Offutt v. Offutt, 106 Md. 236, 67 Atl. 138, 12 L. R. A. (N. S.) 232, 124 Am. St. Rep. 491; Harris v. Parry, 215 Pa. 174, 64 Atl. 334; Richmond v. Dubuque, etc., R. R. Co., 33 Iowa, 480; Chehak v. Battles, 133 Iowa, 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130, 12 Ann. Cas. 140; Law v. Smith, 68 N. J. Eq. 81, 59 Atl. 327; Newton v. Wooley (C. C.) 105 Fed. 541.

From the allegations in the bill it appears that crude oil cannot as a rule be purchased in the open market, but, to obtain it, the refining and pipe line companies must extend their pipes at enormous expense to the oil fields, assuming that the oil fields can be found. It is charged that in 1910 the oil production in the localities reached by complainant's pipe line system had greatly declined, and is still declining; that this was one of the vital considerations leading to the execution of the contract by the complainant; that other pipe line companies have acquired and obtained control of large acreages, if not practically of all producing and prospective oil lands and leases in those localities; and, if said contract is not specifically performed, complainant charges its pipe lines and refineries will remain idle to that extent.

In Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co., specific performance was decreed on a contract to sell coal tar which plaintiff needed in order to fulfill existing contracts and which it was impossible to obtain otherwise than by purchasing in distant cities and transporting the same at great expense. In Gloucester Isinglass & Glue Co. v. Russia Cement Co. specific performance was decreed of

a contract to furnish fish skins to be used in the manufacture of glue. It appeared that fish skins were of very limited production; that most of the producers were under contract; and that, unless relief were given by specific performance, it would be very difficult, if not impossible, for the complainant to carry on its business. The equities in those cases were no stronger than those in this case. * * *

The decree of the court below is reversed, with directions to grant a temporary injunction, and proceed in conformity with this opinion.

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## BLAKE et al. v. FLAHARTY.

(Court of Errors and Appeals of New Jersey, 1888. 44 N. J. Eq. 228, 10 Atl. 158, 14 Atl. 128, 6 Am. St. Rep. 886.)

SCUDDER, J. A bill was filed for the specific performance of a contract in writing, signed by the defendant John Blake, to convey a lot of land for the sum of $55, to be paid in cash when the purchaser received his deed. Five dollars was paid on signing the contract. The land is described in the receipt given, and memorandum of sale, as a lot of land near lands of Michael Hagerty. It appears in the evidence that before the writing was signed by Blake the lot was examined and designated by the parties, and there is no dispute or difficulty as to the exact location of the land intended to be conveyed, for a more particular description is given in the bill of complaint, and admitted in the answer to be correct. The defendant Blake further offers in his answer to make the conveyance required, as he has always been willing to do; but his wife refuses to execute the deed. Both say that she had no knowledge of, and never gave her consent to, the contract for a conveyance. The decree directs a deed to be made by Blake to the complainant, not by his wife, and does not require any indemnity against her subsequent acts, as no sufficient evidence of fraud or collusion was shown. It gives the costs of suit to the complainant against Blake, and dismisses the bill as to the wife, but without costs to her or the complainant.

It appears from this statement of the case that the real grievance of which defendants, who have taken this appeal, may justly complain, is the imposition of a large bill of costs upon each of them. It might be said that the court can properly relieve the defendants by reversing the decree for costs, and putting them upon the complainant, who gets by the decree only what he might have had without controversy, —the title of the husband to the lot of land. This, however, would not reach the question which has been mainly considered by us in this case, and which was overlooked in the court below, though pleaded in the separate answers, and the same benefit claimed as if each had demurred to the complainant's bill. This question is whether it is correct practice for a court of equity to compel a specific performance

of a contract for the conveyance of land, where the purchase price is so small as to be but little more than the usual costs of an undefended suit in the court of chancery, less than the complainant's taxed costs in this case, and no special equity is shown in the bill. The lot described is a small, unimproved piece of land, without any peculiar value to the complainant for business purposes, or by any connection with his other property, or for any use to which he may wish to apply it.

A case may be conceived where a small lot of land, of little value to others, might be so located as to be an important possession to a purchaser. In such case his claim for a conveyance would be based on his equity to have it because no other adequate relief could be given to him. This is the original foundation of the jurisdiction of courts of equity to compel a specific performance of contracts for the conveyance of land. A wider rule has been adopted in many cases, and it is said that, where a contract respecting real estate is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for the breach of it. Hall v. Warren, 9 Ves. 605; Greenaway v. Adams, 12 Ves. 395; King v. Hamilton, 4 Pet. 311, 7 L. Ed. 869; 1 Story, Eq. Jur. §§ 750, 751. But it is also held that courts of equity will not interfere to decree a specific performance, except in cases where it would be strictly equitable to make such a decree. Whether, therefore, the contract shall be enforced specifically must rest in the sound and reasonable discretion of the court, depending on the equity of the particular case, and the nature of the objections to it. It must determine what are the objectionable circumstances which will control its jurisdiction in such cases, within the established rules of equity, though none of these rules are of absolute obligation and authority in all cases. Gariss v. Gariss, 16 N. J. Eq. 79; Pinner v. Sharp, 23 N. J. Eq. 274; Locander v. Lounsbery, 24 N. J. Eq. 417; Plummer v. Keppler, 26 N. J. Eq. 481; Brown v. Brown, 33 N. J. Eq. 650; 1 Story, Eq. Jur. § 742.

It is a serious objection to the exercise of the extraordinary jurisdiction of the court in this case that there is not an allegation in the bill of complaint, nor a single fact in the evidence, to show that the complainant would be in a worse position if he should bring his action at law to recover damages for a breach of this agreement, nor a reason given for burdening the defendants with large bills of costs in such a small matter. An action for damages, where the amount that can be reasonably claimed is so little, must, by statute, be brought in an inferior court of law, where the costs are much less than in the higher courts of law or equity. To permit the complainant to evade this statutory limitation of costs by bringing his action in a higher court, and claiming a remedy which does not appear to be in any way more beneficial to him, would be contrary to the policy of the law, and unjust in its results. If this decree is affirmed, the defendant will lose

the whole purchase price of his land in costs, and the complainant be in no better position than if he had pursued his less expensive remedy at law. The case is without precedent in the small value of the land in controversy, and the absence of any special cause for its prosecution in a court of equity. These objections conjoined are sufficient to influence this court to deny the relief which the complainant has sought in his bill for specific performance. The decree will be reversed, the bill dismissed, and costs allowed to the defendants. Unanimously reversed.

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## BROWN v. SMITH.

(Circuit Court of the United States, D. South Carolina, 1901. 109 Fed. 26.)

In Equity. Suit for specific performance of contract.

SIMONTON, Circuit Judge. This is an action for specific performance of a contract for the sale of land. The action was originally brought in the court of common pleas of South Carolina, sitting in the county of Aiken, and it has been regularly removed into this court. The plaintiff, Pinckney Brown, was in possession of a plantation known as "Belfast," situate in the county of Barnwell, S. C., claiming to own the fee therein. The defendant, Edward L. Smith, is a citizen of the state of New York, temporarily residing in Aiken, S. C. Mr. Smith is known to be a man fond of field sports, hunting and bird shooting, and is supposed to be a man of fortune. Mr. Brown became desirous of selling his plantation, and of removing to Aiken, for the purpose of completing the education of his children, and of giving them more enlarged social advantages. To this end approaches were made by him and at his instance to Mr. Smith to visit the plantation, and to observe its advantages for hunting and fishing, which finally resulted in a visit by Mr. Smith. He spent a day or two on the plantation, shot over it for birds, and went upon the pond and creeks connected with it seeking for ducks. Apparently he was pleased with what he saw, and a few days afterwards, at an interview with each other, they discussed the sale of the plantation and its price. Brown proposed to sell the place as a whole,—the land, agricultural implements, stock, cotton seed, and provisions on the place, in fact, the entire plantation as a whole and a going concern,—for the price of $24,000. After some trading, he reduced his price to $19,000. They then went to the office of the Messrs. Henderson, who were the attorneys of Mr. Smith, and there a written contract was prepared by Mr. Henderson, and executed by both parties. As this agreement is the foundation of this case, it is set out in full:

"That, in consideration of the sum of nineteen thousand dollars ($19,000.00), paid and to be paid as hereinafter set forth, said Brown agrees to convey by proper deed to said Smith the certain plantation or tract of land known as the 'Belfast Plantation' of said Brown, situate in Barnwell county, South Carolina, containing thirty-nine hundred and ninety-seven (3,997) acres, as shown by blue-print plat hereto attached; also eight head of mules, one

horse, and all live stock on place; all farm implements on place; four (4) double-team wagons; one new single wagon; all harness of every kind on place; about 1,500 bushels of corn, being all on the place; all fodder, hay, pea and pea vines, and cotton seed on place; all personal property on place, excepting the baled cotton and loose cotton in gin on the place; also the ferry boat. The said Edward Livingston Smith has paid twenty dollars this day upon the price agreed on for above property (the receipt of which is hereby acknowledged), and agrees to pay the balance of said price, to wit, $18,980.00, as soon as possession of said property, real and personal, is delivered to him, and proper deed executed and delivered as hereinbefore agreed, and title approved of."

The next day after the agreement was executed, Mr. Smith visited the plantation, and as soon as he met one Bush, who resided upon it as manager for Mr. Brown, he told him that he had purchased the plantation, and thought that he had made a bargain. During that day he had frequent conversations with Bush, and found that he had obtained an erroneous impression on several points relating to the size, the resources, and the profits of the plantation. He took a memorandum in writing of these points, and when Mr. Brown came to the plantation the next day he produced his memoranda, and asked an explanation. They then and there discussed these, and finally Mr. Smith said that he thought Brown should reduce his price by $1,000. This Brown refused to do. After some further discussion, it was mutually agreed that the price should be $18,500, instead of $19,000, and, when this was finally settled, Mr. Smith jumped up, and, taking Brown's hand, expressed himself fully satisfied. The plantation had been planted in cotton and watermelons as the market crops, and had upon it a number of tenants, living in houses on the place, and paying rent in kind. Some of the plantation was planted by Mr. Brown himself. There was a supply store on the place, called a "commissary," at which the tenants got their supplies. Mr. Smith, on his visit to the plantation after the execution of the agreement, had seen the tenants, and had told them that he had bought the place, and expected them to continue. He also entered into negotiations with Mr. Bush, the manager, looking to his retention. After the discussion with Mr. Brown last above spoken of, Mr. Smith gave formal notice to Brown that he would not hold himself bound by the agreement, and would treat it as a nullity, at the same time demanding the return of the $20 paid in advance. Thereupon these proceedings were instituted.

The bill sets out the contract, the circumstances preceding and succeeding it as above stated, the delivery of the control of the plantation to the defendant, and prays specific performance. The answer admits the execution of the contract, and seeks to avoid the same because it was entered into under facts and circumstances, and upon false representations, which induced the defendant to purchase, and which operated as a fraud upon him. The answer sets these out in detail: (1) That said place and the lands connected therewith was a magnificent place for a hunting preserve, specially adapted to the sport of duck shooting, and a great resort for ducks in the season; that, after the

contract was signed, defendant learned that this was untrue. (2) That, in addition to its excellence as a hunting preserve, the plaintiff had represented that in any good year an income could be realized from the crops on the place of 25 or 30 per cent. on the price asked,—in no year less than 15 per cent; that in the year 1900 plaintiff had made $3,500 from his melon crop, and that he had 60 bales of cotton from his rent, and that he ran 8 plows with his wage hands,—all of which, after the contract was signed, he found untrue. (3) That plaintiff had represented that the profit from the commissary on the place was from $1,500 to $2,000 per year, and that, after signing the contract, he found that this was untrue. (4) That, before signing the contract, plaintiff had stated that a ferry on the Savannah river, connected with the place, earned him $300 per year, and that he afterwards found this to be untrue. (5) That representations were made as to the forest trees upon the place as in their original condition, never having been cut for timber or timber purposes. After the contract was signed, he discovered this to be untrue, and he also found that the plaintiff had made contracts with third persons, under which they were then actually engaged in cutting timber on the place. (6) That, before signing the contract, defendant had been told by plaintiff that he had refused $16,000 for the place, which statement he found afterwards was false. (7) That, before he had executed the contract, defendant had been informed that there was an excellent set of hands on the place, who worked well, and paid their debts in the way of supplies and advances promptly, and afterwards that he found this representation untrue. (8) That, before he signed the contract, defendant had been informed that Mr. Bush, the manager for Brown, was under contract with him to work for the year 1901 at $600 per annum, and that afterwards he found that this was not true. (9) That, before signing the contract, defendant had been informed by the plaintiff that a large parcel of land adjoining the mill on the land lying near the railroad, and which had on it a pen or barn in which mules were lodged during the melon season, belonged to the place, and that afterwards he found that this was not true. The answer also insisted that the plaintiff had a plain, adequate, and complete remedy at law.

As to the jurisdiction: The contract in this case is for the sale of a plantation, stocked and supplied, a going concern. True, a large part of the contract was for personalty. But this personalty was part and parcel—an essential part—of the plantation. With the land the personalty made the subject-matter of the contract a unit, gave enhanced value to the land; indeed, was inseparable from it as a going concern. When personal property is mingled with an agreement for sale of realty, the court will decree specific performance of the entire contract. Leach v. Fobes, 11 Gray, 506, 71 Am. Dec. 732. The remedy at law will hereafter be considered.[7] * * *

[7] In Duff v. Fisher (1860) 15 Cal. 375, the suit was for the specific performance of a contract for the sale of real and personal property, to wit: a

The evidence in this case discloses the facts: That the defendant, having been informed of the supposed advantages and merits of plaintiff's plantation as a game reserve, went to it in person, shot over it, and had a full opportunity of seeing what kind of a place it was for ducks. After this personal inspection, he signed the contract. So much for his first objection. That he accepted all the statements of the plaintiff as to the percentage made on the plantation, the amount made from rents, the number of plows with the wage hands, the profits of the commissary, and the value of the ferry, although he was on the plantation itself, in the room where the books of the plantation were kept, and in full communication with the manager, who showed every disposition to give him all the information he required. There is conflict of testimony on much of this; but, assuming that the defendant's memory is correct, his purpose to tell all the truth cannot be doubted. He gave his confidence to the plaintiff, with the means in his power to test the truth of his statements, when it is remembered, also, that he had his suspicions excited the day after he had signed the contract, and put questions to the plaintiff from memoranda of points of misunderstanding, and after all this reaffirmed his contract, and expressed full satisfaction. It has been shown also in the testimony that the plantation did earn in 1900 some six thousand and odd dollars. The account sales of the melons were produced, and also those of the cotton. Mr. Frost, the factor of plaintiff, testified to the amount of cotton sold by his firm on account of this plantation,—from 100 to 125 bales each year for several years last past. The plaintiff, in his statements, before the contract was signed, represented the profits on his commissary as from $1,500 to $2,000 per year, and he also stated the net income from the ferry to be $300 per year. Both of these were overestimates. But on his last visit to the plantation the defendant has received intimation of these, and they were discussed by him with the plaintiff, and it was after this discussion that he reaffirmed the contract because of the reduction of $500 on the price. The plaintiff represented that the hands on the place were excellent. This seems to be borne out in the testimony of his neighbors and of the hands themselves. One of the misrepresentations charged is that Mr. Bush, the overseer, had contracted to manage for Brown for the year 1901 for $600. It is true that he did so contract with Brown. But he insisted that Smith should pay him more than this. Although Bush was willing to contract with Brown at the rate, he was not bound to carry out this contract with Smith, nor could Brown bind him to do so. It is charged that plaintiff represented to defendant that a large parcel of land near the mill belonged to this place, and that this proved to be false. Yet

mill and millsite, and a steamtug. Field, C. J., said: "The contract related to realty as well as personalty, and were it otherwise, the fact would not oust the jurisdiction. The equity upon which the court enforces a specific performance of a contract, does not arise from the character of the property involved, but from the inadequate remedy afforded by a recovery of damages in an action at law."

when he signed the contract of sale he saw a blue print, in which the boundaries of the plantation were distinctly defined, and that blue print is mentioned in the contract, and made a part of it. The most important statement made by the plaintiff was as to the timber on the place, and his omission to state that there was a contract under which certain parties had the right for 10 years to cut timber on a part of the swamp lands. The valuation he put on the timber was an exaggeration, although one witness gives the same estimate. It is charged that a statement made by plaintiff to defendant that he had received an offer of $16,000 for the land itself from a responsible person is not true. But the explanation of plaintiff is reasonable. He says that a person in Atlanta, wanting a place in the country, had offered to exchange with him lands in that city estimated to be worth at least $16,000 for his land, and that he did not consider the proposal.

Reviewing and considering the testimony, it is manifest that the defendant entered into this contract assuming many things to be true without proper examination, and without using the means of verification at hand. There was no sort of fiduciary relation between him and the plaintiff. They were mere acquaintances, and in their dealings were both on guard, or should have been. He is evidently a gentleman of culture, of intelligence, and experienced in affairs. He is not a ward of the court, and entitled to its special protection. The case comes directly within Slaughter v. Gerson, above quoted, and the defendant must abide by his contract. In Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246, the court held that, if a purchaser of real estate, to whom representations of the character and value of the property are made by the vendor, visits the property itself prior to the sale, and makes a personal examination of it touching these representations, he will be presumed to rely on his own examination in making the purchase, and not upon the representations of the vendor; and, in the absence of fraud or concealment, cannot have the sale set aside. The case of Development Co. v. Silva is stronger than this. It is in 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678:

**"If a purchaser investigate for himself, and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations. So, also, in Clapham v. Shillito, 7 Beav. 146. If the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded."**

The question really is, shall this contract be enforced in this court, or must the parties be left to the action at law? It is clear that the contract cannot be enforced in its entirety. Much of the personal property which was subject-matter of the contract has been used. The plaintiff, it appears, is still carrying on the plantation. There is no evidence at all as to the title,—whether the plaintiff can convey in fee simple, or what is the nature of the trust under which he holds title.

There appears no abstract of title, and no deed has been proposed or tendered. Then no evidence exists as to the incumbrances upon the land, or the force and effect of the contract for cutting timber thereon, —how far and to what extent it injures the value of the plantation. All these matters must be settled before the mode of relief can be determined upon. It is ordered that the cause be recommitted to the master; that he take testimony, and report whether the plaintiff is seised in fee of the tract of land the subject-matter of the proposed sale, and can convey a good title therefor in fee simple; that he also report what are the incumbrances upon the said land, if any there be, and how and in what manner they can be removed. He shall also inquire and report how much of the personalty in said plantation now remains, and the value of such as may have been used, destroyed, or lost, with leave to report any special matter.

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## LIVESLEY et al. v. HEISE et al.

(Supreme Court of Oregon, 1904. 45 Or. 148, 76 Pac. 952.)

Appeal from Circuit Court, Polk County; R. P. Boise, Judge.

Suit by T. A. Livesley and another, partners as T. A. Livesley & Co., against A. Heise and others. Decree for defendants. Plaintiffs appeal.

This is a suit to compel the specific performance of a contract for the sale and delivery of hops, made and entered into January 22, 1901, between the defendant A. Heise, of the first part, and the plaintiffs, T. A. Livesley & Co., of the second part. Its provisions, so far as they are material, are as follows:

"The party of the first part has bargained and sold, and by these presents does grant, sell and convey unto the said parties of the second part, thirty thousand pounds (net weight) of his crop of hops, the growth of the years 1901, 1902, 1903, 1904 and 1905, grown on Emerson Harris' and Mrs. N. W. Harris' farm, situated on right and left side of main road between Bethel and Independence three miles south of Bethel in Polk county, state of Oregon, of which farm forty acres are set out in hops, and are now being by him cultivated, and which are to be harvested during the years 1901, 1902, 1903, 1904 and 1905. To have and to hold the same unto said T. A. Livesley & Co., their executors, administrators or assigns forever. The said party of the first part hereby agrees to complete the cultivation of the said hop crop and to harvest, cure and bale the same in good first-class and workmanlike manner, and immediately thereafter, and not later than Oct. 13th of each year to deliver the 30,000 pounds of the same in bales of about one hundred and eighty five pounds each, in new 24-oz. bale cloth (seven pounds tare per bale to be allowed) at Crowley, Or. * * * And in consideration of the foregoing, said parties of the second part do hereby agree to pay to said party of the first part the sum of ten cents per pound for each pound of hops delivered and accepted on the conditions stipulated for, that is to say $100.00 paid upon signing of these presents, the receipt whereof by said party of the first part is hereby acknowledged; five cents per pound for each pound of hops hereby bargained to be paid at the time of picking said hops, upon ten days' notice from said party of the first part, if in the judgment of the parties of the second part the crop is in fit condition to warrant the advances, and the balance, if any there may then be due, after delivery of the entire amount bargained and sold to, and acceptance by said parties of the second part at the time and place and in the condition as hereinbefore provided. * * *"

The complaint sets out the contract, and, further, that at the time of the execution thereof the defendant A. Heise was a tenant and in possession of the land described therein, which he had previously leased from N. W. and E. L. Harris, under a lease to expire about October 26, 1905; that plaintiffs have performed all the terms and conditions of the contract on their part, but that defendant A. Heise has refused to perform, and has conspired with his codefendants, Rachel E. Heise, his wife, and W. C. Heise, his son, to defraud plaintiffs—that is to say, he voluntarily and unlawfully, and with intent to defraud plaintiffs, surrendered up to said N. W. Harris and E. L. Harris his said lease for the premises, and pretended to have the same canceled and to surrender possession of said premises to them, but that in fact they were not so surrendered; that the defendant A. Heise, notwithstanding, continued in possession under an agreement with the owners that they would immediately lease the premises to his wife and son; that the latter have ever since, with full knowledge of the contract of sale, pretended to conduct said hopyards and farm in their own names, but that it was done with the sole purpose of assisting A. Heise in circumventing plaintiffs and defrauding them out of their rights under their contract; that there were produced upon the premises during the present year (1903) 175 bales of hops, as the net share of the tenants, which in reality belong to the defendant A. Heise; that he has refused to accept from plaintiffs any of the advances agreed to be made, they having been duly tendered, and has refused to deliver the hops produced, as stipulated; that he is insolvent; that plaintiffs have no plain, speedy, and adequate remedy at law, and have tendered into court for defendants $3,000, the full contract price of the hops. A decree is demanded, declaring the transactions between the defendant A. Heise and Rachel E. and W. C. Heise fraudulent and void as to plaintiffs, and that they be required to deliver to plaintiffs so much of the crop produced as will make 30,000 pounds, and for such other relief as may seem equitable. A demurrer having been sustained to the complaint, and a decree entered dismissing the suit, plaintiffs appeal.[8]

WOLVERTON, J. (after stating the facts as above). The contract or agreement forming the basis of this suit is of similar character to the one sued on in the case of Livesley v. Johnston, 45 Or. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647. There is one important difference, however, which relates to the acceptance of the hops. If of lesser quality than is contracted for, Livesley & Co. have not here the option to purchase any amount. Another particular may be noted. There was here no consideration paid for the execution of the contract, as appears from the Johnston contract, and as alleged in the complaint in that case. Notwithstanding these differences, however, the same considerations of construction as to the binding effect of the contract upon the parties will apply here as in the Johnston Case, and it must be held

[8] The statement of facts is abridged.

to be valid and obligatory. In the present case, in addition to the idea of a joint venture, as stated in the opinion in the Johnston Case, there is clear ground for equitable intervention to require specific performance to deliver the hops, which consists in the alleged fraudulent collusion of the parties defendant, entered into with a view on the part of A. Heise to avoid his obligations to plaintiffs under the contract.

The complaint being otherwise sufficient, the decree of the trial court will be reversed, the demurrer overruled, and the cause remanded for such further proceedings as may seem proper.

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## CUD v. RUTTER.

**(In Chancery before Lord Macclesfield, Chancellor, 1719. 1 P. Wms. 570.)**

The defendant in consideration of two guineas paid down, did by note under hand agree to transfer 1000*l.* South-Sea stock at a fixt price at the end of three weeks; the plaintiff on the day demanded the stock, and offered to pay the price; but on the defendant's insisting that he would only pay the difference, and not transfer the stock, the plaintiff brings this bill for a specific performance, and to have the stock assigned.

Objected, That the compelling a specific execution of contracts must be allowed to be discretionary in this court, and there was not a single instance or precedent, where it had been done in such a case as this; that the plaintiff was put to no inconvenience, since the defendant had offered, and by his answer continued to offer, to pay the difference; that the plaintiff might for asking have the same quantity of stock any where upon the exchange. Indeed had the agreement been for a house or land, which might be a matter of moment and use, in that case (supposing all things to have been fairly transacted) there might be some reason why equity should execute such agreement; but in a matter of so little consequence as the present case, there could be no necessity for this court to interpose.

CUR': The plaintiff ought to have an execution of the contract; for the agreement is a fair one, and in writing, and part of the money paid. Suppose the whole money had been paid, should not equity have executed it? if so, where is the difference betwixt a great sum and a small one? if the agreement had been to transfer stock or pay the difference might have looked like stock-jobbing; but the plaintiff, as is proved in the cause, refused to let the note be so penned, notwithstanding that the defendant had desired it. Decreeing an execution of such an agreement, its beating down and preventing stock-jobbing. Wherefore let the defendant transfer 1000*l.* South-Sea stock accounting for the dividends, and paying the costs; and let the plaintiff pay the defendant interest for the money from the time that it ought to have been paid, according to the contract.

But afterwards on an appeal, the lord chancellor Parker reversed

this decree, delivering his opinion with great clearness, that a court of equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages, and with the money may if he pleases buy the quantity of stock agreed to be transferred to him; for there can be no difference between one man's stock and another's. It is true, one parcel of land may vary from, and be more commodious, pleasant, or convenient than another parcel of land, but 1000*l.* South-Sea stock, whether it be A. B. C. or D.'s is the same thing, and in no sort variant; and therefore let the plaintiff, if he has a right, recover in damages, with which, when received, he may buy the stock himself.

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## CHEALE v. KENWARD.

**(In Chancery before Lord Chelmsford, 1858. 3 De Gex & J. 27, 44 E. R. 1179.)**

This was an appeal from the decision of the Master of the Rolls allowing a demurrer. The Master of the Rolls allowed the demurrer, on the ground that the agreement could not be enforced for want of consideration and of mutuality.

THE LORD CHANCELLOR.[9] * * * The bill is for the specific performance of an agreemnt to take a transfer of shares in the Lewes and Uckfield Railway Company. The Plaintiff was the registered owner of the ten £50 shares in the company, numbered from 12 to 21, both inclusive. Nothing had been paid upon the shares. But under the 21st section of the Companies Clauses Consolidation Act, 1845, the Plaintiff was liable to pay the whole amount of the £500. He was desirous of getting rid of the shares and of the liabilities, and the bill states that the Defendant, who was also a shareholder in the company, entered into an agreement with the Plaintiff to accept and execute a transfer of the shares, and do all acts necessary to relieve the Plaintiff from all liability in respect of the shares.

Upon the demurrer two questions were raised. First, whether there is a sufficient consideration money from the Plaintiff to support the agreement. Secondly, if so, whether there is sufficient mutuality in the contract so as to enable either party to enforce it against the other. Now, there is no doubt that a bill will lie for a specific performance of an agreement to transfer railway shares. This was set at rest by Duncuft v. Albrecht (12 Sim. 199). There the Vice-Chancellor of England said:

"There is not any sort of analogy between a quantity of £3 per cents., or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market."

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[9] The statement of facts is abridged and parts of the opinion are omitted.

The Defendant desired to have the shares; he was willing to pay the amount of the liabilities, from which he agreed to exonerate the Plaintiff; and that appears to me a sufficient consideration. * * *

I think that the demurrer ought to have been overruled.[10]

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## DUMONT v. FRY et al.

(Circuit Court of the United States, S. D. New York, 1882. 12 Fed. 21.)

See supra, p. 35, for a report of the case.

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## Appeal of GOODWIN GAS-STOVE & METER CO. et al.

(Supreme Court of Pennsylvania, 1888. 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 696.)

Appeal from court of common pleas, Philadelphia county.

H. Dumont Wagner filed a bill in equity against the Goodwin Gas-Stove & Meter Company and William W. Goodwin to compel the specific performance of said Goodwin's contract to transfer to complainant certain shares of stock in said company. * * *

CLARK, J.[11] It is a well-settled doctrine that equity will not, in general, decree the specific performance of contracts concerning chattels. The reason assigned for this is that their money value, recovered as damages, will enable the party to purchase others in the market of like kind and quality. In the United States, as well as in England, contracts for public securities, government stocks, bonds, etc., will not be specifically enforced; no especial value attached to one share of stock, or one bond, over another. The money which will pay for one will as readily purchase another. To this rule there are

[10] "Speaking further to plaintiff's position that this resolution, providing for the surrender of the 33 shares and the issue of the 14 in lieu thereof, should be treated as a contract or agreement: While contracts for the sale or transfer of government securities or shares of stock on the market and readily obtainable will not, as a general rule, be specifically enforced, it is otherwise when the agreement, as in this instance, concerns stock of a different character, and there are terms giving the contract special significance and presenting a case where the award of ordinary damages in case of breach would be inadequate. The distinction adverted to is very well stated in Cook on Corporations, § 338, as follows: 'An entirely different rule prevails as regards contracts for the sale of stock of private corporations. If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered, a court of equity will decree a specific performance and compel the vendor to deliver the stock.' It is not required, however, in this case, that defendants should have recourse directly to this principle in the doctrine of specific performance or the remedy ordinarily available in such cases." Misenheimer v. Alexander, 162 N. C. 226, 78 S. E. 161.

[11] The statement of facts is abridged and part of the opinion is omitted.

doubtless exceptions, but the rule is so general in its application that the exceptions are but few. Stayton v. Riddle, 114 Pa. 464, 7 Atl. 72. Although a different doctrine may perhaps exist elsewhere as to contracts concerning stocks and bonds of merely private or business corporations, in the United States the principle seems to be well established by the weight of authority that they will not be carried into effect in equity except under very special circumstances, such as render the remedy at law wholly inadequate, or damages impracticable. Pom. Eq. Jur. 1402. The same general principles govern in contracts for the sale of stocks of this character as in the sale of other personal property. If the breach can be fully compensated, equity will not interfere; but when, notwithstanding the payment of the money value of the stock, the plaintiff will still necessarily lose a substantial benefit, and thereby remain uncompensated, specific performance may be decreed. Wat. Spec. Perf. § 19. In Dungan v. Doheart, an unreported case, decided at nisi prius, and referred to in a note to Railroad Co. v. Stichter, 11 Wkly. Notes Cas. 325, Mr. Justice Agnew, after referring to the cases, said:

"In an ordinary contract for the sale or transfer of stock, where there is no fiduciary relation between the parties, no peculiar circumstances attending the stock, and no trust declared or arising by operation of law, or other fact in the contract, which would make a verdict for damages inadequate relief, there is no reason for specific performance, other than in every case of a sale of a chattel. The non-delivery, or refusal to transfer, can be easily compensated in damages."

The doctrine has in some cases been carried to this extent: that if a contract to convey stock is clear and definite, and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance will be decreed. White v. Schuyler (N. Y.) 1 Abb. Pr. N. S. 300, 31 How. Pr. 38; Treasurer v. Commercial Co., 23 Cal. 390. This would appear to have been the view entertained by Mr. Justice Thompson in Sank v. Ship Co., a case tried at nisi prius, and reported in 5 Phila. 499. "I incline much," says the learned justice, "towards the distinction made by Vice-Chancellor Shadwell in Duncroft v. Albrecht, 12 Sim. 189, between public stocks of a known market value, and stocks of a particular company, with none in market; and recognized by the lord chancellor in Cheale v. Kenward, 3 De Gex & J. 27. The former resembles ordinary property with known values, while the latter resembles more the case of specific or peculiar property, with a value contingent or uncertain, in which, it has been held, the only adequate remedy is to give the thing itself. 1 Lead. Cas. Eq. 757, and 1 Story, Eq. Jur. 724." Whether the distinction taken in the case cited may ultimately be recognized to the full extent stated we cannot say; but the general underlying principle seems to be established that in a sale of stocks in a merely private or business corporation, where from any proper cause it is plain that the remedy at law is inadequate, or damages impracticable, specific relief may be awarded.

As to the case now under consideration, it is fair to assume that the security for the principal investment of $7,000, and for the dividends upon it at the rate of 10 per cent. per annum, was the inducement for Wagner to enter into the contract of July, 1879; and when, on 27th January, 1880, he agreed to waive his right to that security, it was under the special inducement that he was to have, in addition to the shares he then had, 70 other shares on the terms of the latter contract,—shares that would ultimately be paid for, if paid for at all, out of their earnings, in installments equal to the excess of the dividends thereon over 6 per cent. in each year. The contract of 1880 disclosed the special terms upon which the investment was actually made. Wagner was to receive, not only the dividends upon the shares he purchased with his original investment, but was entitled, also, from time to time, to such of the 70 shares in dispute as would be paid for by the excess stated; and the title to the 70 shares was actually transferred to him, in trust, under the contract. He held the shares as a trustee. If transferred on the books, the shares must necessarily have been transferred to him on the footing of that trust. As they were earned, however, they were to become Wagner's own shares, freed from the trust, the dividends thereon payable to him, and he was entitled to have such further assurance from Goodwin as would liberate them from the trust, and authorize the transfer to him absolutely on the books of the company. The case is in some respects a peculiar one. Wagner already has the title to these 70 shares. He holds the certificate transferred in writing, and delivered to him by Goodwin; but, the transfer being subject to a trust imposed upon them by the parties, he cannot avail himself of them as his own, until they are relieved of that trust. The transaction is not, therefore, a simple sale and purchase of stocks. The question presented is whether or not the terms of the trust have been satisfied as to the whole or any part of the 70 shares to which Wagner already has title. If they have, he is entitled to a transfer to his own use; if they have not, he must still hold the title subject thereto. It cannot be doubted, we think, that equity has jurisdiction, in such a case, not only against Goodwin, but against the company; especially as the shares have no recognized market value, and their value, even if ascertained, would not necessarily, as against either, be the proper measure of damages. The 70 shares having been transferred to Wagner in trust, under the agreement, he was entitled, as the trustee, to a transfer on the books; and as dividends were declared from time to time he was entitled, at his option, to an absolute transfer, discharged of the trust, for as many shares as were paid by the excess of the dividends over 6 per cent. annually. * * *

Upon an investigation of the whole case, we are of opinion that the decree of the learned court is right. The decree is therefore affirmed, and the appeal dismissed, at the cost of the appellant.

## SMITH et ux. v. FLATHEAD RIVER COAL CO.

**(Supreme Court of Washington, 1911. 64 Wash. 642, 117 Pac. 475.)**

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by J. H. Smith and wife against the Flathead River Coal Company. Judgment for defendant, and plaintiffs appeal.

MOUNT, J. This action was brought to enforce specific performance of a contract. When the plaintiffs had introduced their evidence, the court dismissed their action. Plaintiffs have appealed.

It appears that the plaintiff J. H. Smith and the defendant company entered into the following contract:

"This agreement made this the 7th day of April, 1908, by and between J. H. Smith, party of the first part, and the Flathead River Coal Company, party of the second part, witnesseth: That the party of the first part agrees to have surveyed and obtain a lease on one certain coal and petroleum claim situated in the southeast Kootenay, B. C., covered by mining license No. 229, and its renewal in the name of Hattie L. Smith, and assign the said lease unto the Flathead River Coal Company, and accept therefor such number of shares of the capital stock in payment as shall have been issued to the original stockholders of said company in proportion to the number of acres involved. And the said party of the second part herein agrees that they will issue the above-mentioned number of shares of the capital stock of said company in payment of such assignment when it shall have been made."

Thereafter the plaintiffs procured the lease mentioned and tendered the same to defendant, and demanded the stock—about 44,000 shares—which defendant refused to issue. It also appeared that the plaintiffs with others had organized the defendant corporation some time before the date of the contract, and were stockholders therein, and knew that all the stock of the corporation had been subscribed and issued by the corporation to its stockholders except 7 shares thereof, and that at the time the contract was entered into and at all times since the corporation had no stock, and was not authorized to issue any more. The trial court properly denied the relief sought, for the corporation could not legally issue the stock. Cook on Corporations, 426. The court was therefore powerless to enforce specific performance or to award damages. Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; Peters v. Van Horn, 37 Wash. 550, 79 Pac. 1110.

Judgment affirmed.

DUNBAR, C. J., and FULLERTON and GOSE, JJ., concur.

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## ADDERLEY v. DIXON.

**(In Chancery before Sir John Leach, 1824. 1 Sim. & S. 607.)**

The plaintiffs having purchased and taken assignments of certain debts which had been proved under two commissions of bankrupt, agreed to sell them to the defendant for 2s. 6d. in the pound.

The defendant's solicitor, accordingly, gave notice of the sale to the assignees, and prepared an assignment of the debts, and the plaintiffs,

notwithstanding the purchase money had not been paid, executed it, and signed the receipt for the consideration money, and left it in the solicitor's hands. The bill was filed to compel the defendant specifically to perform the agreement, and to pay the purchase money to the plaintiffs.

The defendant, by his answer, submitted that the matter of the agreement was not the proper subject of a bill in equity for a specific performance; and claimed the same benefit as if he had demurred to the bill.

THE VICE-CHANCELLOR.[12] Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money-value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market-price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods. * * *

In Ball v. Coggs, 1 Bro. P. C. 140, specific performance was decreed in the house of lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, being to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life for which he had contracted, at a conjectural price. In Buxton v. Lister [3 Atk. 383], Lord Hardwicke puts the case of a ship carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity; and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that as, in both those cases, damages would not, by reason of the special circumstances be a complete remedy, equity would decree a specific performance. * * *

The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, upon the principle established by the cases of Ball v. Coggs, and Taylor v. Neville [cited in Buxton v. Lister] a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and

[12] Part of the opinion is omitted.

to compel this purchaser to take such damages would be to compel him to sell these dividends at a conjectural price.

It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled, by repeated decisions that the remedy in equity must be mutual; and that, where a bill will lie for the purchaser, it will also lie for the vendor.

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## ANONYMOUS.

(In Chancery before Lord Cowper, Chancellor, 1707. 1 Salk. 154.)

It was held, 1st, That if one by will or deed subject his lands to the payment of his debts, debts barred by the statute of limitations shall be paid; for they are debts in equity, and the duty remains; the statute has not extinguished that, though it hath taken away the remedy.

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## HERMANN v. HODGES.

(In Chancery before Lord Selborne, 1873. 43 Law J. Ch. 192.)

This was a suit for specific performance of an agreement to execute a mortgage with an immediate power of sale.

The advance was made at the time the agreement was entered into.

THE LORD CHANCELLOR. I have no doubt that the decree is proper. The defendant does not offer to pay or that would be an answer to the suit. Decree as prayed for.

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## TRIEBERT v. BURGESS et al.

## BURGESS et al. v. TRIEBERT.

(Court of Appeals of Maryland, 1857. 11 Md. 452.)

Appeal from the Circuit Court for Baltimore city.

In this case, Triebert, the defendant below, appealed from an order granting an injunction and appointing a receiver, upon a bill filed against him by Burgess and others, and the latter, the complainants below, appealed from an order directing the receiver to deliver to the defendant all the property taken from him by virtue of the receiver's appointment, passed on motion of the defendant, after he had filed an appeal bond upon his appeal from the previous order.

The bill filed by Burgess and others, partners, under the firm of Burgess, Dale & Goddard, on the 10th of November, 1857, alleges, that upon the application of Triebert, who is, and for some time has been, engaged in the business of buying and selling china, glass and queensware in Baltimore, the complainants, who are importers of

such goods in New York, sold and delivered to him, from time to time, large quantities of goods, of which an account is filed as an exhibit with the bill; that on the 29th of September, 1857, a considerable amount, though not the whole, being then due for the goods, and the complainants pressing for payment, and Triebert, not having or possessing the necessary means then in his hands, proposed to complainants to give them a bill of sale of all his stock in trade in Baltimore, to secure them, by way of mortgage, as well his matured as his maturing indebtedness, and also the further sum of $900, to be lent and advanced him by them, provided they would lend and advance him $900 in cash, which proposition complainants agreed to and accepted, and on that day paid to Triebert the stipulated sum of $900 in cash, in consideration of which he had promised to give them his bill of sale, by way of mortgage, of his stock in trade, and was bound by it; that the greater part of the indebtedness of Triebert to them, for his purchase as well as this $900, is due, with the exception of $200 paid them; that they have applied to him to execute the mortgage he had stipulated to make, but he has neglected and refused to do so.

The bill further charges, that the stock in trade of Triebert, consisting of china, glass and queensware, in the store occupied by him, on Baltimore street, is the same (except where he may have sold part) which was held by him at the time of his aforesaid promise, and which he then undertook to convey to complainants as security; that he not only refuses to perform his undertaking, but is selling the stock and receiving the proceeds, which he is applying to his own use, and fails to pay over to complainants, and is thereby daily diminishing their security; that he is greatly embarrassed in his circumstances at this time, and has created one or more liens, in favor of one or more of his creditors, on other property belonging to him, being thereto pressed and unable otherwise to satisfy the demand made on him, and they apprehend and charge there is great danger that Triebert will dispose of the whole of his said stock in trade, or give liens thereon, to persons unaware of their claims and equitable lien in the premises, and so put said stock in trade, and the proceeds thereof, beyond their reach. And they further charge, that if liens are so created in favor of other persons on said stock, or the same shall be sold by Triebert, and the proceeds pass into his hands, there is great danger that they will not only lose their promised security, which is now ample for their debt, but also their debt itself, it being the belief of the complainants, which they hereby charge, that Triebert is largely indebted beyond his means of payment; that they are advised they have, under the circumstances above stated, an equitable lien on said stock in trade, and as the whole indebtedness which it was meant to secure, has now matured, they are entitled to a sale of the same, under a decree, for the satisfaction of their debt, and, in the mean time, to the protection of the court, through the medium of a receiver, against

what they charge to be, on the part of Triebert, not only a fraudulent denial of the security promised them, but also a fraudulent misappropriation, to their irreparable injury, of the property agreed to be mortgaged to them.

The bill then prays for a decree that the complainants may have and hold the said stock in trade as security for the indebtedness of Triebert, in manner and form as promised, and for a sale thereof, and also for an injunction, restraining Triebert from selling or disposing of the same, and for a receiver to take charge of said stock in trade, and hold the same subject to the order of the court, and for general relief.

The affidavit to this bill is stated in the opinion of this court. On the same day on which it was filed, the court (Krebs, J.) passed the order from which the defendant appealed, and, on the next day, that from which the complainants appealed. Both these orders are fully stated in the opinion of this court.

ECCLESTON, J., delivered the opinion of the court.

That, in Maryland, a parol contract for a mortgage of personal property, based upon a valuable consideration, may be enforced in a court of equity, if the contract is not such as the statute of frauds requires to be in writing, has been fully established in Alexander et al. v. Ghiselin et al., 5 Gill, 138, and Sullivan v. Tuck, 1 Md. Ch. 59. According to the views of the chancellor, in the latter case, courts of equity do not specifically enforce contracts in respect to personal property, with the same facility and universality as contracts relating to real estate; the cause of which is, that in contracts of the first class, courts of law are generally competent to afford full redress. 2 Story's Eq. § 717. But when, at law, a party cannot have a complete and satisfactory remedy, although the contract relates to personal estate, a court of equity will grant relief. Id. § 718.

Under the circumstances set forth in this bill, there was, in our opinion, an equitable lien upon the defendant's stock in trade, which authorized the court to grant the injunction. According to the facts stated, there was no reasonable ground to believe that the complainants could secure payment of their claim, except by enforcing their equitable lien.

On this appeal the answer is not before us, and we can only look to the bill and exhibits.

That portion of the order of the 10th of November, 1857, which appointed the receiver, will be reversed, but the portion of it which relates to the injunction, will be affirmed.

Inasmuch as the receiver was improperly appointed, the appeal of the complainants from the order of the 11th of November, cannot be sustained, for, in any view of the case, that order did them no injury

The order appealed from by Triebert, is reversed in part, and affirmed in part; and the parties are to pay their own costs in this court.

Order reversed in part, and affirmed in part, and cause remanded for further proceedings.

Upon the appeal of Burgess and others, the same Judge delivered the opinion of this court:

From what has been said in the opinion delivered in the appeal of Triebert v. Burgess and Others, it will be seen that we think the order appealed from in this case ought to be affirmed. A decree accordingly will be signed, allowing costs in this court in favor of Triebert.

Order affirmed.

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## SOUTH AFRICAN TERRITORIES, Limited, v. WALLINGTON.

(House of Lords. [1898] App. Cas. 309.)

The following statement of facts is taken from the judgment of Lord Herschell:

In September, 1895, the appellant company issued a prospectus offering to the public an issue of £75,000 in 1500 first mortgage debentures of £50 each, bearing interest at 6 per cent. and being repayable with a bonus of £7. 10s. each on December 31, 1900. The debentures were to form a floating charge on the whole of the properties and assets of the company. The prospectus stated that the allottees of this issue would have the right to exchange them at par for an equal amount of shares at any time within two years after December 31, 1896, that the debentures were to be payable 10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months after allotment, 25 per cent. four months after allotment, and 25 per cent. six months after allotment, and that failure to pay any instalment when due would render previous payments liable to forfeiture.

In the same month, the respondent having deposited with the appellants' bankers £80, being the 10 per cent. required by the prospectus, signed a form of application for the allotment to him of sixteen of the debentures, and thereby agreed to take such debentures, or any less number that might be allotted to him, on the terms of the prospectus, and to pay the further instalments due thereon in accordance with the terms of the prospectus. The appellant company accordingly, a few days later, allotted to the respondent sixteen debentures in the company, and gave him notice thereof.

The respondent having refused to make any further payments the present action was brought against him by the appellants on March 6, 1896, when all the instalments except the last had become due. The appellants claimed: 1. specific performance of the contract; 2. payment of the balance of the price of the debentures; 3. damages.

The action came on for trial before Wright, J., and was determined by the learned judge in the course of a discussion with the learned counsel who appeared for the respective parties, initiated by the learned judge during the course of the opening address of the learned coun-

sel for the plaintiffs. The learned judge held that the claim for specific performance could not be sustained, but gave judgment for the plaintiffs on the ground that a debt had been created by the defendant's promise to pay contained in his letter of application. Judgment was accordingly entered for the plaintiffs for £520, the amount of the instalments due and unpaid at the date of the writ, and costs. From this judgment the defendant appealed. * * *

The Court of Appeal (Lord Esher, M. R., and Lopes and Chitty, L. JJ.) reversed the judgment of the court below, and ordered that judgment should be entered for the defendant. * * *

EARL OF HALSBURY, L. C.[18] My Lords, the forms which have been contrived for the business of joint stock companies and which, when applied to their proper purposes, are convenient, are nevertheless somewhat calculated to mislead when their mere language is regarded. The applicant for debentures on the face of the instrument contracts to pay something, but the real nature of the whole transaction is an agreement by the applicant to lend money at certain interest, and the action in this case was in truth mainly, if not altogether, directed to compel the intending lender to perform his contract to lend, which undoubtedly he had refused and neglected to do.

With respect to the claim for specific performance, a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any court or any member of any court has entertained a doubt but that the refusal of the learned judge below to grant a decree for specific performance was perfectly right. * * *

LORD WATSON (after stating the facts set out above). My Lords, the only engagement made by the respondent with the company consisted in a promise to advance money to them in loan; and it is settled in the law of England that such a promise can not sustain a suit for specific performance. It is equally clear, in my opinion, that the obligation of the company to issue mortgage bonds against the loan did not in any way alter or affect the character of the transaction, or give the company any right to sue as for the price of an article sold by them which they were ready to deliver. The only remedy open to the company was by action against the respondent for any loss or damage which they might sustain through his breach of promise. * * *

Order appealed from affirmed and appeal dismissed with costs.

[18] The statement of facts is abridged and parts of the opinions of the Earl of Halsbury and Lord Watson are omitted. The concurring opinions of Lords Herschell, Macnaghten, and Morris are also omitted.

## LOS ANGELES & BAKERSFIELD OIL & DEVELOPMENT CO. OF ARIZONA v. OCCIDENTAL OIL CO.

(Supreme Court of California, 1904. 144 Cal. 528, 78 Pac. 25.)

GRAY, C.[14] * * * The main object of the contract was to secure the development of the land to the end that it might be determined whether it contained oil, and this was the principal consideration that induced the defendant to make such contract. And the performance of this part of the contract on the part of plaintiff cannot be enforced in a court of equity, because it involves the performance of personal labor and services. Hence there is a want of mutuality as to the remedy sought to be enforced. Equity will not enforce specific performance of a contract as against the defendant unless the plaintiff has performed, or can be compelled specifically to perform, his side of the contract. Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334.

Under this rule the contract cannot be divided up into "independent covenants" and "subsequent conditions" for the purpose of enforcing a part of it and leaving the parties to some subsequent remedy as to the rest of it, but the whole contract, including conditions subsequent as well as precedent, must be kept in view; for our statute says "neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed or is compellable specifically to perform everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." Civ. Code, § 3386.

The forming of the corporation and the issuance of one-quarter of the stock to the defendant was but a small part of the consideration to be performed by plaintiff. The contract was not "nearly" performed on plaintiff's part by the forming of this corporation and transfer of a quarter of the stock. The main object, purpose, and consideration of the contract—the development of the land for oil—was yet to be performed by plaintiff. And, though plaintiff may be entitled at law to a conveyance and to be let into possession before he performs this part of the consideration, yet, as this part of the consideration has not been performed, and its performance cannot in equity be specifically enforced, no enforcement of any part of the contract can be had. This principle is clearly illustrated and the reasons plainly given in Lattin v. Hazard, 91 Cal. 87, 27 Pac. 515. To the same effect is the more recent case of Moore v. Tuohy, 142 Cal. 342, 75 Pac. 896. * * *

[The judgment for the defendant was affirmed.]

[14] Parts of the opinion are omitted.

## DARBEY v. WHITAKER et al.

(In Chancery, 1857. 4 Drew. 134, 62 E. R. 52.)

An agreement for sale of leasehold premises and the goodwill of a trade and certain fixtures to be taken at a valuation, to be made by two gaugers, to be named, or their umpire. * * *

This was a bill for specific performance. * * *

THE VICE-CHANCELLOR desired him to confine his reply to the last objection.

Mr. Baily: Why is the fact of a collateral part of the agreement, being the subject of valuation, to prevent specific performance? The agreement is, in fact, in two distinct parts. There is the contract for sale of the lease and goodwill; a clear, distinct agreement. Then there is the contract for the sale of the fixtures and stock-in-trade to be the subject of valuation. The Court must assume that the valuers will proceed.

THE VICE-CHANCELLOR [Sir R. T. KINDERSLEY].[15] * * * It is said there can be no specific performance of a contract to purchase a goodwill. No doubt you cannot have a specific performance of a contract to purchase a goodwill alone, unconnected with business premises, by reason of the uncertainty of the subject-matter. But when a goodwill is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and goodwill, there is not the slightest ground for doubt that such a contract is a fit matter for a decree in a suit for specific performance. * * *

Then, lastly, is raised a question in which it is with great regret that I feel myself under the necessity of refusing a decree.

By the terms of the contract, the premises are to be sold for a fixed sum, and besides the premises the Plaintiff agrees to sell the fixtures and stock-in-trade. [His Honor referred to the passage in page 136.]

Now I assume it to be clear that this Court has no power to decree specific performance of a contract for sale or purchase at a price to be fixed by arbitration, unless the arbitrators have actually fixed the price.

It appears to me that that is implied by the very nature of a decree for specific performance. What would it be? A decree that directs payment to the Plaintiff of such a sum of money as A. and B. shall fix. I never saw such a decree, and I think the Court cannot make it, on the ground that this Court will never make a decree that it cannot see its way to enforce. Now, how could I enforce such a decree? What is the time to be allowed for arbitration? How can I compel the arbitration? It appears in this case as a fact that one of the arbitrators has refused to go on, because he was told by the Defendant that he did not mean to complete. How can I be sure that

[15] The statement of facts and parts of the opinion are omitted.

he will go on? And even if the arbitrators do go on, and differ, how can I compel the appointment of an umpire?

[His Honor then adverted to the argument that the agreement was composed of separate parts, and decided that it was not; that it was one agreement.

The bill was accordingly dismissed, but without costs, the Court considering that moral justice was on the Plaintiff's side.]

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### *(C) Other Elements Influencing Equity Jurisdiction*

## TAYLOR v. NEVILLE.

(Cited in Buxton v. Lister [1746] 3 Atk. 382, at 384, in the words of Lord Hardwicke, Chancellor.)

* * * [16] That was for a performance of articles for sale of eight hundred ton of iron, to be paid for in a certain number of years, and by installments, and a specific performance was decreed.

Such sort of contracts as these, differ from those that are immediately to be executed.

There are several circumstances which may concur.

A man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, and this on the part of the buyer.

On the part of the seller, suppose a man wants to clear his land, in order to turn it to a particular sort of husbandry, there nothing can answer the justice of the case, but the performance of the contract in specie. * * * [17]

[16] Parts of the opinion are omitted.

[17] In Pollard v. Clayton (1855) 1 Kay & J. 461, Vice-Chancellor Sir W. Page-Wood, after a full discussion of the ground for a specific execution of an installment contract, said: "I cannot help further making the observation that, notwithstanding the case of Taylor v. Neville [cited in Buxton v. Lister], and the approbation it met with from Lord Hardwicke in Buxton v. Lister [(1746) 3 Atk. 383], it seems to me somewhat singular, looking to the large mercantile community of this country, that we do not find in the books, since the case of Taylor v. Neville (a case not in Peere Williams, not reported at all, and apparently only cited from manuscript), a single case of a bill for the performance of any contract for the mere supply of goods—cotton, wool or the like—on the ground of their being supplied by instalments; no such case can be produced at any late period; and, with the exception of Buxton v. Lister, the only case in which the doctrine as to a delivery by instalments has been recognised is that of Adderley v. Dixon [(1824) 1 Sim. & S. 607], a totally different case, where the agreement was for the purchase of the unascertained dividends which might become payable from a bankrupt's estate, and specific performance was decreed at the suit of the vendor, the Court holding that the purchaser as Plaintiff had a right to the specific thing he brought, and ought not to be sent to a Court of Law to try what damages he had sustained."

## PEALE v. MARIAN COAL CO.

(Circuit Court of the United States, M. D. Pennsylvania, 1911. 190 Fed. 376.)

In Equity. Suit by John W. Peale against the Marian Coal Company. Decree for complainant.

WITMER, District Judge.[18] The plaintiff, by bill in equity, here seeks relief for an alleged breach of the defendant's agreement to deliver to him coal from its washery at the Holden Culm Dump, which it undertook to do, in return for money advanced by the plaintiff to lift defendant's obligations and to enable it to make necessary improvements and developments for the successful operation of its washery.

The complaint sets forth:

That on the 11th day of April, 1907, a contract was entered into, between the plaintiff and the defendant. * * *

That pursuant to the terms of said contract the complainant advanced, by way of loan, to the defendant a large sum of money, to wit, $37,364.27, exclusive of interest. That upon the amount so advanced there has been repaid the sum of $12,781.77, leaving due and unpaid on said account, January 28, 1909, the sum of $24,582.50.

That the defendant is engaged in the business of carrying on a coal washery operation in the borough of Taylor, county of Lackawanna, Pa., where it prepares for market coal from the Holden Culm Dump, located along the Delaware, Lackawanna & Western Railroad. That, pursuant of the contract between the complainant and the defendant, the latter proceeded to ship coal to the former on the 17th day of May, 1907, and from that time until the 13th day of October, 1908, it did ship coal to the complainant and receive from him payment therefor in accordance with said contract. That on the day last mentioned the defendant ceased to ship its coal to the complainant, as it had undertaken to do by virtue of its contract, and until henceforth had utterly failed to ship to the complainant the product of its washery, or any part thereof, without excuse or just cause, although having often been requested to do so, resulting in great damage to the complainant.

That the defendant has since been operating said washery and preparing and shipping coal to market from the said culm dump through other agents or parties than the plaintiff, and that such culm bank is not exhausted. That there are yet remaining many thousand tons of coal in said dump, and that large quantities are being added thereto daily by deposits from the Delaware, Lackawanna & Western Railroad Company in connection with the operation of the said Holden Colliery. That it is impossible to anticipate the length of time which will be required to exhaust the said dump, or the amount of coal which may be ultimately taken therefrom, for the reason that the length of time will largely depend upon the extent of the operations which may

[18] Parts of the opinion are omitted.

be conducted at the said washery and the amount of the output, and because it is altogether conjectural and uncertain what amount of materials may be deposited in the future upon the said dump by the Delaware, Lackawanna & Western Company in connection with the operation of the Holden Colliery. That the complainant has already suffered large damages, and will continue in the future to suffer to an extent which it is impossible now to determine. Wherefore he is remediless in the premises at law and prays for relief in this court, to wit:

(a) For damages for the coal diverted, and for discovery of the amount as the basis for determining them.

(b) For a decree requiring the defendant to repay the balance of the sum advanced by the plaintiff to the complainant.

(c) For specific performance of said contract.

(d) For an injunction restraining the defendant from shipping coal to other persons than the complainant.

(e) For general relief.

The defendant admits the execution of the contract in suit and the loan of $35,000 by the plaintiff to it on account of which it insists the plaintiff has received a credit of the sum of $17,000, and that it (the defendant) is entitled to a further credit of $1,988.21 for 24,647 tons of coal delivered to the plaintiff and sold by him without defendant's consent at various prices below the minimum stipulated in said contract.

The answer furthermore sets forth that by reason of the plaintiff's violations of the terms of said contract he has prevented the defendant from further attempting to comply with the same. * * *

This therefore requires a partial analysis of the contract to determine its nature, and the duties and obligations of the several parties thereunder. * * *

Under its provisions the plaintiff agrees to advance to the defendant moneys to the amount of $35,000 for its benefit, to release its obligations, and to enlarge and improve its plant so as to operate it to better advantage. In consideration of such advance, the defendant agreed "to deliver to the party of the first part (the plaintiff) or his assigns the entire output of the culm bank and washery above referred to, not only until the payment of the moneys to be advanced, with interest, but also until the entire exhaustion of said culm bank, including materials hereafter deposited thereon by the Delaware, Lackawanna & Western Railway Company, or its successors or assigns, in connection with the operation of the Holden Colliery."

It is further agreed "to prepare all the coal to be delivered to the party of the first part (the plaintiff) as to the sizes, the percentage of impurities, and the merchantability and appearance, according to the standard of the Delaware, Lackawanna & Western Railroad, prevailing in the region where the said washery is situated," and that the respective sizes of the coal shipped from said washery should conform

to the standard, and be made over meshes corresponding in size to the meshes used by the said railway company in the Lackawanna region. * * *

The defendant demurs and contends that the plaintiff can by a recovery of damages have a complete or adequate remedy at law, and is therefore not entitled to relief here. The admission of this doctrine and its application to such cases as the one under consideration would practically divest courts of equity of all jurisdiction to compel specific performance of real contracts.

As a matter of fact it appears impossible to anticipate the length of time required to exhaust the dump, or to estimate the amount of coal that may ultimately be taken therefrom, because it will largely depend upon the extent of the operation which may be conducted at the washery and the amount of the output, and because it is altogether conjectural and uncertain what amount of materials may be deposited in the future upon the dump of the Delaware, Lackawanna & Western Railroad Company in connection with the operation of the Holden Colliery, and therefore the plaintiff's damages are not susceptible of liquidation.

"That the plaintiff could maintain an action at law for damages, for breach of the contract, there is no doubt; but it is a well-settled rule that, although the action at law will lie, yet if there is an utter uncertainty in any calculation of damages for the breach of the covenants, and the measure of the damages is largely conjectural, equity will intervene because of the inadequacy of the remedy, and enforce performance of it by injunction. Palmer v. Graham, 1 Pars. Eq. Cas. (Pa.) 476; Wilkinson v. Colley, 164 Pa. 43 [30 Atl. 286, 26 L. R. A. 114]."

It is evident, furthermore, that in order to recover damages by remedy at law it would be necessary to resort to a multiplicity of suits. The plaintiff might bring suit monthly to recover damages for loss of profits for the preceding month, or he might resort to annual suits. He could not recover in any one suit for all of the damages, because it would be impossible to ascertain or to show what the damages would amount to in any one suit, for reasons which are clearly obvious. He could not wait until the entire dump should have become exhausted, because it might be that by that time a substantial part of his claim might be barred by the statute of limitations. Furthermore, no plaintiff is required to wait after a breach of contract has occurred, and unless one action can be brought in which adequate relief could be obtained equity will always take jurisdiction. Bank of Kentucky v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180; 16 Cyc. 60, 63.

Many authorities upon this general proposition might be cited; but the court is satisfied, as argued by counsel for plaintiff, that this question was settled by this court, Judge Archbald presiding, in the initial stage of the case upon demurrer. In his opinion he said:

"As to the further ground of demurrer, that the plaintiff has a complete remedy at law by action for damages, it is sufficient to say that the bill seeks the specific performance of the defendant's agreement, to deliver coal from

their washery at the Holden Culm Dump, which they undertook to do in return for the money advanced by the plaintiff to make the necessary developments. For this it is evident that damages for a breach of the contract would not be at all adequate. Nor is this disturbed because the plaintiff, in the same connection, asks damages for the coal so far diverted, and calls for a discovery of the amount as the basis for determining them. Equity, having taken jurisdiction, will dispose, if possible, of the whole of the controversy, and the plaintiff is entitled to be made good for the commissions which he has lost as a part of it."

Moreover, it is now, in any event, too late to take objection to the jurisdiction of the court. As stated by Justice Brewer in Brown v. Lake Superior Iron Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021), adopting the language in earlier cases:

"* * * If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it; and in a note (in 1 Dan. Ch. Prac. [4th Am. Ed.] p. 550) many cases are cited to establish that, 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff had a plain and adequate remedy at law. This objection should be taken at the earliest opportunity.'"

Attention is also called to the language of the same learned justice in Hollins v. Brierfield Coal & Coke Co., 160 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113.

Regarding the remedy provided for in the contract, it is sufficient to note that, while it might afford redress for the failure to repay the plaintiff's loan, it gives none for the loss of his commissions. Furthermore, this court, having obtained jurisdiction, will retain such for the purpose of administering complete relief and doing justice with respect to the subject-matter.

It is therefore adjudged and decreed:

First. That the defendant be ordered and directed to specifically perform its contract with the plaintiff by delivering to the plaintiff from the date of this decree the output of its washery.

Second. That the defendant be enjoined by perpetual injunction from delivering any of the output of the washery and the Holden Dump to any one other than the plaintiff.

Third. That the defendant be and it is hereby required to account to the plaintiff for all moneys advanced by the plaintiff to it under the contract, which has not already been repaid, together with interest thereon, and that the defendant be required to account to the plaintiff for all damages sustained by the plaintiff by reason of the defendant's breach of contract.

Fourth. That J. Fred Schaffer, Esq., be appointed a special examiner to state an account between the parties and report the same to the court.[19]

[19] The modern rule as to the right of specific performance in installment contracts is stated by Lord Atkinson in Dominion Coal Co., Limited, v. Dominion Iron & Steel Co., Limited, and National Trust Co., Limited, [1909] A. C. 293, 299, 311. In this case there was contract for the delivery of coal to be used in the manufacture of steel. The deliveries were to be by install-

## CLARK v. ROSARIO MIN. & MILL. CO.

(Circuit Court of Appeals of the United States, Ninth Circuit, 1910. 176 Fed. 180, 99 C. C. A. 534.)

Appeal from the Circuit Court of the United States for the Northern District of California.

Suit in equity by the Rosario Mining & Milling Company against C. W. Clark and others. Decree for complainant, and defendant Clark appeals.

Before GILBERT and Ross, Circuit Judges, and DE HAVEN, District Judge.

Ross, Circuit Judge.[20] * * * The effect of the contract was to require the appellant and his associates to do very extensive development work upon the property at their own expense for one year (save the right to apply 80 per cent. of the gross bullion output to expenses during the first 90 days); to operate the reduction works to their full capacity for one year, and pay the appellee 20 per cent. of the gross output during the first 90 days, regardless of the expense of getting it out, and all of the profits thereafter; to keep open their offer to buy the property for $400,000 at any time within the year, even though the development work should prove the mine valueless, with the consequent liability in the sum of $100,000 in the event of their failure to comply with the terms of the offer, should it be accepted; and with the reserved right on the part of the appellee to sell the property to any other party at any price it might fix, in the event the development work performed by the appellant and his associates should prove the mine to be of great value, with the condition that, in the event such sale to a third party should equal or exceed $650,000, the appellee would pay $50,000 thereof to the appellant and his associates, or any less excess over $600,000, with the preferred right already mentioned to the appellant and his associates to become the purchaser at the price of $600,000. The only real obligation the contract seems to have imposed upon the appellee was to pay for the stores and supplies the appellant and his associates might have on hand in the event it should resume possession of the property, which it reserved the right to take at any time after 90

ments over a period of ninety-nine years. The counsel for the respondents contended that they were entitled to a decree for specific performance, on the ground that damages were an inadequate remedy; urging that the contract was of an exceptional character, that the length of time over which the contemplated obligations extended, and the consequent impossibility of ascertaining the damages in anticipation of the probable conditions of the market in a distant future—that is, of ascertaining the present values of future obligations, even the proximity of the appellant's coal fields to the respondents' works—pointed to specific performance rather than damages as the proper remedy in this case. In reply to this contention, Lord Atkinson, delivering the judgment for the Privy Council, said: "According to their Lordships' view, this is not a contract of which, on the authorities cited, specific performance would be decreed by a Court of Equity."

[20] The statement of facts and parts of the opinion are omitted.

days (thereby depriving the appellant and his associates of the right to further explore it), and to sell the property to the appellant and his associates at the end of the year for $600,000, provided it had not already sold or contracted it to somebody else.

It is difficult to conceive of a much more one-sided contract. It is one that we do not think any court of equity should decree the specific performance of. "To stay the arm of a court of equity from enforcing a contract," said the Supreme Court in Pope Manufacturing Co. v. Gormully, 144 U. S. 224, 236, 12 Sup. Ct. 632, 637, 36 L. Ed. 414, "it is by no means necessary to prove that it is invalid. From time immemorial it has been the recognized duty of such courts to exercise a discretion, to refuse their aid in the enforcement of unconscionable, oppressive, or iniquitous contracts, and to turn the party claiming the benefit of such contract over to a court of law." * * *

The judgment is reversed, and the case remanded, with directions to the court below to dismiss the suit, at the complainant's cost.

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## J. B. BROWN & SONS v. BOSTON & M. R. R.

**(Supreme Judicial Court of Maine, 1909. 106 Me. 248, 76 Atl. 692.)**

WHITEHOUSE, J.[21] This is a bill in equity brought by the plaintiff corporation to compel the specific performance of an undertaking on the part of the defendant, created by a reservation in a deed of land, to construct and maintain an overhead street crossing suitable for foot passengers and teams. The case was reported for the determination of the law court upon bill, answer, and replication, and so much of the evidence reported as is legally admissible. * * *

There is a rule respecting this remedy, uniformly recognized by courts of equity, that is also applicable to the facts in the case at bar. It has not been overlooked that by the terms of the reservation the overhead street crossing was not only to be constructed but "always" maintained by the defendant. In Beach, Mod. Eq. Jr. § 576, the author says:

**"The court will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once. It will not direct the performance of a continuous duty extending over a number of years."**

This question appears to have been carefully examined in Ross v. Union Pacific Ry. Co., Woolw. 26, Fed. Cas. No. 12,080, in which the authorities prior to that time are fully considered, and it was there decided that the court could not enter upon the duty of compelling one party to build a railroad and the other party to pay for it according to contract. This case was cited with approval in Texas Ry. v. Marshall, 136 U. S. 406, 10 Sup. Ct. 849 (34 L. Ed. 385), in which latter case it is said in the opinion:

[21] Part of the opinion is omitted.

"If the court has rendered a decree restoring all the offices and machinery and appurtenances of the road which have been removed from Marshall to other places, it must necessarily superintend the execution of this decree. It must be making constant inquiry as to whether every one of the subjects of the contract which have been removed has been restored. It must consider whether this has been done perfectly in good faith, or only in an evasive manner. It must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes, in this way, an endless duty, inappropriate to the functions of the court, which is as ill calculated to do this as it is to supervise and enforce a contract for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions, and not within its powers of specific performance."

See, also, Blackett v. Bates, 1 Chancery App. Cases, 117; Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co., 9 Law Rep. Chancery Appeal Cases, 334.

In the case at bar it is manifest that performance of the contract according to the terms of the reservation would not be beneficial to the plaintiff, but would prove imperfect and nugatory; that it would impose an unnecessary expense and burden upon the defendant; that, since the bridge must be maintained forever, no decree could be made which could be wholly performed at once, but must be for the performance by the defendant of the perpetual duty of maintaining the bridge, and necessarily involve the frequent interposition of the court to consider the new conditions that might arise during the progress of time.

It is therefore the opinion of the court that a decree of specific performance would be inequitable and ought not to be granted, and that the certificate must accordingly be:

Bill dismissed, with costs.

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## TEXAS CO. v. CENTRAL FUEL OIL CO. et al.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1912. 194 Fed. 1, 114 C. C. A. 21.) [22]

TRIEBER, District Judge. * * * It is next contended that the contract in respect to which relief is sought extends over a period of 10 years, necessitating supervision for a long time in a manner which a court of equity will not undertake. * * *

The contract sought to be enforced in this case runs for 10 years only, and involves no "skill, personal labor, and cultivated judgment." What it does require is easily ascertainable, and, if carried out in good faith, ought not to give rise to any disputes requiring the interposition of the court. During the time it was complied with by appellee no disputes arose, and there is no reason for anticipating any now if good faith will control the actions of both parties. That some differences may occur is true, but they are not likely to be of a nature requiring much consideration. No one will question for a moment

[22] An abridged statement of the facts of this case and parts of the opinion here omitted are printed at page 166, supra.

the duty of a court of equity specifically to enforce a lease of ground for a term of ten years or even a term of 99 years because the lessee is bound by certain covenants such as paying rents, taxes, and assessments, keeping the buildings in repair or erecting buildings according to certain specifications, keeping the buildings insured and other conditions usually inserted in such contracts of lease, and which may give rise to as many or more disputes than the contract in the case at bar. * * *

Defendants contracted for all the oil, not exceeding 540,000 barrels for any one month of 30 days. It had the pipe lines to carry that amount, and there was no question of any incoming freight.

In Edelen v. Samuels & Co. [126 Ky. 295, 103 S. W. 360, 31 Ky. Law Rep. 731] the contract was of such a nature that, if specifically enforced, it would require the court's constant attention for a period of at least five years. As stated by the court:

"In order to make the whisky contemplated by the terms of the instrument before us, the court will be forced to purchase a large quantity of grain and other material necessary to the distillation of the spirits to be delivered; also to erect a bottling works, and be prepared to bottle the whisky after it is made."

There are no such facts in this case. * * *

Many other cases are cited by the learned counsel for appellees to this point. All of them have been carefully examined, and are as distinguishable upon the facts as those above cited. Some of them apply to construction contracts requiring skill and judgment. In others the parties can be compensated in an action at law; while some, sustaining appellee's contention to some extent rely upon cases determined long ago, overlooking the fact that equitable remedies have steadily been expanded by the court to meet the increased complexities of modern business relations. The leading cases in the national courts sustaining the right of having specific performance decreed in cases of this nature, although it may necessarily result in the court retaining the cause to settle questions which may arise under the contract thereafter, are Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, affirming the decision of Judge, afterwards Mr Justice Brewer, in Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.) 29 Fed. 546; Union Pacific Railway Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265, affirming the decision of the Circuit Court of Appeals for this Circuit in 51 Fed. 309, 2 C. C. A. 174, which had affirmed Mr. Justice Brewer's decision in Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co. (C. C.) 47 Fed. 15.

In the Joy Case Mr. Justice Blatchford, who delivered the unanimous opinion of the court, in reply to a contention similar to that of the instant case, said:

"In the present case it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash Company for the running of its trains upon its tracks by the Colorado Company. But this is no more than a court of equity is called upon to

do whenever it takes charge of the running of a railroad by means of a receiver. Irrespective of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances."

In Union Pacific Railway Co. v. Chicago, etc., Ry. Co., where the contract sought to be enforced was for 999 years, Mr. Chief Justice Fuller, speaking for the court sustaining a decree for specific performance, said:

"But it is objected that equity will not decree specific performance of a contract requiring continuous action involving skill, judgment, and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies this attitude. We do not think so. The decree is complete in itself, is self-operating, and self-executing; and the provision for referees in certain contingencies is a mere matter of detail, and not of the essence of the contract. It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies, 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrong are constantly committed.' Pomeroy, Eq. Jur. § 111."

Judge Brewer, in his opinion in the Circuit Court in Central Trust Company v. Wabash, etc., R. R. Co., said on that subject:

"It is true that such a decree cannot be executed by the performance of a single act. It is continuous in its operation. It requires the constant exercise of judgment and skill by the officers of the corporation defendant; and therefore, in a qualified sense, it may be true that the case never is ended, but remains a permanent case in the court, performance of whose decree may be the subject of repeated inquiry by proceedings in the nature of contempt. It is also true that in the changing conditions of business the details of the use may require change. The time may come when the respondents' business may demand the entire use of its tracks and the intervener's rights wholly cease. But other decrees are subject to modification and change, as in decrees for alimony. The courts are not infrequently called upon to modify them by reason of the changed condition of the parties thereto. So, when a decree passes in a case of this kind, it remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill and judgment of the officers of the respondent corporation, the contract, in terms, provides that the regulations of the running of trains shall be subject to the control of the officers of the respondent. While I concede that there is force in the objection that this must remain, in a qualified sense, a continuing case in the courts, with a constant duty of supervising the acts of the respondent, yet it seems to me that, where there is a right, there must be a remedy, and that the mere machinery of court procedure is flexible enough to adapt itself to the necessity of protecting a right. Clearly a mere action for damages would be a grossly inadequate remedy." 29 Fed. 558.

In the Rock Island Case the same learned justice said:

"I know to one who is only familiar with the narrow limits and the strict lines within and along which courts of law proceed the act of a court of equity in taking possession of a contract running for 999 years, and decreeing its specific performance through all those years seems a strange exercise of power; but I believe most thoroughly that the powers of a court of equity are

as vast and its process and procedure as elastic as all the changing emergencies of increasingly complex business relations and the protection of rights can demand." 47 Fed. 26.

While it is true, as contended by counsel for appellees, that these cases relate to contracts between railroads and therefore might have been sustained upon the ground of the interests of the public, there are other cases in no wise affected by public exigency, especially where violations of the decree could only occur infrequently and each violation would be a single complete act. Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776; Hackett v. Hackett, 67 N. H. 424, 40 Atl. 434; Chubb v. Peckham, 13 N. J. Eq. 207; Livesley v. Johnston, 45 Or. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647; St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967.

Prof. Pomeroy, the editor of the last edition of Pomeroy's Equity Jurisprudence, in his article on the subject of specific performance, published in the Encyclopedia of Law & Procedure, after discussing this subject and referring to the authorities, says:

"But in a remarkable series of cases, beginning with the year 1890, contracts involving the operation of railroads, often of the utmost complexity and extending over a long term of years, or perpetual, have been enforced specifically. In the leading case of the series a controlling reason for the decision was that the interests of the general public would have been injuriously affected by a failure to make the decree; but this reason appears to have dropped out of sight in the cases following this precedent"—citing numerous cases sustaining this last proposition. 36 Cyc. 587.

As counsel for appellees, neither in their exhaustive brief nor extended oral argument, contended that the contract is unenforceable in a court of equity upon the ground that the court cannot efficiently compel appellant to perform its obligations under the contract, this claim must be treated as abandoned, and therefore will be disregarded.[23] * * *

[23] In Marble Co. v. Ripley (1870) 10 Wall. 339, 358, 19 L. Ed. 955, the Supreme Court refused specific performance of a contract to furnish marble on the ground that it involved the doing of continuing acts; Mr. Justice Strong, speaking for the court, saying: "Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it required of the owners of the quarries. These duties are continuous. They involve skill, personal labor, and cultivated judgment. It is, in effect, a personal contract to deliver marble of certain kinds, and in blocks of a kind, that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size, or shape, or proportion. Meanwhile the parties may be constantly changing. The marble company are liable so long as they hold the land, and Ripley's rights exist only while he holds the mill. It is manifest that the court cannot superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder. Many of the dif-

The decree of the court below is reversed, with instructions to grant a temporary injunction, and proceed in conformity with this opinion.

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## LONE STAR SALT CO. v. TEXAS SHORT LINE RY. CO.

(Court of Civil Appeals of Texas, 1905. 86 S. W. 355.)

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by the Texas Short Line Railway Company against the Lone Star Salt Company. From a judgment for plaintiff, defendant appeals.

BOOKHOUT, J.[24] The appellee instituted this suit December 11, 1902, for the purpose of compelling specific performance of a contract alleged to exist between it and appellant, in words and figures as follows:

"Whereas, on January 18th, 1901, the Board of Directors of this Company adopted a resolution authorizing the President and Secretary to enter into a contract with Henry M. Strong, of Battle Creek, Michigan, in form and substance as set forth in said resolution, which appears in full in the minutes of the said meeting of January 18th, 1904. * * *

"The indenture made and entered into by and between the Lone Star Salt Company, a corporation under the laws of Texas, of the first part, and Henry M. Strong, of Battle Creek, Michigan, of the second part, on this the 15th day of February, 1901, witnesseth:

"That, whereas, the first party has built and now in operation a plant of works of a permanent character for the manufacture of salt of great value, located at the town of Grand Saline, in Van Zandt County, Texas; which produces annually a large quantity of salt, which has to be moved to market by rail, and is in direct competition with other salt produced at works enjoying the benefit of several railways at point of origin, and

"Whereas, there now exists only one line of railway at Grand Saline, which is detrimental to the interest of the said first party, and embarrasses it in its competition aforesaid in many ways, and

"Whereas, said second party for himself and associates, and the corporation to be by them formed, contemplates building another line of railway into Grand Saline, which will afford to the first party an additional outlet by rail for its product, provided said second party can be assured for a definite time of sufficient revenue to warrant the construction of said contemplated line.

"Therefore, the said first party hereby agrees with the said second party, and hereby covenants and [binds] itself, to furnish to said second party or its assigns, for transportation, for the full term of twenty years, sixty-six per cent. of all the tonnage moved by rail incident to the operation of its said works at Grand Saline, together with any renewals or extensions thereof, said term to begin to run from the date when the line of railway of said second party or his assigns shall be open for traffic to a point of intersection with some line of existing railway other than the Texas & Pacific Railway.

"In consideration whereof said second party hereby agrees with said first party, and hereby covenants and binds himself and his assigns, to construct a line of railway into said town of Grand Saline, which shall extend thence

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ficulties in the way of decreeing specific performance of a contract, requiring, as this does, continuous personal action, and running through an indefinite period of time, are well stated in Port Clinton Railroad Company v. Cleveland & Toledo Railroad Company, 13 Ohio St. 544."

[24] Parts of the opinion are omitted.

to a point of intersection with some line of railway now existing, other than the Texas & Pacific Railway, which line so to be constructed shall be open for traffic to such point of intersection within twenty-four months from date hereof, which limitation of time is hereby declared to be of the essence of this contract.

"And to receive promptly and promptly forward all freight tendered to it by said first party, and in respect to said freight to fully discharge all of its duties as a common carrier of freight, and to make to said first party on freight, or any part thereof, the lowest rate made, quoted or given by any common carrier or common carriers between the same points, on such freight, so that said Lone Star Salt Company, first party, shall never be compelled to pay more freight to the second party or his assigns for any service, than it would have to pay for the same service to any other carrier or carriers.

"It is further agreed between the parties hereto that inasmuch as the damages for a breach of this contract by the first party would be impossible of satisfactory estimation under the rules of law, the same are hereby liquidated at the sum of six thousand dollars ($6,000) per annum, and the said first party hereby agrees to pay to the second party or his assigns the sum of six thousand dollars ($6,000.00) liquidated damages, for each year during said contract period in which said first party shall fail to tender to second party or his assigns for transportation sixty-six per cent. of its tonnage into and out of Grand Saline, which damages shall be payable annually as they accrue.

"It is further mutually agreed that this contract shall terminate without notice whenever the Texas & Pacific Railway and the proposed railroad shall cease to compete for business.

"In witness whereof the parties hereto have signed these presents in duplicate on the day first written and the first party has attached hereto its corporate seal.

"[Seal.]

F. R. Blount, President,
"D. C. Earnest, Secretary,
"Henry M. Strong,
"Party of Second Part."

A trial on January 28, 1904, resulted in a judgment:

"That the said contract be specifically enforced against the defendant, and the defendant, its agents, officers, and employés, are hereby enjoined and required, so long as the Texas & Pacific Railway Company and the plaintiff shall compete for business, but not after the 8th day of September, A. D. 1921, to furnish to the plaintiff for transportation, as it accrues, sixty-six per cent. of all outgoing tonnage moved by rail, incident to the operation of defendant's works at Grand Saline, Texas, together with any renewals or extensions thereof, and also to furnish to the plaintiff for transportation, as it accrues, in addition to said sixty-six per cent., such amount of outgoing tonnage moved by rail, incident to the operation of defendant's works at Grand Saline, Texas, together with any renewals or extensions thereof, as will equal sixty-six per cent. of all the incoming tonnage moved by rail, incident to the operation of defendant's works at Grand Saline, Texas, together with any renewals or extensions thereof; provided, such additional outgoing tonnage, when added to the incoming tonnage incident to the operation of defendant's works at Grand Saline, Texas, together with any renewals or extensions which defendant may furnish to plaintiff for transportation, if any, shall not exceed sixty-six per cent. of the incoming tonnage aforesaid."

Defendant duly perfected an appeal. * * *

Again, it is insisted that a contract will not be specifically enforced unless the remedy is mutual; that is, the court will not compel the defendant to perform unless it can at the same time compel plaintiff to perform the contract. It is asserted that mutuality is lacking in the contract sued on, for two reasons: (1) That the contract is terminable at the option of plaintiff; and (2) the duties required of plaintiff by the contract necessitate the maintenance and operation of its railway for

20 years, and this the court will not undertake to compel. We have held that the contract does not authorize the plaintiff to terminate the same at its option. The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner, but not necessarily enforceable on both sides by its specific performance. Eckstein v. Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404; Railway Co. v. Walworth, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683; Jennings v. McComb, 112 Pa. 518, 4 Atl. 812; Grove v. Hodges, 55 Pa. 504.

Again, appellee's road has been constructed, and the contract to that extent has been fully performed by the appellee, and it would be inequitable, under the facts, to refuse a specific performance in its behalf. University v. Polk Co., 87 Iowa, 36, 53 N. W. 1080; Yerkes v. Richards, 153 Pa. 646, 26 Atl. 221, 34 Am. St. Rep. 721; Whitney v. Hay, 181 U. S. 77, 21 Sup. Ct. 537, 45 L. Ed. 758; Johnson v. Hubbell, 10 N. J. Eq. 332, 64 Am. Dec. 773; Fry's Specific Performance, § 445; 3 Pomeroy's Eq. Juris. p. 2163; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; Burdine v. Burdine, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741; Brown v. Sutton, 129 U. S. 238, 9 Sup. Ct. 273, 32 L. Ed. 664; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; French v. Boston Nat. Bank, 179 Mass. 404, 60 N. E. 793.

It is contended that specific performance of the contract sued on cannot be accomplished by a single decree, capable of execution at once, but will involve the continuous performance of manifold duties upon the part of both parties for a period of 20 years; that the constant supervision of the court for such period would be required, and its powers unduly taxed. The evidence shows that, under its present conditions, plaintiff's road could not be successfully operated on the freight that is tributary to it if the freight that it would get under the contract sued on is excluded. It would not even pay operating expenses. There is no prospect of the conditions becoming better. The fact that the contract has some time to run, and the acts required to be done by the decree may continue as much as 20 years, when the acts to be done are of a purely ministerial nature, and do not require the exercise of personal taste, judgment, or discretion, furnishes no sufficient excuse for not enforcing specific performance. Such is the doctrine announced by the later decisions. Joy v. St. Louis, 138 U. S. 47, 11 Sup. Ct. 243, 34 L. Ed. 843. * * *

Nor is the language of the contract so general and uncertain that it cannot be definitely determined therefrom what it binds appellant to do. It is reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. Such being the case it is not subject to the objection of uncertainty. Bay City Irrigation Co. v. Sweeney (Tex. Civ. App.) 81 S. W. 546. * * *

The court construed the contract as entitling the appellee to receive 66 per cent. of the outgoing tonnage and 66 per cent. of the incoming tonnage of the appellant. The contract, in that part relating to the tonnage to which the plaintiff was entitled, reads:

"Sixty-six per cent. of all the tonnage moved by rail incident to the operation of its said works at Grand Saline together with any renewals or extensions thereof."

In a subsequent part of the contract it is spoken of as "sixty-six per cent. of its tonnage into and out of Grand Saline." It seems clear that the contract contemplates both the incoming and outgoing tonnage incident to the operation of appellant's works at Grand Saline, and the decree is correct in so interpreting the contract.

The remaining assignments of error have been carefully considered by the court, and because, in our opinion, no reversible error is pointed out by any of them, they are overruled.

Finding no reversible error in the record, the judgment is affirmed.[25]

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## WESTERN WAGON & PROPERTY CO. v. WEST.

(Chancery Division. [1892] 1 Ch. Div. 271.)

Action by the Western Wagon & Property Company, Limited, to recover from the defendants personally the sum of £500 alleged to have been improperly paid by them to one Jonathan Dumbleton Pinfold.

* * *

CHITTY, J.[26] Now, upon the facts, the case stands thus: the plaintiffs are the assignees for value of the benefit of a contract to make a loan of money at interest upon security. Having given notice of their assignment, they claim to recover from the defendants the £500 which the defendants lent and paid to Pinfold under the contract. They are not assigns of the entire contract, but they are assigns of the benefit without the burden; they claim to be entitled to receive and keep the £500, without being liable to repay. However, I pass this point by as not being material to my judgment, which is founded on the following

[25] "As another reason why this contract will not be enforced specifically, it is alleged that it calls for continuing contributions of money and property, and exercise of judgment and skill, and no decree that could be entered by the court would be final. This contention is much insisted upon, and requires careful consideration. A prayer for a specific performance always appeals largely to the discretion of the court whose jurisdiction is invoked. In the exercise of this discretion, courts have, it is true, in many cases declined to enforce a contract, whose provisions are multifarious, and whose obligations are continuing, so that a final decree cannot be made, which will end the matter, but will require constant supervision and supplemental proceedings to enforce the performance of constantly recurring duties. Each case, however, must depend upon its own circumstances." Gray, J., in Western Union Telegraph Co. v. Pennsylvania Co. (1904) 129 Fed. 849.

[26] The statement of facts is abridged and part of the opinion is omitted.

reasons: A Court of Equity will not decree specific performance of a contract to make or take a loan of money, whether the loan is to be on security or not. This was decided by Sir John Romilly in Rogers v. Challis, 27 Beav. 175, and Sichel v. Mosenthal, 30 Beav. 371, and these decisions were approved of by the Privy Council in Larios v. Bonany y Gurety, Law Rep. 5 P. C. 346. In other words, a Court of Equity will not compel the intended lender to make, or the intended borrower to take, the loan, but will leave the parties to such a contract to their remedies by action at common law for damages. It follows, then, that Pinfold could not have maintained a suit in equity against the defendants to compel them to lend the £500, and that, inasmuch as the plaintiffs, as assigns of Pinfold, are in no better position than Pinfold himself, the plaintiffs can not maintain such a suit. * * *

The action is dismissed with costs.

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## ASHTON v. CORRIGAN.

**(In Chancery, 1871. L. R. 13 Eq. Cas. 76.)**

This bill was filed for the purpose of compelling the defendant to execute a mortgage to the plaintiff of certain leasehold premises pursuant to an agreement dated the 20th of August, 1870, by which the defendant, in consideration of a sum of money then due from him to the plaintiff, charged certain long leasehold premises with the repayment of that sum and interest, and agreed that he (the defendant), his executors, administrators, or assigns, would at any time thereafter, at the request of the plaintiff, his executors, administrators, or assigns, at his own cost, execute to him or them a mortgage of the premises in the usual form, containing an absolute power of sale, and all the usual trusts, powers, and covenants, subject to all prior charges. The defendant was called upon to execute a mortgage, but he failed to keep an appointment for that purpose, and he had returned no answer to the communications which had been addressed to him on the subject.

Mr. Cadman Jones, for the plaintiff, asked for a decree, and referred to Jones v. Greatwood and Fraser v. Thomas, referred to in Seton on Decrees (3d Ed.) 448, 443.

An appearance had been entered for the defendant, but no one appeared for him in court.

Sir JOHN WICKENS, V. C. I doubt whether a contract to execute a mortgage, which the mortgagee may enforce by a sale the day after its execution, is one which the court will specifically perform; and I know of no reported case in which such relief has been given where the right to it has been contested. However, on the authority of the cases cited from Seton on Decrees, I will make the decree.

## CITY OF LONDON v. NASH.

(In Chancery before Lord Hardwicke, 1747. 1 Ves. Sr. 12, 27 E. R. 859.)

The bill was brought to have a specific performance of an agreement in a lease of some old houses, made with G. Graves the original lessee of the premises, which were now vested in the defendant. The covenant was within three years to build brick messuages on the premises demised.

The defendant insisted, that he had satisfied the covenant by building in the plural number two houses, and only repairing the rest.

The first point was, as to the true intent and construction of the covenant in the lease? The second, whether it had been sufficiently performed?

LORD CHANCELLOR. As to the first it was plainly intended to let on a building lease, which is for 61 years at least; not on a repairing lease, which can only be for 21 years. The words or any part thereof were inserted in the covenant in the draft, but rejected in the lease itself very properly, which shews, that the meaning of the covenant was that all the messuages should be new-built: for an indefinite proposition is equal to an universal one; and the whole seems to mean a building lease. If therefore an action at law had been brought upon this covenant, and a breach assigned; and Graves had pleaded performance by building only two new messuages, that plea would not be allowed. But this court has power to go further and see what was the intent, supposing no lease had been executed: upon a bill for a specific performance the court would decree the whole to be built: the lease appears not to have been made in a proper manner; for Graves did not take it for his own benefit, but as trustee for the defendant, to whom it was assigned for 5s. consideration: and who was at the time one of the committee for letting the city lands; and his scheme plainly was to get a longer term upon repairing the houses only.

As to the second point, it has not been performed by Graves or the defendant; for though the houses have been largely repaired and new fronted &c., that is different from new building. The first defence made is, that the plaintiff should not come here for a specific performance, but be left to a court of law. But I am of opinion, that upon a covenant to rebuild, the landlord may come here for a specific performance; as the not building takes away his security: but upon a covenant to repair he may have damages at law. The most material objection for the defendant, and which has weight with me, is, that the court is not obliged to decree a specific performance, and will not, where it would be a hardship; as it would be here upon the defendant (supposing he meant an evasion) to oblige him, after having very largely repaired the houses, to pull them down and rebuild them; which would be to decree destruction, and would be a public loss, and no benefit to

the plaintiffs, who only want to be repaired in damages, which will be sufficient satisfaction to them.

Let the parties therefore proceed to a trial at law, to see what damages the plaintiffs have sustained. (Reg. Lib. 1746, B. Fol. 475.)

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## RAYNER v. STONE.

**(In Chancery before Lord Henley, 1762. 2 Eden, 128, 28 E. R. 845.)**

The bill in this case was for a specific performance of several contracts and agreements entered into by the defendant as contained in a lease, dated in the year 1746, and since determined; and also for an account, &c. * * *[27]

THE LORD CHANCELLOR. This bill is founded upon an equity so extremely refined that I cannot well comprehend it. If I should encourage such bills, it would introduce a practice most prejudicial to all landlords and tenants: especially to tenants, who, for the most part, are of mean and low circumstances. I am sure I shall never consider what are called common covenants in a lease as specific covenants, to be subject to the jurisdiction of this court. The covenants here are not at all of that specific nature. The argument which has been mentioned, that I have no officer to see the performance, is, to me, very strong. How can a Master judge of repairs in husbandry? What is a proper ditch or fence in one place may not be so in another. It is said, that this is an equitable right; and it is insisted that I should now put the plaintiff in a better state than what he can be at law: but the court has no jurisdiction to strip the defendant to try the supposed breach of covenant at law. Besides, how can a specific performance of things of this kind be decreed? The nature of the thing shews the absurdity of drawing these questions from their proper trial and jurisdiction. Therefore let the demurrer be allowed.

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## MAYOR, ALDERMEN, AND BURGESSES OF WOLVERHAMPTON v. EMMONS.

**(Court of Appeal. [1901] 1 K. B. 515.)**

Application by the defendant for judgment or a new trial in an action tried before Wills, J. and a jury.

The action was for specific performance of a contract by the defendant to erect buildings, or, in the alternative, for damages for breach of the contract.

The plaintiffs had obtained a provisional order, which was subsequently confirmed by Act of Parliament, authorizing them, as the sani-

[27] The statement of facts is abridged.

tary authority for the borough of Wolverhampton, to carry out an improvement scheme dealing with an insanitary area by the construction of new streets and the erection of better houses and buildings therein. For the purposes of this scheme they acquired (among others) the properties in a street in the borough called Canal Street, and proceeded to put them up for sale in lots. The defendant having become the purchaser of certain lots, by indenture dated July 31, 1897, the plaintiffs, in consideration of the sum of £1000, conveyed to the defendant in fee the plot of land fronting upon Canal Street, delineated in a plan drawn on the deed, and containing 1127 square yards or thereabouts, and the defendant thereby covenanted with the plaintiffs that he would pull down the existing buildings thereon, that he would not erect any building on the land until an elevation of the proposed building had been submitted by him to, and approved by the plaintiffs' public works committee, and that he would commence to erect upon the land within twelve calendar months from May 25, 1897, a new building, or new buildings, fronting to Canal Street, of a minimum height of thirty-five feet from the pavement to the eaves or parapet, and not more than the height regulated by the by-laws for the time being in force in the borough of Wolverhampton, up to the line of street shewn in the said plan, and would complete the same ready for occupation within two years from the date aforesaid. The defendant pulled down the existing buildings on the plot conveyed, but did not commence to erect buildings in pursuance of his covenant. After the lapse of rather more than a year, the town clerk on behalf of the plaintiffs wrote to the defendant, reminding him that he had not complied with the covenant; and a correspondence thereupon ensued between the town clerk on one side and the defendant and his solicitors on the other, in the course of which the town clerk threatened that legal proceedings would be taken on the covenant, and the defendant promised on several occasions to submit plans for buildings. The effect of the correspondence was held by Wills, J., and subsequently by the court of appeal, to be that, in consideration of the plaintiffs' giving further time to the defendant for the fulfillment of his obligation to erect buildings, the defendant agreed without delay to commence and proceed with the erection on the land of eight houses, in accordance with plans which were ultimately submitted by him to, and approved by the plaintiffs' public works committee. The court of appeal, as will be seen, were of opinion that these plans contained sufficiently definite details as to the elevation, form, materials and other particulars of the proposed houses for the purposes of an order for specific performance. The defendant failing to carry out this last-mentioned agreement, the plaintiffs brought their action against him as above mentioned. The learned judge at the trial directed the jury to assess the damages provisionally, in case he should ultimately be of opinion that the contract was not one of which specific performance should be ordered. The jury assessed the damages at £50. The

learned judge subsequently gave judgment for the plaintiffs, ordering specific performance.

ROMER, L. J.[28] I also am of opinion that the judgment of Wills, J., should be affirmed. The question, which is not free from difficulty, is whether, under the circumstances of this case, an order for specific performance should be made in favour of the plaintiffs. There is no doubt that as a general rule the court will not enforce specific performance of a building contract, but an exception from the rule has been recognised. It has, I think, for some time been held that, in order to bring himself within that exception, a plaintiff must establish three things. The first is that the building work, of which he seeks to enforce the performance, is defined by the contract; that is to say, that the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he can not adequately be compensated for breach of the contract by damages. The third is that the defendant has by the contract obtained possession of land on which the work is contracted to be done. * * *

I therefore find that all the three matters which I have mentioned as essential to the plaintiffs' title to specific performance exist in this case. No case has been cited, and I do not know of any, where, upon those three matters being shewn to the court to exist, a decree for specific performance has been refused. * * *

For these reasons I think that the appeal should be dismissed. Application dismissed.

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## OWENS v. CARTHAGE & W. RY. CO.

(Kansas City Court of Appeals, Missouri, 1905. 110 Mo. App. 320, 85 S. W. 987.)

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by David D. Owens against the Carthage & Western Railway Company. From a judgment for plaintiff, defendant appeals.

ELLISON, J.[29] The plaintiff is the owner of land over which defendant constructed its railway. Plaintiff conveyed the right of way to defendant by deed, the consideration expressed being $400 in money and the following clause:

"Said Carthage & Western Railway Company hereby agrees to construct cattle or wagon pass at place designated by the chief engineer on said premises."

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[28] Parts of the opinion of Romer, L. J., and the concurring opinions of Smith, M. R., and Collins, L. J., are omitted.

[29] Parts of the opinion are omitted.

Plaintiff alleges that he and defendant understood that the contract and agreement was that defendant would construct a crossing under the tracks of sufficient width and height to admit of the passage of cattle and loaded wagons—that is to say, not less than 12 feet wide and 10 feet high—at a point to be designated by the defendant's chief engineer. He further alleges that he and defendant by mutual mistake supposed the words in the deed above quoted meant what they each understood. Defendant having refused to comply with the agreement alleged, plaintiff brought this action to reform that portion of the deed referred to so as to correct the mistake of the parties, and to set out the contract as it was understood, and to require defendant to perform it. The trial court found the issues for the plaintiff, and directed that a passway be constructed under the railroad, sufficient for cattle and loaded wagons, which was found to be 12 feet wide and 10 feet high. * * *

In Mastin v. Halley, 61 Mo. 196, it was held that specific performance of a contract to build "a certain building," without more description, could not be decreed, as there was nothing upon which to base a direction as to what description of building was to be built. It was likewise said in that case that a court of equity will not direct specific performance of building contracts, because, "If one will not build, another may." That case finds no application to the facts of the one at bar. From what we have already said, it is apparent that there was sufficiency of description here to justify the court's decree in that respect.

As to the objection that courts of equity will not enter upon the enforcement of building contracts, it is manifest that this is not such case. When the complaining party wants a building contract performed, it is something which he may get any third party to do without the aid of a court of equity. But the contract in this case is something which defendant was to perform for plaintiff's benefit on its own premises (so to speak), and which this plaintiff, in the nature of the case, could not have any one other than defendant perform. It seems that defendant embodied in the deeds similar agreements with other landowners from whom it secured right of way. Plaintiff was permitted to show, against defendant's objection, that under such deeds defendant had constructed under passways of the nature he is now demanding. We regard the evidence as admissible as tending to show what the contract with plaintiff was understood by the defendant to be. * * *

After a full consideration of the points made against the judgment, we do not feel authorized to interfere with it, and it is accordingly affirmed. All concur.

## INDIANAPOLIS NORTHERN TRACTION CO. et al. v. ESSINGTON.

(Appellate Court of Indiana, Division No. 2, 1912. 54 Ind. App. 286, 99 N. E. 757.)

Suit by Mary E. Essington against the Indianapolis Northern Traction Company and others. From a decree for plaintiff, defendants appeal.

LAIRY, J.[80] Appellee filed this suit to compel specific performance of a covenant contained in a deed, by which she conveyed to the first-named appellant a strip of land constituting its right of way across her farm for an electric interurban railway. The house and other buildings on appellee's land were situated about 40 rods back from the highway, and were reached by a private lane extending over her lands. The right of way conveyed to appellants crosses the land of appellee about halfway between the buildings and the road, and at the point where it intersects the private lane there is a cut eight or ten feet in depth. The deed contained the following covenant, which constituted a part of the consideration for the conveyance:

"It is agreed between the parties to this conveyance that the grantee shall construct and maintain a suitable and proper overhead crossing 14 feet wide over grantee's railway track with proper approaches on either side, said crossing not to be less than 22 feet in the clear from the rail grade and to be located at a point where the present lane of grantor's land will be intersected by grantees' railroad grade."

The Indianapolis & Northern Traction Company took possession of such right of way under this deed, and an electric interurban railway was constructed thereon, and has been operated ever since by said appellant and its successors the other appellants, who according to the averments of the complaint assumed the obligations of the covenant contained in the deed by subsequent contracts. Appellants have provided a grade crossing on appellee's land about 320 feet north of the point where the lane intersects the right of way, but have failed and refused to construct the overhead crossing for which the deed provides. The trial court made a special finding of facts and announced conclusions of law thereon, and gave judgment in favor of appellee decreeing and ordering appellant to specifically perform the covenant in the deed by the construction of the overhead crossing. * * *

In most cases involving the breach of a contract for personal services or for the erection of buildings or other structures the remedy at law is adequate. If A. employs B. to erect a building or other structure at a fixed price, and B. refuses to perform his contract, A. may employ others to do the work and recover from B. the damages occasioned by his breach of contract. In such cases the award of damages is an adequate remedy; but in cases where the defendant has acquired land

[80] Parts of the opinion are omitted.

from the plaintiff and as a part of the consideration for the conveyance has agreed to erect a structure thereon for the benefit of plaintiff, and where the contract has been partly performed so that the defendant is enjoying the benefits of the same, a different rule applies. Wilson v. Furness R. Co., L. R. 9 Eq. 28, 33; Birchett v. Bolling, 19 Va. (5 Munf.) 442; Stuyvesant v. New York, 11 Paige (N. Y.) 414; Grubb v. Starkey, 90 Va. 831, 20 S. E. 784. In such a case the plaintiff has no right to enter upon the lands conveyed to the defendant and erect the structure, in the absence of a statute authorizing him so to do, and he is therefore without adequate remedy unless the court may compel the specific performance of the contract. In the absence of such a remedy, the defendant may retain and enjoy the land without yielding to the plaintiff the consideration upon which the conveyance was based. The general rule that a court of equity will not decree the specific performance of a building contract does not apply in such a case. Storer v. Great Western R. Co., 12 L. J. Ch. 65; Columbus v. Cleveland, etc., R. Co., 25 Ohio Cir. Ct. R. 663; Gregory v. Ingwersen, 32 N. J. Eq. 199.

There is no universal rule that courts of equity will not enforce a contract which requires some building to be done or some supervision to be exercised. In the case of Union Pacific R. Co. v. Chicago, etc., R. Co., 163 U. S. 569, 16 Sup. Ct. 1173, 41 L. Ed. 265, the Supreme Court of the United States enforced by a decree for specific performance a complicated contract made by one railway company to permit another to use its tracks. In Murray v. Northwestern R. Co., 64 S. C. 520, 42 S. E. 617, the court specifically enforced a contract on the part of a railway company to establish and maintain a passenger station. Storer v. Great Western R. Co., supra, was a case in which the court compelled the defendant to construct and forever maintain an archway and its approaches. The court said there was no difficulty in enforcing such a decree. In Wilson v. Furness, supra, the defendant was compelled to erect and maintain a wharf. The objection that the judgment in this case involves continuous acts and supervision of the court is well met by the reasoning in Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, where the court said:

"In the present case it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash Company for the running of trains upon its tracks by the Colorado Company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespectively of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree, and make it effective under altered circumstances."

To the same effect is the case of Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610, where a contract to run street cars for a series of years over a

track of another company to a depot was specifically enforced over the objection that it required the exercise of skill and judgment and a continuous series of acts. The contract which this complaint seeks to enforce falls clearly within the exception to the general rule. Cincinnati, etc., R. Co. v. Wall, 48 Ind. App. 605, 96 N. E. 389; Pomeroy, Equity Jurisprudence (3d Ed.) § 1402, and notes. * * *

The decree of the lower court is clearly right upon the merits, and, as no error is shown affecting the substantial rights of appellee, it should be in all things affirmed.

Judgment affirmed.

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## In re CARY-ELWES' CONTRACT.

**(Chancery Division. [1906] 2 Ch. Div. 143.)**

May 3. SWINFEN EADY, J.[31] It is well settled that in cases of compulsory purchase, after notice to treat and ascertainment of the price, a contract is established, enforceable in a court of equity, and with regard to which both vendor and purchaser can enforce specific performance: Adams v. London and Blackwall Ry. Co., 2 Mac. & G. 118; Regent's Canal Co. v. Ware, 23 Beav. 575. Following these decisions, it was held by Jessel M. R. in In re Pigott and Great Western Ry. Co., 18 Ch. D. 146, that as specific performance of the contract, as a contract of purchase and sale, or sale and purchase, may be enforced, all the ordinary rules apply, unless you find some statutory enactment in the way. In that case Jessel M. R. applied the rule, stated in Dart's Vendors and Purchasers, 5th Ed. pp. 629–30, 7th Ed. p. 653, that where the vendor has shewn his title the purchaser pays interest from the time at which he might prudently have taken possession, supposing it to have been offered him, that is, the time when a good title was shewn. That is the ordinary rule.

The reason why equity interfered to enforce a statutory contract, after notice to treat and ascertainment of the price, is stated by Wood V. C. in Mason v. Stokes Bay Pier and Ry. Co., 32 L. J. Ch. 110. It was because a court of law would be unable to do complete justice between the parties, having no machinery either for investigating the title or settling the conveyance. In that case, which was a suit to compel specific performance of a compulsory purchase of freeholds, he made a decree against the company, and said that Romilly M. R. had put the matter on the right grounds in Regent's Canal Co. v. Ware, 23 Beav. 575; that after notice given and the price fixed, the relation of the parties as vendor and purchaser was as fully constituted as in the case of a formal and regular agreement. And in a subsequent case of Harding v. Metropolitan Ry. Co., L. R. 7 Ch. 154, the same learned judge, when Lord Chancellor, overruled Lord Rom-

[31] The statement of facts and part of the opinion are omitted.

illy M. R. and compelled the railway company, against their will, to take an assignment of leasehold premises which they had purchased compulsorily and had already paid for.

The principle is fully established that when land is purchased compulsorily, after the price has been ascertained, the purchaser is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a Court of Equity to complete the purchase. It is an implied term of every contract for the sale of real property, if not expressed, that the contract shall be followed by a deed of conveyance conveying the property to a purchaser, and this may be enforced by a suit for specific performance. * * *

In my judgment the respondents are bound, as in the case of an ordinary purchase, to take a conveyance, and there must be an order in the terms of the summons—the conveyance in case of disagreement to be settled under the direction of the court. The respondents must pay the costs of the application.

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## JOYNER et al. v. CRISP.

(Supreme Court of North Carolina, 1912. 158 N. C. 199, 73 S. E. 1004.)

Appeal from Superior Court, Pitt County; Whedbee, Judge.

Action by A. L. Joyner and another against S. M. Crisp. Judgment for plaintiffs, and defendant appeals.

The action was brought by the plaintiffs to have set aside and canceled upon the ground of fraud a certain paper writing, or contract, in reference to the selling of land entered into on the 15th day of September, 1910, between Alice Lee Joyner and her husband, Andrew Joyner, and S. M. Crisp.[32] * * *

BROWN, J. In the view we take of this case, it is unnecessary to consider the first exception of the defendant in respect to the refusal of the court to make one O. L. Joyner and others parties to the action. If the contract is one which a court of equity will not require to be specifically performed, then a defect of parties is of no material matter.

His honor ruled that the contract is one upon its face with which the plaintiffs cannot comply, and therefore a court of equity will not attempt to enforce it, and consequently in respect to a decree compelling partial performance, as asked by the defendant, his honor was of opinion that the contract was intended as an entirety, and must stand or fall as such, and that the court will not under the circumstances compel partial performance of the contract, and require abatement of the price.

The facts are, as appears by the pleadings: That the property in question, known as the "Peebles Place," belonged to the feme plaintiff

[32] The statement of facts is abridged.

for her life, and after her death to her children, some of whom are minors. At the time the contract referred to was entered into between the plaintiffs and the defendant, the defendant admits he knew the status of the title, and there is nothing in the pleadings themselves which indicate, or even allege, that any imposition was practiced upon the defendant, or that he entered into this contract except with his eyes open. The contract upon its face indicates plainly that it does not lie within the power of the plaintiffs of their own will to comply with it. It appears upon its face that the plaintiffs own practically nothing but a life estate, and that the only method to carry out the contract was by appealing to the judicial tribunal to decree a sale of the infants' estate. The following excerpts from the contract are plainly indicative that resort to a judicial tribunal was absolutely essential to its performance, viz.:

"This option is to remain in force for ninety days, or until such time as the parties of the first part can obtain by special proceedings in the superior court of Pitt county a judicial decree confirming to the party of the second part a fee-simple title."

Again:

"Upon the performance of the above stipulations by the party of the second part, the parties of the first part will agree to execute in their own proper persons and by the decree of the superior court a deed in fee simple," etc.

The plaintiffs in this case had no power to enter into a contract to sell their children's land, and a mere promise to resort to a court for the purpose of decreeing a sale of it cannot possibly be enforced, for it is beyond the power of the plaintiffs to predicate what the judgment of the court may be. Upon this principle it is held that a party cannot recover upon a contract wherein a guardian who owned certain interest in land of which his ward was part owner agreed to institute and to carry through court proceedings necessary to the consummation of a sale or exchange of such property. Zander v. Feely, 47 Ill. App. 660; Le Roy v. Jacobosky, 136 N. C. 444, 48 S. E. 796, 67 L. R. A. 977. There have been cases where guardians have entered into such contracts, and, upon failure to perform them, have been held liable in damages personally. Mason v. Wait, 4 Scam. (Ill.) 127, and Mason v. Caldwell, 5 Gilman (Ill.) 196, 48 Am. Dec. 330. But we find no instance where such contract has been specifically performed by decree of court, unless it was to the ward's interest.

In regard to the contention that the defendant is entitled to the partial performance and conveyance of the life estate, and damages in the way of abatement of the price, it may be said that we recognize the general rule that, where the vendor has not substantially the whole interest he has contracted to sell, yet the purchaser can insist on having all that the vendor can convey with compensation for the difference. But in this case it is apparent on the face of the contract that it was to be performed as a whole, stand or fall as an entirety, and therefore it cannot be specifically enforced as to part.

It is admitted by the defendant in his answer that he knew that the land in fee belonged to the plaintiffs' children. It seems to be well settled that the rule that when a person makes a contract for the sale of real estate, in which he has only limited interest, he may be compelled in equity to convey as much of the property as lies in his power to convey, with a deduction from the agreed price, does not apply where the purchaser at the time of the sale had notice of the defect in the vendor's title. Knox v. Spratt, 23 Fla. 64, 6 South. 924; 26 Am. & E. Ency. p. 84.

For the reasons given, we think the contract is one which cannot be specifically performed, nor can the defendant recover damages for a failure on the part of the plaintiffs to perform it.

The judgment of the superior court is affirmed.

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## RHOADES v. SCHWARTZ et al.

**(Supreme Court of New York, Special Term, New York County, 1903. 41 Misc. Rep. 648, 85 N. Y. Supp. 229.)**

Action by Pauline Rhoades against Emma Schwartz and Emma Schwartz Ruppert, to enforce an alleged agreement on the part of Emma Schwartz to devest certain real estate. Demurrer to complaint.

SCOTT, J.[33] This action is brought to enforce specifically an alleged agreement on the part of one Elise Schmid, now deceased, to devise certain real estate in a particular way. It is alleged that said Elise Schmid was from 1878 to the time of her death in 1900 the owner of the real estate in question; that in the year 1889, being desirous of settling the said premises upon and for the benefit of the plaintiff and her sister, Josephine Schmid, the younger, she entered into a contract with Josephine Schmid, the elder, mother of the plaintiff and Josephine Schmid, the younger, to the effect that the said Elise Schmid would by will so devise the said premises that the said Josephine Schmid, the elder, should have and become seised of the same, in trust, however, to apply the income thereof to the maintenance of the plaintiff and her sister, Josephine Schmid, the younger, until said plaintiff should attain the age of 25 years, and then to divide the said premises, share and share alike, between the plaintiff and her said sister, Josephine. It is further alleged as a part of the agreement that said Elise Schmid was not only to make and execute such a will, but also to allow it to stand in full force and effect until her death, doing nothing to defeat the full intention thereof. The consideration for this agreement was the promise and undertaking on the part of Josephine Schmid, the elder, to pay, down to the death

[33] Part of the opinion is omitted.

of said Elise Schmid, the taxes, Croton water rents, and assessments which might be imposed upon the property and the premiums upon insurance against fire upon the building erected upon the premises. It is further alleged that the said Josephine Schmid, the elder, fulfilled the agreement upon her part by paying the taxes, Croton water rents, and insurance premiums which she agreed to pay. It is alleged that in violation of her agreement the said Elise Schmid executed a deed and a will under which the defendants claim to be seised and possessed of the property, and for such deed and will it is alleged they gave no valuable consideration. Elise Schmid died on February 23, 1900, leaving her surviving no husband, no children, and no grandchildren, except the plaintiff, Josephine Schmid, the younger, who was also a grandchild, having died intestate and unmarried in February, 1893. At the time of Elise Schmid's death the plaintiff had attained the age of 25 years. The defendant Emma Schwartz demurs upon the ground that the complaint does not, as to her, state facts sufficient to constitute a cause of action. The defendant Emma Schwartz Ruppert demurs upon this ground, and also for that there is a defect of parties plaintiff in that Josephine Schmid, the elder, and the personal representative of Josephine Schmid, the younger, now deceased, are necessary parties plaintiff; and, further, that there is a defect of parties defendant in that the personal representative of Elise Schmid, deceased, is a necessary party defendant.

The complaint is based upon the principle now firmly established in this state that, where a certain and definite contract is clearly established, even though it involves an agreement to leave property by will, and it has been performed on the part of the promisee, equity, in a case free from all objection on account of the adequacy of the consideration, or other circumstances rendering the claim inequitable, will compel a specific performance. * * *

When Josephine Schmid, the younger, died in 1893, there was in existence a contract whereby the grandmother had undertaken to transmit to her the title to one-half the premises in suit. The agreement had then become irrevocable by reason of the part performance of the consideration, and, if the contract was fulfilled, Josephine, the younger, must in due time, upon the happening of the precedent condition, become seised of an interest in the property. The position of Josephine Schmid, the younger, at the time of her death was therefore closely, if not quite, analogous to that of a person who holds a contract for the conveyance of real estate. It is well settled that the interest of a vendee in such a contract is real estate, and in case of his death intestate descends to his heirs, and not to his executor or administrator. Champion v. Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343; Griffith v. Beecher, 10 Barb. 434; Hathaway v. Payne, 34 N. Y. 103. The complaint shows that Josephine Schmid, the younger, died intestate and unmarried, leaving as her sole heirs at law the plaintiff and

her mother, Josephine Schmid, the elder. It seems to be quite clear that upon the death of Josephine, the younger, the mother took by inheritance from her an estate in the property in suit, and is therefore a necessary party to an action to determine its ownership. I have not overlooked the allegation of the complaint that the agreement between Elise Schmid and Josephine Schmid, the elder, was made for the express benefit of the plaintiff and her sister, Josephine, "and the survivor of them." This, however, is merely the statement of a conclusion as to the effect of the agreement, and, in so far as it asserts that the agreement was made for the benefit of the survivor, is not borne out by the terms of the agreement as recited in the complaint. Because the interest of Josephine Schmid, the younger, under the contract, was real estate, it is not necessary that any personal representative of hers should be a party.

The demurrer of the defendant Emma Schwartz is overruled, with leave to withdraw the demurrer and answer in 20 days. The demurrer of the defendant Emma Schwartz Ruppert, upon the first ground stated by her, to wit, that Josephine Schmid, the elder, is a necessary party plaintiff, is sustained, with leave to plaintiff to amend her complaint within 20 days. The demurrer of said Emma Schwartz Ruppert upon the second, third, and fourth grounds stated by her is overruled, with leave to withdraw her demurrer and answer within 20 days.

Ordered accordingly.

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## STROMME v. RIECK et al.

**(Supreme Court of Minnesota, 1909. 107 Minn. 177, 119 N. W. 948, 131 Am. St. Rep. 452.)**

Appeal from District Court, Hennepin County; John Day Smith, Judge.

Specific performance by Maude H. Stromme against Gustav Rieck and Anna Rieck. Judgment for plaintiff, and, from an order denying a new trial, defendants appeal. Affirmed as to the defendant Gustav Rieck; reversed, and a new trial granted, as to defendant Anna Rieck.

BROWN, J.[84] Action for the specific performance of a contract for the sale and exchange of certain real property. On the trial below judgment was directed for plaintiff, and defendants appealed from an order denying a new trial.

The facts, briefly stated, are as follows: Plaintiff owned certain property in the city of Minneapolis, and defendant Gustav Rieck owned a farm in Anoka county. They entered into a contract for the exchange of these properties; plaintiff being represented in the transac-

[84] Parts of the opinion are omitted.

tion by her husband, W. A. Stromme. The contract was in writing, and in the following language:

"This agreement made and entered into by and between Gustav Rieck of St. Paul, Minn., party of the first part, and Maude H. Stromme of Minneapolis, Minn., party of the second part. * * * Maud H. Stromme, by W. A. Stromme. Gustav Rieck. Witness: Anna Rieck."

Anna Rieck, who signed the contract as a witness, was and is the wife of Gustav Rieck. Plaintiff acquiesced in and confirmed the contract made by her husband, and has offered and tendered performance of the same. Both defendants refused to perform and this action followed. * * *

It is further claimed that the contract is not enforceable because not signed by the wife of defendant Gustav Rieck. We here reach the only serious question in the case. Mrs. Rieck did not in fact join in the contract, and the question presented is whether it may be enforced as against her interest in the land. The land did not constitute the homestead of the parties; and, while it is clear under our decisions that the contract may be enforced as to the husband to the extent of his ability to perform, it is equally clear that it cannot be enforced as against the wife. Schwab v. Baremore, 95 Minn. 295, 104 N. W. 10; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817. It rests with the opposite party in such case to determine whether to accept performance by the husband alone or abandon the contract. He may not be compelled to accept part performance, but may do so at his option, unless, as in the Baremore Case, the refusal of the wife to join in the conveyance constitutes a defect in the title which renders the contract by its terms wholly void.

The contract in question did not so provide, and plaintiff may insist on performance by the husband, but not against the wife, unless she in some way legally bound herself to its performance. Counsel for plaintiff recognizes this situation, and in avoidance of its legal consequences maintains that Mrs. Rieck did consent to convey her interest in the property. This position is founded on the claims (1) that Mrs. Rieck orally contracted to sell her interest in the land and that there was a sufficient part performance to render it valid; and (2) that her signature as a witness appended to the contract was a sufficient consent, within the meaning and purpose of our statute on the subject, to the sale by the husband. We are unable to concur in either of these contentions. The trial court found an oral contract by Mrs. Rieck to sell her interest in the land and also part performance; but we are unable to discover evidence sustaining the findings. The basis of the claim that there was an oral contract is found in the fact that Mrs. Rieck had full knowledge of the transaction, was present during a part at least of the negotiations, and interposed no objection to the sale. But it does not appear that anything was said in reference to a relinquishment of her interest in the land, and it is apparent that the parties did not consider her consent at all necessary. Nothing was said about it,

and we find no sufficient basis in the record before us to support the conclusion that she either orally or otherwise contracted or agreed to part with her rights.

Our statutes (section 3648, Rev. Laws 1905) provide that a wife shall be entitled on the death of her husband to a one-third interest in all land owned by him at any time during the marriage relation to the sale or disposition whereof she did not consent in writing. The same right is extended the husband in the wife's land. The interest thus granted the wife, though in lieu of the former dower right, is for all substantial purposes identical with that right, and is protected by an application of the same rules and principles of law. Before a wife can be divested of her interest, it must be shown that she consented in writing to a sale of the land in which she subsequently claims a right, though it may be conceded for the purposes of the present case that a contract of sale by the husband, partly performed by the vendee, might bind the wife if orally consented to by her, where she received and retained a substantial benefit from the transaction. But that would be by force of the equitable doctrine of estoppel. Such is not this case, however. The question now being considered is whether her signature as a witness to an executory contract by the husband is a sufficient written consent to the sale of the land. A careful consideration of the question leads to a negative answer. The consent of the wife rendered essential by the statute to a divestiture of her rights necessarily involves an intention on her part to relinquish her interest in the property. If she should join in the execution of the contract, though not mentioned in the body thereof, it would undoubtedly bind her. But where she is not mentioned in the contract, nor her interests in any way referred to, and she signs as a witness, expressly so designating her signature, no consent to a release of her interest can follow as a matter of law. The written contract in the case at bar contains no reference to the interests of the wife, and no attempt appears to have been made to sell or exchange the property free from any claim on her part.

The courts have been quite strict in the protection of the rights of married women in matters of this kind, both under statutes creating and defining dower rights and statutes like those of this state, and the statutory method of relinquishing those rights and interests have been held to be exclusive, barring, of course, questions of estoppel not involved in this case. Motley v. Motley, 53 Neb. 375, 73 N. W. 738, 68 Am. St. Rep. 608; Lewis v. Apperson, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. Rep. 903; Higginbotham v. Cornwell, 8 Grat. (Va.) 83, 56 Am. Dec. 130. Mere knowledge of or acquiescence in a sale by the husband is not sufficient to bar her rights. 14 Cyc. 931, and cases cited; Hunt v. Reilly, 24 R. I. 68, 52 Atl. 681, 59 L. R. A. 206, 96 Am. St. Rep. 707; Foley v. Boulware, 86 Mo. App. 674. The statute requires the consent to be in writing. Welford v. Beazely, 3 Atk. 503, and Coles v. Trecothick, 9 Ves. 234, cited by plaintiff's

counsel, are not in point. In the first of these cases it appeared that the person who signed under the designation of "witness" was described therein as one of the contracting parties. Not so in the case at bar. In the second case the signature of the contract was by an agent of the principal, and as follows: "Witness Evan Phillips for Mr. Smith, Agent for the Seller." It was held that, where the person to be bound by a contract signs the same as a witness when he cannot be a witness, he must be understood to have signed as principal. In the case at bar Mrs. Rieck was not designated as one of the principals in this contract, and the rule of that case has no application. * * *

For the reasons given the order appealed from is affirmed as to defendant Gustav Rieck, but reversed and a new trial granted as to defendant Anna Rieck.

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## ROHDE v. HESELDEN.

**(Supreme Court of New York, Equity Term, Lewis County, 1910. 134 N. Y. Supp. 103.)**

MERRELL, J. This is an action for the specific performance of a contract entered into between the parties for the sale of real estate, to recover back the sum of $200 paid by plaintiff thereon and for damages by reason of defendant's failure to perform.

The contract purports to have been made on August 18, 1909, and was negotiated through one Walter H. Woodworth, a real estate agent, residing at Central Square, Oswego county. The property contracted to be sold was defendant's farm of about 80 acres situated in the town of Clay, Onondaga county, N. Y., together with 10 cows and a quantity of hay and some little personal property. The defendant had on July 8, 1909, some weeks prior to the making of the contract between the parties, employed Woodworth to effect a sale of his said farm. This employment of the agent, Woodworth, was by a written instrument signed by defendant giving the agent the exclusive sale of the premises for a sum not less than $4,000.

By the terms of the contract the purchase price, $4,300, was to be paid as follows: $200 cash down, the receipt whereof was acknowledged in the contract itself; $500 November 1, 1909; and the balance in payments of $100 or more each year.

The dispute between the parties arises over the first payment of $200, which under the terms of the contract writing was to be a cash payment. The contract was signed first by the purchaser, Rohde, on August 18, 1909. At the time of signing, it appears that Rohde did not have the money to make the cash payment of $200, and gave his promissory note for that amount with one Edwin Guyette as an accommodation maker, payable 30 days from date to the order of the defendant at the agent Woodworth's office at Central Square.

Woodworth testifies that, having obtained Rohde's signature to the

contract and the latter's note, he went to the farm of the defendant and told him that he had effected a sale of the premises, but that he had been compelled to take Rohde's 30-day note for the first cash payment of $200, with a signer, and that the defendant expressed his satisfaction with such arrangement. Heselden denies that he consented to the taking of the 30-day note in lieu of the cash payment, but admits that Woodworth did inform him that he had taken a note for the $200 which defendant says Woodworth told him would be paid by the 1st of September following. Heselden says that, when so informed by Woodworth, he (defendant) said it would be all right if the note was paid by September 1st. The note was in fact given on August 18th and was payable 30 days after its date. It was in fact paid to Woodworth on September 11, 1909.

It would therefore appear that Heselden waived the express provision of the contract that the $200 should be paid in cash at the time of executing the contract. It is quite significant that Heselden, who is a man of intelligence, signed and delivered the contract without requiring the payment of the $200 cash down, and does not seem to have spoken either by way of demanding payment or recalling his contract until Woodworth sought to turn over to him the $200 shortly after the note was paid. Then for the first time he complains that the contract had been broken and refused to proceed further in its performance. Shortly before the 1st of November, when the $500 was to be paid, defendant informed the plaintiff that he would not perform nor accept the further payment.

Another matter of some significance is the provision contained in the contract as to the $200 payment. The contract was drawn by Woodworth, the agent, and after specifying that, of the purchase price, $200 was to be paid cash down, the following significant words appear, "receipt of which is hereby acknowledged." Of course, a receipt is always open to explanation; but the acknowledgment of receipt of the cash payment is rather significant, taking into consideration the fact that, when Heselden signed the contract, he had been informed that a note must for some time at least take the place of the specified payment of $200 "cash down." I think the circumstances corroborate the agent Woodworth in his testimony as to the transaction. The defendant insists that as the note was never delivered to him it could not have constituted payment. In answer to that position, Woodworth must be regarded as Heselden's agent. He had months before invested him with authority to negotiate the sale, and the delivery of the note and its subsequent payment to his agent, Woodworth, must be regarded as binding upon defendant.

I am therefore compelled to decide that the defendant waived the express terms of the contract as to the payment of the $200 in cash, and consented to and did receive the 30-day note in lieu thereof, and that he was not justified in his refusal to accept the $500 payable November 1, 1909, nor in refusing to carry out his contract.

The plaintiff is entitled to relief in this action.

Upon the evidence, it is somewhat doubtful if defendant would be able to perform his contract. Indeed, it is discretionary in any case as to whether specific performance will be decreed. Under all the circumstances I think justice will best be served by awarding judgment to the plaintiff that he recover back the $200 paid by him September 11, 1909, with interest to date, together with $200 damages proven upon the trial suffered by plaintiff by reason of defendant's refusal to perform the contract. O'Beirne v. Allegheny, etc., R. R., 151 N. Y. 372, 45 N. E. 873.

Judgment is ordered accordingly, with costs.[85]

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## HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

(Supreme Court of Canada, 1906. 39 Can. Sup. Ct. Rep. 673.)

Appeal from the judgment of the Court of Appeal for Ontario (10 Ont. L. R. 594), affirming the judgment at the trial (8 Ont. L. R. 642) in favour of the respondent.

The action was to enforce specific performance of certain agreements entered into by the appellants in virtue of by-laws of the corporation of the city of Hamilton, and for a mandamus or mandatory injunction to compel the defendants to provide and keep for sale on their tramcars, operated in the city, limited transportation tickets, called "workmen's tickets," good for the payment of passenger fares on the tramway during certain fixed hours of each day.

At the trial Street, J., held that the respondent, plaintiff, was entitled to succeed in the action and made an order restraining the defendants, appellants, from operating tramcars in which they did not have such limited tickets for sale. By the judgment appealed from, this decision was affirmed and it was held that the agreement of which the enforcement was sought was intra vires; that the defendants were obliged to sell the tickets in question and to receive them from all persons tendering the same in payment of passenger fares during the specified hours

[85] In Hipgrave v. Case (1885) L. R. 28 Ch. Div. 356, at page 361, Lord Chancellor Selborne said: "The plaintiff thus declaring his election to claim specific performance, and offering on his part specifically to perform the agreement, I construe the prayer at the end of his claim to be a prayer for specific performance, with an alternative prayer for damages as a substitute for specific performance, in case the court for any reason should not see its way to granting specific performance. I do not think that with regard to the construction of such a claim the judicature act has made any difference. Therefore I do not think it necessary to discuss what the powers of the court might be with regard to damages in this case under the judicature act. Assuming that on a properly drawn claim for them the court could give the damages which it is now asked to give, I think that the damages were here claimed merely as an alternative for the specific performance claimed upon an allegation of readiness and willingness to give the defendant the property on paying the price."

of each day; that the action could be maintained without the aid of the Attorney-General of the province, and that specific performance of the contract could be enforced by injunction.

After hearing counsel on behalf of the parties, on the appeal, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs. The only written notes of the reasons for judgment were those delivered, as follows, by

IDINGTON, J. The respondents' right to the injunction granted herein by the late Mr. Justice Street is maintainable for the reasons appearing in the judgment of that learned judge and in the judgments of the Court of Appeal.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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## LORD MANNERS v. JOHNSON.

(In Chancery, 1875. 1 Ch. Div. 673.)

At the date of the agreements and conveyances hereinafter mentioned, J. H. Manners Sutton and J. E. B. Dashwood were mortgagees in fee in possession of lands of considerable extent in the parish of Streatham, known as the Roupell Park Estate, the equity of redemption in which was vested in Richard Roupell. The estate had been laid out for building purposes according to a regular scheme; and upon a part of it, known as Palace Road, five houses, Nos. 3 to 8, Palace Road, had been built in a line with and at a distance of about forty feet from one another, the fronts of which houses were at a distance of about eighty feet from Palace Road, from which they were each separated by a wall having entrance and exit gates for carriages, inside which wall was a front garden and carriage drive to the house door; and each house and garden was divided from the other by garden walls about eight feet in height. The houses were worth £4000 to £6000 apiece.

By an agreement in writing, dated the 29th of April, 1873, and made between Messrs. Manners Sutton and Dashwood of the first part, Mr. Richard Roupell of the second part, and the defendant of the third part, the defendant agreed to purchase a piece of land in Palace Road (upon the site of which he afterwards built Nos. 1 and 2, Palace Road), and by the 15th clause of the agreement it was provided that he should not erect "any building" thereon "nearer to the said Palace Road than the line of frontage of the then present houses in Palace Road," but should "observe a straight line of frontage with the line of houses Nos. 3 to 8, Palace Road, aforesaid."

By a similar agreement, dated the 18th of June, 1873, the plaintiff, Mr. B. B. Baker, agreed to purchase a piece of land in Palace Road,

next to the defendant's plot, with the messuage erected thereon, and known as No. 3, Palace Road, subject to a similar provision as to building; and upon the treaty for his purchase it was agreed between him and the mortgagees and mortgagor that he should have and be entitled to the benefit of the agreement with the defendant by the 15th clause of his agreement.

By an indenture, dated the 31st of July, 1873, and made between the same persons as were parties to the agreement of the 29th of April, the premises Nos. 1 and 2, Palace Road, were conveyed to the defendant in fee, and the defendant entered into a covenant with Messrs. Manners Sutton and Dashwood, their heirs and assigns, precisely similar in terms to the 15th clause of his agreement.

By an indenture, dated the 26th of September, 1873, the premises No. 3, Palace Road, were similarly conveyed to the plaintiff Baker in fee.

By an indenture dated the 9th of February, 1874, Messrs. Manners Sutton and Dashwood transferred to the plaintiff Lord Manners their mortgage debts and securities on the Roupell Park estate, and conveyed to him in fee the said estate, subject to the equity of redemption subsisting therein.

The defendant took possession of his piece of ground and erected two houses thereon, the general line of which was nearer to Palace Road than the line of the existing houses therein, by a distance variously stated as from five inches to one foot. These houses were, moreover, built with bay windows, projecting about three feet further towards the road, which bays were, on one side of the door in each house, carried from the foundation up to the roof. Lord Manners and Mr. B. B. Baker conceived this mode of building to be a breach of the defendant's covenant, and after some correspondence they filed the present bill against the defendant, and prayed for a declaration that the buildings and houses being erected by the defendant constituted a breach of the covenant entered into by him in the indenture of the 31st of July, 1873, and for an injunction to restrain him from further proceeding with the erection of the buildings or houses erected or commenced to be erected by him, and from erecting, or permitting to continue on his premises, any building nearer to Palace Road than the line of frontage of the houses which existed at the date of his conveyance, and from not observing the straight line of frontage with the line of houses Nos. 3 to 8, Palace Road.

In September, 1874, the plaintiffs moved for an injunction in the terms of the prayer of their bill, and the motion was ordered to stand to the hearing of the cause, the defendant undertaking to abide by any order the court might make at the hearing as to pulling down his buildings.

The cause now came on for hearing, and there was a considerable amount of evidence by scientific and other witnesses on either side.

HALL, V. C.[36] * * * Now as to the right of the plaintiffs to sue. It has been said this is the suit of Mr. Baker, and that Lord Manners had no interest whatever in it. The position of the parties I conceive to be this: Lord Manners, or his predecessors as mortgagees, were covenantees, and the covenants were entered into with them, their heirs and assigns. Under the circumstances of the case Mr. Baker is an assign of the covenants, as far as regards the property which he acquired from the persons who sold to him. The covenants in respect of the property retained by the original covenantees passed along with the property so retained to Lord Manners, the other plaintiff. Although Lord Manners may be merely a mortgagee, yet I cannot assume that it is a matter of no importance to him to have the covenant performed. I do not know the extent or value of the security, or if there is anything belonging to the mortgagor after his mortgage is paid. But he is covenantee; and something was said about his having entered into covenants with the purchasers from him, and that he would enforce those covenants. I do not know how that was. But whether that was so or not, he being a covenantee, he would be reasonably and properly willing to concur in any proceedings taken to enforce those covenants and protect persons for whose common benefit those covenants were obtained. So that I consider both parties have a substantial and material interest. It is not very material whether they have or not, for if one has an interest, that is sufficient to maintain the suit. * * *[37]

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## STATE v. O'LEARY et al.

(Supreme Court of Indiana, 1900. 155 Ind. 526, 58 N. E. 703.)

Appeal from circuit court, Porter county; Robert Lowry, Special Judge.

Application by the attorney general, on behalf of the state, for an order to restrain James O'Leary and others from keeping and maintaining a gambling house. From a judgment in favor of defendants, and from an order denying a new trial, plaintiff appeals.

DOWLING, C. J.[38] This was an application, on behalf of the state, for a restraining order forbidding the defendants from keeping and maintaining a gambling house in the town of Roby, in Lake county, Ind. To render the injunction effectual, the appointment of a receiver to take possession of the room and building where the gambling was alleged to be carried on was asked for. Prayer for a permanent injunction on the final hearing of the cause. The proceeding was by information filed in the Lake circuit court by the attorney general and

[36] The omitted parts of the opinion are printed at page 315, infra.
[37] The Vice Chancellor granted a mandatory injunction.
[38] Part of the opinion is omitted.

the prosecuting attorney of that county, which was duly verified. The information charges, in substance, that all of the defendants except Annie O'Leary are, and since September 1, 1898, have been, unlawfully engaged in the business of selling pools, and keeping a room in which to sell pools, and in recording and registering bets and wagers upon the results of trials of skill, speed, and power of endurance of man and beasts, in a certain room and building in Lake county, and state of Indiana, owned by the defendant Annie O'Leary, but the real ownership of which is believed by plaintiff to be in James O'Leary; that the defendants on every day since September 1, 1898, up to and at the time of the filing of the information, unlawfully kept in said county and state a certain room and building, afterwards in said information particularly described, with apparatus, blackboard, blanks, papers, and other devices for the purpose of recording and registering bets and wagers upon the results of trials and contests of skill, speed, and power of endurance of man and beasts, etc. * * *

The evidence fully sustained the charges of the information as to the nature of the resort, the unlawful practices carried on therein, the number and disreputable character of the patrons of the establishment, and the "open, repeated, persistent, and intentional violation of the statutes" against gambling by the appellees and others at the place and in the manner set forth in the information. There was no proof that any person had been annoyed or disturbed by reason of the maintenance of the gambling house, or that any property rights of the state were, or were likely to be, in any manner injuriously affected. The gambling house was remote from any other building, and was situated upon the open and uninhabited plain or prairie. The premises described were within the corporate limits of the town of Roby, and had been so located and operated for a considerable period of time. It was not shown that any of the inhabitants of Lake county in any way or under any circumstances came in contact with the persons who frequented the gambling house. Nothing prevented the enforcement of the ordinances of the town and the statutes of the state against gambling and the maintenance of gambling houses, excepting the indifference or sympathy of the community, or the indolence or faithlessness of the public officers of the town and county charged with that duty.

The question, therefore, for decision, is whether an injunction may be had, on the application of the state, to suppress a gambling house, where no injury to property is shown, where no person has been annoyed or disturbed, where gambling in all of its forms is made a criminal offense by statute, and the ordinary criminal process for its punishment and suppression is in full force and available to the state. While it is probably true that every indictable nuisance may, under particular circumstances, be enjoined, it cannot be said that a court of equity is bound in every case to award the extraordinary remedy of injunction upon the naked proof of the existence of such a nuisance.

The circumstances that the acts constituting the nuisance are crimes or misdemeanors, and punishable as such, is not of itself a sufficient reason for refusing the writ. Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407; State v. Crawford, 28 Kan. 726, 42 Am. Rep. 182; State v. Saunders, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Littleton v. Fritz, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19; Port of Mobile v. Louisville & N. R. Co., 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342.

Unless it appears not only that a public nuisance exists, but that the public is subjected to actual annoyance or injury by it, the courts generally refuse to interfere by injunction, at least before indictment and a trial and conviction at law. Another element is usually found in the cases where an injunction has been granted to suppress an indictable nuisance, and that is the existence of some circumstances which seemed to render the immediate interference of the court necessary to prevent a real injury to the public; proof of an exigency which the ordinary process of the court was not adequate to meet generally being required.

In the present case every unlawful act charged in the information as constituting the nuisance complained of is a crime or a misdemeanor, and is subject to indictment and punishment under the Criminal Code. The premises where the gambling is alleged to be carried on are not in a populous neighborhood, but out upon a prairie; the nearest house being nearly a quarter of a mile distant. The place has not been recently established, so that time was not afforded within which to present the offenders before the grand jury, but its existence has been of long standing and notorious. So far as the record discloses, no private person has made complaint of any injury sustained or likely to be sustained by himself or his property.

Under these circumstances, we can see no legal reason why resort should not be had to criminal proceedings to punish and suppress acts, every one of which is expressly forbidden by the Code, as a crime or a misdemeanor, instead of casting the burden of the abatement of these unlawful practices upon the civil side of the court. A civil suit by information, in the name of the state, filed by the attorney general and the local prosecuting attorney, is but an indirect method of accomplishing an end which could more properly and more satisfactorily be attained by indictment. The apathy or sympathy of the local community, and the negligence of the public officers, which prevent a criminal prosecution, or render its result doubtful, cannot be regarded as a reason why a civil action should be substituted for a criminal proceeding, and the alleged violations of the criminal law should be tried and determined by a judge instead of a jury. Mains v. State, 42 Ind. 327, 13 Am. Rep. 364; State v. Houck, 73 Ind. 37; 2 Bish. Cr. Proc. § 813; People v. Equity Gaslight Co., 141 N. Y. 232, 36 N. E. 194;

Attorney General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227; State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478.

Injunctions have been granted, at the instance of the attorney general of the state, to prevent the destruction of a bridge upon a public highway (Attorney General v. Forbes, 2 Mylne & C. 123); to prevent the deposit of filth and noxious refuse matter upon a private vacant lot in the city of London (Attorney General v. Heatley, [1897] 1 Ch. Div. 560) to prevent obstructions to the freedom of interstate commerce (In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092); to prevent nuisances upon public highways (Green v. Oakes, 17 Ill. 249; Craig v. People, 47 Ill. 487); to prevent the obstruction of rivers, harbors, or other navigable waters (People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351; Davis v. Mayor, 14 N. Y. 526, 67 Am. Dec. 186); to prevent the pollution of streams (Attorney General v. Board, L. R. 18 Eq. 172); to restrain a corporation from exercising a franchise not granted to it by law (People v. Third Ave. R. Co., 45 Barb. [N. Y.] 63). On the other hand, there are many cases where a violation of law occurs, with injury either to the public or to private individuals, in which relief by injunction has been denied. It is said in High, Inj. § 23, that:

"The subject-matter of the jurisdiction of equity being the protection of private property and of civil rights, courts of equity will not interfere for the punishment or prevention of mere criminal or immoral acts, unconnected with violations of private rights. Equity has no jurisdiction to restrain the commission of crimes, or to enforce moral obligations and the performance of moral duties; nor will it interfere for the prevention of an illegal act, merely because it is illegal. And, in the absence of any injury to property rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral or illegal acts. Thus, the relief has been refused to prevent persons from carrying on the business of banking, in violation of a statute restraining unincorporated banking associations. So, where it was sought to enjoin defendants from running their street cars on Sunday, in violation of a statute making it a penal offense, the relief was refused, although the action was brought by pew holders and property owners on the line of defendants' track. In all such cases ample remedy may be had by proceedings at law, and, the offense being damnum absque injuria, courts of equity will not interfere. And, in accordance with the well-settled doctrine that equity will not interfere with the administration of the criminal laws of the state, an injunction will not be granted against the enforcement of executions for costs issued against an unsuccessful party to a criminal prosecution. Nor will a court of equity enjoin a judgment imposed for violating a law of the state. Nor will it enjoin suits of a criminal nature."

See, also, Wood, Nuis. (2d Ed.) § 788; Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622; State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478; Attorney General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227; State v. Uhrig, 14 Mo. App. 413.

It may be stated that where the injury is pressing or imminent, so that the public safety is menaced or public rights are obstructed or interfered with, and the special circumstances are such that the ordinary process of the courts is not sufficiently prompt or effective to prevent such injury or obstruction, the remedy by injunction may be applied, provided the right is clear, and the wrong has not been ac-

quiesced in by the plaintiff. The important inquiry in each case is whether, under the circumstances of the particular instance, there is a necessity for the exercise of that jurisdiction. The evidence in the case before us entirely fails to establish the existence of such a necessity at this time. We do not undertake to lay down any general rule, or to decide that a place where gambling is carried on, and where lawless and disreputable persons congregate for the purpose of gaming, may not, under special circumstances, constitute a public nuisance, and be a proper subject for the exercise of the powers of a court of equity. But, owing to a total failure of proof in the important particulars pointed out in this opinion, we are constrained to hold that the appellant failed to make such a case as warranted the interposition of the court by its extraordinary writ of injunction. Crighton v. Dahmer, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666, and notes; Goodrich v. Moore, 2 Minn. 61 (Gil. 49), 72 Am. Dec. 74; 16 Am. & Eng. Enc. Law (1st Ed.) 927.

Judgment affirmed.[39]

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## MOSS & RALEY v. WREN.

(Supreme Court of Texas, 1908. 102 Tex. 567, 113 S. W. 739.)

Certified Questions from Court of Civil Appeals of Second Supreme Judicial District.

Action by D. T. Wren against Moss & Raley. From a judgment for plaintiff, defendants appeal to the Court of Civil Appeals, which certifies a question to the Supreme Court.

GAINES, C. J. This is a certified question from the Court of Civil Appeals of the Second District, and, in order to save copying a long statement, we undertake to state the point in the case.

The appellee, D. T. Wren, was employed as a real estate broker to make sale of certain land belonging to appellants, and, having effected, as he claimed, a sale to one Clark, brought suit for his commission. In

[39] INSOLVENCY AS A DEFENSE.—The effect of insolvency upon specific performance is discussed in the case of Texas Co. v. Central Fuel Oil Co. (1912) 194 Fed. 1, 11, 114 C. C. A. 21, 31; Trieber, District Judge, saying: "It is charged that the Central Company is insolvent, and that all of its property is now covered by a mortgage to secure an indebtedness in excess of its value. While there is high authority for holding that insolvency alone may sometimes be a cause for equitable interference, it is unnecessary to determine that question in this case, but we do hold that insolvency is a circumstance to be considered in connection with the other allegations in the bill for the purpose of determining whether there is a complete and adequate remedy at law. McNamara v. Home Land & Cattle Co. (1900, C. C.) 105 Fed. 202. In many instances insolvency alone will justify the interposition of a court of equity otherwise cognizable only in a court of law. Injunctions are often granted against trespassers solely upon the ground of insolvency." See, also, Emirzian v. Asato (1913) 23 Cal. App. 251, 137 Pac. 1072, when the court said: "Attention has been called to the failure to find upon the issue of insolvency. In the cases cited by respondent insolvency was a material factor. Insolvency of itself is not a ground of equitable interference, but, as said by Mr. Justice

the contract for the conveyance of the land, after specifying the price, consideration, etc., the following stipulation was inserted:

"And it is further mutually agreed, in case purchaser fails to comply with the terms hereof relating to the payment and securing of the purchase price as above mentioned and by the time herein designated, purchaser shall forfeit the amount paid hereon to seller, and the same shall be paid to seller by said trustees and accepted by said seller as and for liquidated damages for such injury and damage as the seller may suffer by reason of the nonperformance of this contract on the part of the purchaser."

The question certified for our determination is whether upon this contract a sale was effected, so as to entitle the appellee to his commission.

We have numerous decisions holding that, although there is a stipulation in the contract of this character, payment of a fixed sum of money as liquidated damages does not affect the contract for sale of the land, but that the seller can enforce specific performance. Hemming v. Zimmerschitte, 4 Tex. 159; Williams v. Talbot, 16 Tex. 1; Vardeman v. Lawson, 17 Tex. 11; Bullion v. Campbell, 27 Tex. 653; Gregory v. Hughes, 20 Tex. 345. It seems to us that these decisions are decisive of the case. If the vendor of the land can enforce a specific performance of the contract to pay for it, then the broker has effected a sale, valid in law, and is entitled to his compensation. We have also examined the authorities cited in the certificate upon the same proposition and find it is amply supported by them. Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; Hull v. Sturdivant, 46 Me. 34; Hooker v. Pynchon, 74 Mass. (8 Gray) 550; Ewins v. Gordon, 49 N. H. 444; O'Connor v. Tyrrell, 53 N. J. Eq. 15, 30 Atl. 1061; Palmer v. Bowen, 138 N. Y. 608, 34 N. E. 291, affirming Palmer v. Gould, 63 Hun (N. Y.) 636, 18 N. Y. Supp. 638; Kettering v. Eastlack, 130 Iowa, 498, 107 N. W. 177, 8 Ann. Cas. 357.

We therefore answer the question submitted in the affirmative, and say that the contract is such that appellants are entitled to have it specifically enforced, and that therefore the appellee is entitled to his commission for making the sale.[40]

Thompson, in Heilman v. Union Canal Co. (1860) 37 Pa. 100, referred to in Livesly v. Johnston (1904) 45 Or. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647, cited by respondent: 'In balancing cases, it is a consideration that gives preponderance to the remedy.' In the present case it was alleged, and, we think, was a controlling factor and should have been proven and found by the court."

[40] This case was reversed on rehearing (102 Tex. 567, 120 S. W. 847 [1909]), where the court said, speaking through Gaines, C. J.: "Upon consideration of the motion for a rehearing in this case, we are of opinion that we erred in disposing originally of the question. Referring to the stipulation quoted at the end of the statement of the case, it is to be noted that it provides that the $1,000 put up as a forfeit 'shall be paid to the seller by said trustees and accepted by said seller as liquidated damages for such injury and damage as the seller may suffer by reason of the nonperformance of this contract on part of the purchaser.' Now it occurs to us that, if nothing had been said as to the acceptance of the $1,000 by the seller, our original opinion would have been correct; but, if the seller is bound to accept the sum for such damages as may be suffered by reason of the nonperformance of the contract on part of

## SHIREY v. ALL NIGHT AND DAY BANK et al.

(Supreme Court of California, 1913. 166 Cal. 50, 134 Pac. 1001.)

In Bank. Appeals from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Ida E. Shirey against the All Night and Day Bank, W. C. Weaver, and another, to compel a conveyance. From a judgment for damages against the said bank, and denying relief against the said Weaver, the plaintiff and the bank prosecute appeals.

ANGELLOTTI, J. There are two appeals in this case, one taken by defendant All Night and Day Bank, from the judgment in favor of plaintiff against it for the sum of $898.67 and costs, and from an order denying its motion for a new trial, and one taken by plaintiff from all other portions of the judgment in said action, and especially that portion thereof denying her any relief as against defendant Weaver. In so far as the appeal of the bank is concerned, the record on appeal consists of the judgment roll and a bill of exceptions. The appeal of plaintiff is before us on the judgment roll alone.

The facts material to the controversy as between plaintiff and Weaver established by the findings are substantially as follows: On April 23, 1909, Weaver was the owner of two lots in the city of Los Angeles. He was desirous of selling the same. By reason of certain representations made to him by defendant Baylis, apparently a real estate agent, to the effect that it would be necessary for Baylis to have a conveyance of the property to himself in order to effectuate a sale, Weaver conveyed the same to him for such purpose by a deed absolute on its face. This deed was duly recorded in the recorder's office of Los Angeles county on April 23, 1909. It was made without any consideration, and Weaver has not received any consideration whatever therefor. On

the purchaser, can he sue the proposed purchaser for specific performance of the contract? The contract evidently was that the proposed purchaser should have until a future day to pay the price and accept a conveyance, yet, should he decline for any reason to pay the price and to accept the land, he may pay the liquidated damages and be absolved from further suit. Moss & Raley entered into a contract with Clark to sell him certain lands, and stipulated that, in case he failed to buy, he should forfeit $1,000, which had been put up to enforce the bargain. They chose to forfeit the $1,000, which absolved them from further obligation. Before Wren was entitled to his commission, he should have procured a purchaser who was willing to enter into a contract to purchase the land absolutely. For this reason, we answer the question in the negative."

In Buckhout v. Witwer et al. (1909) 157 Mich. 406, at page 410, 122 N. W. 184, at page 186, the court says: "We are of the opinion that the provision in the contract, 'If you do so and do not fulfill on your part both in the spirit and language of this letter, you shall forfeit to me one thousand dollars, $1,000, per annum until the end of the five years from the time you shall not have acted in good faith in performing the terms of this sale,' should be construed to provide for a penalty, and therefore that it does not preclude complainant from filing a bill for specific performance. It is within the rule stated in Daily v. Litchfield, 10 Mich. 29, followed in Powell v. Dwyer, 149 Mich. 145, 112 N. W. 499, 11 L. R. A. (N. S.) 978."

the same day Baylis borrowed from defendant All Night and Day Bank the sum of $500, giving two notes therefor, one for $100 and one for $400, and conveyed said property to such bank by deed of conveyance absolute on its face. The bank had no knowledge that Weaver had any interest in the property. It was alleged by all the parties and found by the trial court that this deed was solely by way of security and intended as a mortgage to secure the payment of said notes, and this fact was known to plaintiff at all times. This deed was recorded April 23, 1909. On October 8, 1909, for the sum of $670.61 paid him by plaintiff, and the agreement on her part with him to pay the notes held by the bank, Baylis "agreed to and did sell" said property to said plaintiff, and in writing authorized the bank "to convey said lots to Ida E. Shirey when the said Ida E. Shirey shall assume and take over my two notes amounting to $100.00 and $400.00 respectively, now held by said bank, and for which said deed was given as security." On October 11, 1909, the bank sent to the plaintiff and her husband the following letter, viz.:

"Los Angeles, Cal., October 11, 1909.

"Mr. J. W. Shirey and Ida E. Shirey—Dear Sir and Madam: We received a notification dated October 8th, signed by T. H. Baylis, authorizing us, on payment of his two notes to us for $100 and $400, respectively, with such interest as may be due, to deed to you lots 11 and 12 in block 9 of the Schmidt tract, Los Angeles, California. We understand that Mr. Baylis has transferred all of his title in this property to you subject to your payment of these notes, and you understand that we hold the property as security for the payment of these notes. We want it thoroughly understood that we will give you due notice of the sale of this property, if necessary to secure the payment of these notes, and that we in no way waive our rights by giving you this notice or writing you this letter.

"Yours very truly,
All Night and Day Bank,
"By Newton J. Skinner, President."

On January 14, 1910, plaintiff paid to the bank the principal sum on the $100 note, together with the interest thereon, and also interest on the $400 note, amounting in all to $110.20. She also expended $13.88 taxes on said lots, and $38.98 in payment of an assessment for street improvements. On December 14, 1909, Baylis notified the bank in writing that, as the contract between him and the Shireys had not been carried out, it should cancel his instructions and hold the deeds until further notice. Plaintiff was never informed by the bank of this notice, and so far as appears had no knowledge thereof. On April 29, 1910, the bank, upon an order given by Baylis to it, conveyed all its interest in the property to Weaver; the deed of conveyance being duly recorded. This conveyance was made without any notice to plaintiff. On May 10, 1910, plaintiff tendered to the bank the sum then due on the $400 note, if the same had not been paid, namely, $410.65, for the payment of said note, and demanded a conveyance; but the bank refused to accept the money so tendered, and refused to make any conveyance. "Plaintiff at all times, since said tender by said sum of $410.65 was made, has been, and now is, ready, able, and willing to pay the same" to said defendant bank. Plaintiff did not know prior to May

10, 1910, that Weaver claimed any interest whatever in said property, and was a purchaser in good faith and, as we have seen, for a valuable consideration. Weaver did not know that plaintiff had any interest in or claim to said property until the complaint in this action was served upon him. There is nothing in either pleadings or findings to show that any money was paid to the bank by either Baylis or Weaver in consideration of the purported transfer by the bank to Weaver, or that the $400 note has ever been paid.

The action was one to compel a conveyance of the property by Weaver and the bank to plaintiff, upon payment of the sum tendered by her to the bank, to have it determined that neither Baylis nor Weaver has any interest in the property, and for such further relief as to the court might seem just. The trial court concluded upon the facts we have stated that plaintiff was entitled to no relief as against Weaver, but rendered judgment against both the bank and Baylis, who had failed to appear, though duly served with summons, and whose default had been regularly entered, for the sum of $898.67 and costs.

So far as Baylis is concerned, a valid contract for the sale of this property by him to plaintiff is undoubtedly shown by the findings, under the terms of which contract plaintiff, having paid $670.61 to Baylis, was entitled to a conveyance upon the further payment to the bank of the amount of the notes. It is clear that this contract must be held to be binding upon Weaver, who was, in view of the facts shown by the findings, the real owner of the property, subject to the lien of the mortgage held by the bank.

It cannot be doubted that the deed to the bank was simply a mortgage and vested it with nothing more than a mortgage lien. "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage," except in cases of pledges of personal property. Section 2924, Civ. Code. "Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien." Section 2888, Civ. Code. The contract for sale was binding upon Weaver for the same reason that the mortgage to the bank was a valid mortgage upon his property. By his deed to Baylis, who was in fact his agent for the sale of his property, he had clothed him with every indicia of ownership necessary to make him the absolute owner of the property, and permitted him to so hold himself out to the world, and to deal with all persons as such absolute owner.

As against persons who in good faith dealt with Baylis as such owner, without any knowledge or notice that the conditions were otherwise than he, Weaver, had allowed them to appear by the execution and delivery of his absolute deed of conveyance, he is estopped to deny the authority of Baylis. The general principle applicable in such a case is recognized in our Civil Code as follows:

"Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Section 3543.

As originally said in McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341, and several times approvingly quoted by this court (see Woodsum v. Cole, 69 Cal. 142, 10 Pac. 331, Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 Pac. 405, and Conklin v. Benson, 159 Cal. 793, 116 Pac. 38, 36 L. R. A. [N. S.] 537):

"Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence, or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

See, also, Schultz v. McLean, 93 Cal. 329, 357, 28 Pac. 1053, 1058, where this court said:

"In this case plaintiffs and defendant were both innocent. Neither knew that the fraud was being practiced; but, if that fraud was productive of injury, the injury must result to the plaintiffs, for they placed it in the power of the wrongdoer to perpetrate the fraud. The vendee will not be compelled by a court of equity to lose the benefit of a bargain obtained in all fairness and honesty, because of a fraud practiced upon the vendors by their own agents. Under such circumstances they must bear the consequences, for the loss is chargeable to the trust reposed in their agent—in this case a trust so complete and entire as to cause them to disregard the dictates of ordinary prudence."

Relying upon the appearances created by Weaver, as she had the right to do, plaintiff in good faith entered into this contract with Baylis, paying $670.61 to him, and expending the other money heretofore specified.

As said in Schultz v. McLean, supra, she "will not be compelled by a court of equity to lose the benefit of a bargain obtained in all fairness and honesty, because of a fraud practiced upon" the vendor by his own agent.

In view of what we have said, it seems clear that upon the facts found plaintiff was entitled, upon performing or offering to perform her part of the contract, to a conveyance of the property by Weaver, who was, in substance and effect, her vendor. The only objection of any possible merit to such relief, being granted her upon the findings already made, was that it was not alleged in the complaint or found that she made any tender to Weaver of the amount remaining unpaid. Her allegations as to such a tender to the bank, and her readiness, ability, and willingness ever since and now to pay to the bank the amount tendered are full and complete, as are the findings. Her tender to the bank was in substantial accord with the terms of her contract, which could not be effectually changed, so far as she was concerned, without her consent, and we think that under the circumstances of the case it should be held to have constituted a sufficient compliance with all conditions on her part to enable her to maintain an action to enforce her rights under the contract. See, in this connection, Corbus v. Teed, 69 Ill. 205.

It would be too narrow a construction of her complaint to hold that plaintiff, in this action against all the persons who can possibly be held to have any interest in the matter, did not therein sufficiently offer to do equity. With all the parties interested before it, the trial court is in a position to provide that the money that must be paid by plaintiff as a condition precedent to the obtaining of the relief sought shall go to the parties who are justly entitled to the same. It would seem that upon the merits there can be no question as to the right of plaintiff to have this property upon the further payment by her of the sum of $410.65. If by any arrangement with Mr. Weaver the bank has abandoned all claim on the property, and transferred all its interest therein to him, which appears to be clearly found by the trial court, and which is also conceded by all the parties in their briefs, the $410.65 should be paid, of course, to him. We see no good reason why judgment should not be entered upon the findings in favor of plaintiff in this matter.

As to the appeal of the All Night and Day Bank, we are entirely in accord with the view of the District Court of Appeal that the judgment of the trial court cannot be sustained. The amount of $898.67 awarded plaintiff against the bank was made up of the $670.71 paid by her to Baylis on account of the purchase price, the $110.20 paid by her on the $100 note (also a part of the purchase price), $13.88, taxes on said property, $38.98, street assessment on the property, and $65 interest. This was awarded plaintiff on the theory that she was damaged in the amount specified by a failure to obtain the property; the court concluding that the bank was negligent in making the conveyance to Weaver and in failing to convey its interest in the property to plaintiff. In view of what we have said as to the nature of the only interest held by the bank in the property, viz., that of a mortgagee, it is obvious that the rights of the plaintiff were in no way injuriously affected by the transfer by the bank to Weaver of all its interest in the property. The bank had nothing but a mortgage lien to transfer. If the bank had executed a deed of conveyance of its interest in the property to plaintiff, such conveyance would have transferred "no title to the property" to her. And, of course, the conveyance to Weaver transferred "no title to the property" to him, and in no way affected any interest of plaintiff in the property. The only effect thereof was to transfer the mortgage lien of the bank to Weaver (Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763), or rather, in view of the fact that Weaver was the owner of the property subject to the lien and the contract of purchase held by plaintiff, to release and extinguish the lien of the mortgage, unless it was necessary for the protection of Weaver's rights that the same should be kept alive. See Anglo-Californian Bank v. Field, 146 Cal. 653, 80 Pac. 1080.

It is not made to appear that Weaver has purported to transfer or incumber the property, so there is no question as to the rights of innocent third parties. Thus, as we said, there is nothing to show that plaintiff's rights have been in any way injuriously affected by any act

or neglect of the bank. Her right to obtain the property from the owner upon payment of the balance of the purchase price was precisely the same after the transfer by the bank to Weaver as it was before, and was in no degree affected thereby. Of course, it cannot well be claimed that plaintiff should recover this money from the bank, and at the same time be allowed to obtain the property upon complying with the terms of her contract.

We are of the opinion that, in place of the judgment given in this cause, judgment should be given upon the findings substantially decreeing as follows: That neither defendant Baylis nor defendant bank has any interest in the property; that defendant Weaver convey the property to plaintiff upon the payment by plaintiff to him or into court for his benefit, within a time to be specified therein, of the sum of $410.65; and that, except for the adjudication that the bank has no interest in the property, plaintiff take nothing against it, said bank. The matter of costs, except costs on appeal, should be left to the discretion of the trial court.

The order denying a new trial is affirmed. The judgment is reversed, with directions to the trial court to give judgment in accord with the views herein expressed. Appellant Shirey is entitled to her costs on appeal as against defendant Weaver, and appellant bank is entitled to its costs of appeal as against plaintiff Shirey.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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## II. NEGATIVE CONTRACTS

### *(A) General Nature of Negative Contracts*

#### (a) TRADE CONTRACTS

### PEPERNO v. HARMISTON.

**(Court of Appeal, 1887. 31 Solicitors' Journal, 154.)**

This was an appeal from a decision of the Divisional Court (Manisty and A. L. Smith, JJ.) refusing an order for an interim injunction. It appeared that the plaintiff and defendant were circus proprietors and had entered into a partnership agreement to take their joint circus for a year's tour, beginning at Leamington. The defendant was to supply certain performing horses and ponies and some performers. The plaintiff supplied for exhibition certain persons known as the Burmese Hairy Family. The defendant committed various breaches of the partnership agreement by failing to supply the agreed number of horses and performers, in consequence of which the tour was unsuccessful

The plaintiff refused to supply any more money for carrying on the concern, and upon the defendant threatening to remove his property and live stock, applied for an injunction to restrain him from removing the horses and ponies and the paraphernalia which he had supplied from Leamington where the circus then was. It was urged for the plaintiff that, on the authority of Lumley v. Wagner (1 De G. M. & G. 604) and De Mattos v. Gibson (4 De G. & J. 276), where the court will not grant a decree for specific performance it will, nevertheless, grant an injunction to indirectly compel it.

THE COURT (LORD ESHER, M. R., and LINDLEY and LOPES, L. JJ.) refused the application and dismissed the appeal. They said the principle of the decision in Lumley v. Wagner was that the circumstances in that case were such that no amount of damages would have given adequate relief to the plaintiff, and that the court, therefore, granted the injunction, and that in De Mattos v. Gibson it was still doubtful whether specific performance could be granted or not. The rule now was that the court would not grant an injunction where specific performance could not be obtained unless they considered that damages would be an absolutely inadequate remedy for the non-performance of the agreement.[41]

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## ALTMAN v. ROYAL AQUARIUM SOCIETY.

(Chancery Division, 1876. L. R. 3 Ch. Div. 228.)

Motion.

By an agreement dated the 3d of July, 1876, and made between the defendants, the Royal Aquarium and Summer and Winter Garden Society, Limited, at Westminster, by William Wybrow Robertson, the managing director of the society, of the one part, and the plaintiffs, Lewis Joseph Altman and Harris Brown, trading as L. J. Altman & Co., thereinafter called the exhibitor, of the other part, the society agreed to let, and the exhibitor agreed to take, certain spaces in the Aquarium for the term of three years, from the 22nd of January, 1876, at the rent of £325, payable by equal quarterly payments in advance, such spaces to be used by the exhibitor for the purpose and with the sole right of exhibiting therein and selling English and foreign china, glass, and earthenware, chandeliers and lamps of all descriptions, with the exception of Venetian glass and terra cotta; and the

[41] In Kemble v. Kean, (1829) 6 Sim. 333, at page 335, Vice-Chancellor Shadwell, while denying the injunction to enforce an express negative clause in a service contract, states he would enforce a negative clause in a trade contract, saying: "In the case of a mere contract between two persons who are both carrying on the same trade, that one shall not carry on his trade within a limited distance in which the party contracted with intends to carry on his trade, the whole agreement is of so genuine a kind, that the court would enforce the performance of the agreement by restraining the party, by injunction, from breaking the agreement so made."

sole right to sell and exhibit all descriptions of scents and perfumes within the company's premises. No goods or articles of any other description were to be exhibited therein or sold by the exhibitor without the permission in writing of the said society being first obtained. In case the exhibitor failed to pay the rent, or to observe and perform the regulations from time to time made by the directors, the society should have the power of putting an end to the agreement on giving seven days' notice in writing; but the exhibitor should, notwithstanding the agreement be so terminated by the society, remain liable for the rent to the end of the current year.

The plaintiffs took possession of the stall, and used it for the sale of china, glass, earthenware, and other articles named in the agreement. The Aquarium was opened on the 22nd of January. Finding that other exhibitors were exhibiting and selling china, glass, and earthenware articles, the plaintiffs called the attention of the managing director to the fact, but without redress; and on the 13th of May a writ was issued indorsed for specific performance of the agreement, for an injunction to restrain the sale of the goods, and for damages.

The plaintiffs now on notice dated the 13th of May, moved that the defendants might be restrained from permitting, or neglecting to prevent, the exhibition or sale of English and foreign china, glass, and earthenware, chandeliers and lamps (not being Venetian glass or terra cotta), by any other persons or person than the plaintiffs within the premises of the defendants.

From the evidence in support it appeared that the other exhibitors who were exhibiting and selling china, glass, and earthenware at the opening of the Aquarium, were named Wills, Marie Louise, the London Stereoscopic Company, and Fentum, who were still exhibiting, and two, named Ramsay and Mrs. Ryan, who had left.

Julia Cohen, a witness for the plaintiffs, deposed that she had bought at Wills' stall an earthenware flower-pot and stand, and a glass flower vase or tube; that at Marie Louise's stall she had bought a glass scent bottle; and at the stall of the London Stereoscopic Company a magnifying glass, and that articles similar to those she purchased were being exhibited. At the last-mentioned stall other articles of glass were being exhibited. * * *[42]

Bacon, V. C. In my opinion the plaintiffs are entitled to that right which the defendants have granted them by way of agreement.

I agree with Mr. Swanston that the terms of the agreement must be construed according to the common and ordinary sense and meaning of the words. (His Lordship read the words, and continued:) The defendants have the entire control over this exhibition, or bazaar, or whatever it is called, and they, for valuable consideration, have contracted with the plaintiffs that none but they shall have the right to sell these goods within the building. Then what sort of excuse is offered

[42] The statement of facts is abridged.

in the course of the argument for the sale by Ramsay, for example, of articles of biscuit, majolica, and faience? It is true that all such acts of selling are now over and gone; but the plaintiffs' complaint is, that when they remonstrated, their remonstrances were unheeded.

There are in truth, no facts in dispute. The facts as to Wills, the florist, are that he not only sells flowers in glazed flower-pots, but that he has a sale of Minton's coloured tiles for flower-pots and boxes; and it is to be observed that it is the defendants—they who ought to have protected the plaintiffs from breach of the agreement—who bring into court exhibited articles of their own selection, and ask the court to say whether the sale of such articles is a breach of the agreement. The plaintiffs cannot, of course, except by purchasing them, bring into court the articles which other persons not parties to the dispute are selling. But taking the defendants on their own shewing, earthenware brooches are as much within the covenant as anything else made of earthenware; and though a very small article is produced, if made of earthenware, it is not the less within the agreement on that account.

As to the photographs, the selling of a magnifying glass, or the putting of a glass front to a photograph, can scarcely be called an infringement of this agreement.

But enough has been proved to shew that the defendants have not been dealing fairly with the plaintiffs; that they have broken the contract they have entered into with them; and the consequence is, the defendants must be restrained from doing or permitting to be done anything in violation of the agreement.

There must be an injunction as moved for; and the costs of the motion will be costs in the cause.

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## SEVIN v. DESLANDES.

(In Chancery before Lord Romilly, 1860. 30 Law J. Ch. 457.)

The bill in this case was filed by Messrs. Sevin, Chinery & Co., of London, merchants, against George Deslandes, who carried on the business of shipowner and builder in Jersey, under the firm of Deslandes & Son, and against George Seymour and Martin Diederich Rucker, who carried on the business of ship and insurance agents in London, under the firm of Seymour, Peacock & Co., praying that the defendants, and each of them, and their servants, agents, &c., might be restrained until after the performance by George Deslandes of a charter-party entered into with the plaintiffs, or until further order, from taking or permitting to be taken any goods or passengers in or on board the ship Just, other than for the plaintiffs, or with their consent in writing, and from preventing or interrupting the preparation and loading of the ship according to the charter-party, and from advertising, navigating or using the ship for Messrs. Seymour & Co. as

a general ship, or for any other person or persons, or purposes, or otherwise than for the purposes of the charter-party, and from preventing or interrupting the voyages of the ship according to the charter-party, the plaintiffs offering to perform the charter-party on their part. The bill also prayed for damages from the defendants, and that they might pay the costs of the suit.

On the 22nd of November, 1860, Messrs. Sevin & Co. applied to Messrs. Gamman Brothers, of London, ship-brokers, for a charter of the ship Just, and subsequently on the same day, upon the telegraphic authority of Messrs. Deslandes, Messrs. Gamman signed a charter-party on their behalf. * * *

On the evening of the 23d of November Messrs. Sevin & Co. sent letters of advice by the post which was made up on that day to their agents in Africa, informing them that they had chartered the ship, and of her intended departure for various stations on the western coast of Africa, and instructing them respecting the receipt and sale of the cargo, and at the same time they gave various orders in contemplation of the ship's voyage.

On the 24th of November, in the morning, Henry Gamman met George Deslandes in the city, and gave him a copy of the charter-party. * * *

This charter-party, among the usual provisions, contained a clause, that no goods or passengers should be taken in the Just, other than for the charterers, or with their consent in writing.

Messrs. Sevin subsequently received a letter from Messrs. Seymour & Co., inclosing the following letter:

"26th Nov. 1860.

"Messrs. Sevin, Chinery & Co.—Gents: We find it is impossible to carry out the charter of the Just agreed with you on Saturday, as the engagements for the vessel are too far advanced. I therefore give you notice at once, to prevent your suffering any loss or inconvenience. We are, Gents,

"Yours faithfully, Deslandes & Son."

On the 29th of November Messrs. Sevin & Co. informed the master of the Just that their coopers were about to send down for loading certain palm-oil casks. On the same day the master wrote to Messrs. Sevin & Co., saying that he could not take in any goods "without the consent of Messrs. Seymour & Co., with whom my owners have arranged for loading the vessel. With reference to the charter you allude to, I beg to state that my owners have instructed me not to fulfill it, and they gave you notice thereof on Monday morning last."

Messrs. Sevin then filed this bill and obtained an injunction upon their undertaking to submit to any order respecting damages which the court might make. It was afterwards arranged that the cause should be brought on upon a motion for a decree. * * *

THE MASTER OF THE ROLLS.[48] The owner of a vessel having the

[48] The statement of facts is abridged and part of the opinion is omitted.

sixty-four sixty-fourths, without any mortgage upon it, enters into a charter-party with the plaintiffs for a particular voyage: this prima facie is perfectly good. The charter-party is produced duly signed by the parties; it lies therefore upon the defendants to shew why the plaintiffs are not entitled to the benefit of it. The law is, and it is laid down in De Mattos v. Gibson [4 De Gex & Jo. 276; s. c. 28 L. J. Rep. (N. S.) 165, 498] that if a charter-party is bona fide entered into between the owner of the vessel and the charterer, either party is entitled to an injunction to restrain the other from doing anything inconsistent with the contract entered into. If there is nothing that can be adduced by the defendant to shew that the charter-party ought not to be acted upon, it is a case in which the charterer is entitled to an injunction to restrain the defendant from doing anything inconsistent with the rights which he has given to the plaintiffs. * * *

Upon the facts stated the plaintiffs are entitled to an injunction to restrain any act inconsistent with the charter-party which has been entered into by the defendant.

The defendants appealed against this order to the Lords Justices; but they subsequently agreed to withdraw it, and allow the costs to be disposed of at the hearing of the cause.

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## HARRIS v. BOOTS, CASH CHEMISTS (SOUTHERN), Limited.

(Chancery Division. [1904] 2 Ch. Div. 376.)

Action.

The only question raised by this action which calls for any report was as to the right of the assignor of leasehold premises to enforce by injunction the specific performance by his assignee of the negative covenants contained in the original lease by means of the usual covenant by the assignee "to perform and observe" the covenants and conditions contained in the lease, and to indemnify the assignor from and against all claims and demands on account of the same. The facts, so far as material, were as follows:

By a lease of October 29, 1902, a house and shop, No. 162, Western Road, Brighton, were demised by one Broadbridge to the plaintiffs for a term of thirty years at the rent therein mentioned, with a covenant by the plaintiffs with the lessor that they would not at any time during the said term "make any alteration or addition whatsoever to the said premises" without the previous approval in writing of the lessor first had and obtained.

The plaintiffs subsequently entered into negotiations with the defendants, who were already in possession of No. 161 and other houses in Western Road, for the sale of this lease to the defendants. One term of the negotiations was that the defendants should be at liberty to make a connection between No. 161 and No. 162 by means of open-

ings on the ground and first floors; to this Broadbridge, the lessor, consented, and the transaction was carried out by three deeds of June 24, 1903. By one of these deeds the lessor formally consented to the proposed alterations.

By another deed the premises comprised in the lease of October 29, 1902, were assigned to the defendants for the unexpired residue of the said term of thirty years, subject to the rent reserved by, and the covenants and conditions contained in, the said lease, and the defendants thereby covenanted with the plaintiffs, in the usual form, during the residue of the said term to pay the said rent, and "to observe and perform the covenants and conditions therein" (i. e., in the lease) "contained, and which henceforth on the lessees' part ought to be observed and performed," and to indemnify the plaintiffs from and against all claims and demands on account of the same.

By the remaining deed the defendants covenanted with the plaintiffs to make the proposed openings in conformity with the plan therein referred to, and at the expiration of the term to close up the communications so made; and again covenanted "to observe and perform" the covenants in the lease, in identical terms.

The defendants, having entered into possession of No. 162, were advised that it was desirable for the convenient carrying on of their business, and for the better accommodation of their own servants and of customers, that they should rearrange the water-closet accommodation of No. 162, which was insufficient and insanitary; and they accordingly proceeded to construct further and more suitable accommodation on the first floor, and in carrying out this additional alteration they opened a new window in the eastern wall of the premises, and put in the necessary soil and ventilating pipes, which also passed through this wall and remained exposed on its outer face.

As these further alterations had been made without the leave of the plaintiffs the present action was commenced, claiming a mandatory order on the defendants to remove these alterations, and to restore all such parts of the said messuage and premises as had been altered (otherwise than in accordance with the said agreed plan) to the condition in which the same were at the date of the execution of the deeds of June 24, 1903.

The action was tried with witnesses, and several other defenses were raised on the evidence; but, having regard to the view taken by the court on the question of law, namely, the plaintiffs' claim to an injunction as covenantees in the assignment of the lease, it is not necessary to make any reference to them, and the facts and arguments on this portion of the case are accordingly omitted.

WARRINGTON, J.[44] * * * There remains only the one serious question of law, namely, whether the plaintiffs, who no longer have any interest in the premises, are entitled to require the defendants

[44] Parts of the opinion are omitted.

specifically to perform the negative covenant contained in the lease not to make any alteration without the lessor's consent. * * *

The lessor can clearly obtain no injunction against the plaintiffs, and that for two reasons. He cannot obtain an injunction restraining them from committing a breach of the negative covenant in future, because they have not committed a breach of it in the past. The breach has been committed by somebody over whom they have no control. He cannot obtain a mandatory injunction requiring the plaintiffs to restore the premises to their original condition, because the plaintiffs are not in possession and have no right to possession. The lessor, therefore, could not obtain an injunction against these plaintiffs in any form, and could not obtain specific performance of this covenant against them. On the other hand, he could obtain damages, if he had suffered any by the breach of this covenant. * * *

I think the true object of the covenant entered into on the assignment of the lease is to indemnify and protect the original lessee against breaches of covenant contained in the lease under which he holds. Now there is admittedly no direct authority on this point; so far as the reports go, there is no reported case in which a lessee has sought to enforce by injunction, as against an assignee, a negative covenant contained in a lease. * * *

The covenant in the present case is, in terms, an affirmative covenant, and I think that that fact does distinguish it from the cases in which it has been held the court has no discretion, but must enforce by way of injunction specific performance of a negative covenant.

On the whole I come to the conclusion, therefore, that the action fails, and there must be judgment for the defendants with costs.

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## POPE-TURNBO v. BEDFORD.

(St. Louis Court of Appeals, Missouri, 1910. 147 Mo. App. 692, 127 S. W. 426.)

Appeal from St. Louis Circuit Court; Jas. E. Withrow, Judge.

Suit by Annie M. Pope-Turnbo against Maggie Bedford. From a judgment dismissing the bill, complainant appeals. Reversed and remanded, with directions to enter judgment as stated.

GOODE, J.[45] These parties entered into a contract, which we transcribe:

"This contract made and entered into this 29th day of August, 1907, by and between Annie M. Pope of the city of St. Louis, state of Missouri, party of the first part, and Mrs. Maggie Bedford, of 3964A Finney avenue, party of the second part, witnesseth that: Whereas, said Annie M. Pope has knowledge of a certain system or method of treating the scalp and hair, having for its object the production or increase of a growth of hair, which system of treatment said party of the first part has practiced on large numbers of persons for years, and for use in which said party of the first part has adopted

[45] Parts of the opinion are omitted.

certain preparations known as 'Poro' Temple Grower, 'Pope' Hair Grower, 'Poro' Pressing Oil, etc., which said preparations the party of the first part has found by experience to be especially suitable for and adapted to her aforesaid system or method of treatment of the scalp and hair: Now, therefore, in consideration of the said party of the first part instructing said party of the second part in said system or method of treatment of the scalp and hair and in the use and application of said 'Poro' remedies and hair applications, said party of the second part hereby agrees as follows: (1) That the party of the second part will pay to the party of the first part the sum of twenty-five dollars ($25). (2) That the party of the second part will not use in the practice of said system or method of scalp or hair treatment so taught the party of the second part by the party of the first part as aforesaid any temple grower, hair grower, pressing oil, or other application or preparation except the above mentioned 'Poro' preparations of the party of the first part, and said party of the second part agrees not to mention having learned the system or method of treatment of the scalp and hair of the party of the first part except in connection with the use by the party of the second part of said 'Poro' preparations of the party of the first part and not in connection with the use of any other hair or scalp applications or treatments; and said party of the second part furthermore agrees that if the party of the second part teaches said system or method of hair and scalp treatment of the party of the first part to any one else, it shall be only after having first obligated any such pupil by a contract similar to the one contained in this paragraph not to practice or mention said treatment of the party of the first part without using said 'Poro' preparations of the party of the first part. In testimony whereof the parties hereto have hereunto affixed their signatures and seals at St. Louis, Missouri, the day and year first aforesaid. Mrs. Maggie Bedford. [Seal.] Annie M. Pope. [Seal.] Witnesses: Lena Love. Mrs. Octavia A. Rainey."

* * * * * * * * * *

Defendant testified she applied to plaintiff to be taught the latter's method, paid $25, and afterwards the contract was presented to her, and she signed it without reading, but would not have signed if she had known it bound her to use Poro preparations forever. After receiving a diploma from plaintiff, defendant began to practice at her own home No. 3964A Finney avenue, St. Louis; plaintiff's place of business being No. 2223 Market street. Defendant must have commenced to practice in September, 1907, and she testified she used plaintiff's Poro decoctions until March, 1908, then ceased to use them, and instead used her own preparation, known as "Bedford's Wonderful Hair Grower." On March 21, 1907, defendant inserted this advertisement in a newspaper published in St. Louis and admitted to have a wide circulation:

"Mrs. Bedford, 3964 Finney avenue, is now in business for herself. She was formerly a pupil of Mrs. A. M. Pope née Turnbo, and thoroughly understands her business and guarantees all work. She would be pleased to have you give her a call. Telephone, Lindell 2646."

Plaintiff testified her process of treatment of the hair and scalp was a secret one for which she had built up a reputation, and it was becoming famous; that plaintiff was known in St. Louis and over the country to cause hair to grow rapidly on people's heads; that the secret of the treatment consisted in the application of the Poro remedies to the hair and scalp. She said these remedies produced a growth of hair, as had been proved in many instances; that, when defendant

applied for instruction, defendant said she was using a treatment different from plaintiff's, but wanted to learn the latter's so defendant could "establish herself in business on the same basis." There was testimony to prove the treatment administered by defendant, in the course of which her remedies were used on patients instead of plaintiff's, did not yield a good result. One patient treated by defendant testified the latter said she was doing the same work plaintiff was, and only "used a different soap"; that in connection with the treatment defendant applied to the hair and scalp two remedies called "Temple Grower" and "Bedford's Wonderful Hair Grower." Another witness testified she had taken plaintiff's treatment for three years and had been benefited; that she was nearly bald when she commenced the course, and it had improved the growth of her hair.

1. The petition in this case might be considered either a bill in equity to restrain defendant from advertising or saying she had been a pupil of plaintiff and had learned plaintiff's system and method of treatment, unless defendant practiced the same method and treatment, and also to enjoin her from practicing the system without using plaintiff's remedies; or it might be considered as uniting a case at law for damages for breach of the contract with a suit in equity for an injunction. Paddock v. Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254. The cause was tried without a jury, and no declarations of law were asked. The parties appear to treat the case as one in equity for an injunction, and we will dispose of the appeal on the theory that it is. * * *

2. The petition accuses defendant of telling her patients she had learned her system of treatment from plaintiff, and of advertising herself as plaintiff's pupil after she had ceased to apply the latter's remedies and was applying her own. It is alleged the reputation of plaintiff's business, her method of treating the hair, and her preparations were being greatly damaged by said conduct, which constituted a breach of the agreement and worked detriment to plaintiff's business and the reputation she had established for her system, by "imposing responsibility for the harmful, deleterious, and inadequate results of the use of said 'Bedford's Wonderful Hair Grower.'" The testimony for plaintiff conduced to prove she had established a good will for her remedies and system of treatment and was enjoying an increasing business. This testimony is uncontradicted and must be accepted as true. The good will of her preparations and system of treatment is a species of property. 14 Ency. Law (2d Ed.) 1086; Beebe v. Hatfield, 67 Mo. App. 609; Met. Nat. Bank v. Dispatch Co. (C. C.) 36 Fed. 722. It was of value to plaintiff, and she had the right to protect it from unfair competition by inserting a restrictive stipulation in contracts made with pupils to prevent them from leading the public to believe they applied plaintiff's remedies, when, in fact, they applied others less efficacious. Goodyear, etc., Co. v. Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U.

S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; Hopkins on Unfair Trade, § 12, and notes.

Probably she would have the same right in the absence of such a stipulation, but as to that we need not inquire. In view of the restriction, it was unfair for defendant to advertise herself, either verbally or in the press, as having been a pupil of plaintiff, thereby giving the impression she administered plaintiff's system of treatment after she had ceased to do this. In this aspect the case strikes us as simply one to restrain the breach of a negative stipulation in a contract; a relief readily granted in equity if the stipulation is supported by a consideration, and is not oppressive, opposed to the policy of the law, or for personal services. Those conditions of relief exist in the present case, and this further one, too, if it is essential: The damages plaintiff would suffer from breaches of the stipulation are not recoverable in a legal action because they cannot be measured. Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332.

There is authority for saying the violation of a negative covenant inserted in a contract to protect property will be restrained even though it does not appear irreparable damage will flow from a violation of it. Schlitz Brew. Ass'n v. Neilsen, 77 Neb. 868, 110 N. W. 746, 8 L. R. A. (N. S.) 494; Dickerson v. Canal Co., 15 Beav. 260; Hulme v. Shreve, 4 N. J. Eq. 116. Commentators say injunctions are granted almost as a matter of course to prevent the breach of such covenants. 3 Pomeroy, Eq. Jur. § 1342. See, too, 2 High, Injunctions, § 1142. Those writers refer to the restraint of breaches of negative covenants in leases; but we do not see any reason why the principle does not apply to the stipulation in question.

Plaintiff considered it would be detrimental to the good will of her method of treatment and remedies to have persons who had studied under her as pupils advertise that fact after they had commenced to practice, unless they used plaintiff's remedies; and this opinion stood on solid ground, if, as she testified, the beneficial part of her system consisted in applying the Poro remedies to the scalp. The use of remedies which lacked their virtue would impair their reputation and diminish the value of plaintiff's good will. We have no doubt the contract ought to be enforced to this extent, and find abundant authority for our conclusion in the text of sections 1342 to 1344, inclusive, of 3 Pomeroy, Eq. Jur., and cases cited in the notes. See, too, Hall v. Wesster, 7 Mo. App. 56; St. Louis Safe Dep. & Sav. Bank v. Kennett, 101 Mo. App. 370, 389, 74 S. W. 474; Manhattan Mfg. Co. v. Stock Yards, 23 N. J. Eq. 161.

The judgment entered below dismissing plaintiff's bill and denying any relief by injunction will be reversed, and the cause will be remanded, with directions to enter judgment that defendant be enjoined from mentioning to patients she had learned from plaintiff the latter's method

of treatment of the scalp and hair, and from advertising herself as the former's pupil, unless she uses plaintiff's Poro preparations, instead of her own, in treating patients; and that the costs of this action be taxed against the defendant. All concur.

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## ANDREWS v. KINGSBURY.

**(Supreme Court of Illinois, 1904. 212 Ill. 97, 72 N. E. 11.)**

Appeal from Appellate Court, Fourth District.

Suit by Edwin C. Kingsbury against Harry B. Andrews. From a decree of the Appellate Court (112 Ill. App. 518), affirming a decree for plaintiff, defendant appeals.

At the April term, 1903, of the circuit court of Richland county the appellee, Edwin C. Kingsbury, filed his bill to restrain the appellant, Harry B. Andrews, from engaging in the newspaper business in the city of Olney, either as proprietor, editor, manager, or in any way whatever, either for himself or any one else, for a period of five years, as provided in a certain alleged contract executed between the parties. A temporary injunction was issued as prayed, and upon a hearing it was made perpetual for the period of five years from November 2, 1901. An appeal was prayed to the Appellate Court for the Fourth District, where the decree of the circuit court was affirmed, and a further appeal has been prosecuted to this court. * * *

WILKIN, J.[46] * * * It is urged that the court erred in refusing to admit competent testimony offered by appellant. It is said that on the hearing he offered to prove the distinctive characters of the Olney Advocate and the Olney Times as to their respective classes of business and sources of patronage, and therefore no financial injury would result to appellee, which evidence the court refused to admit. The record does not sustain the contention, except as to an offer to prove the politics of the papers. But, in any view, the evidence was wholly immaterial. Appellant entered into a contract not to engage in the newspaper business in the city of Olney for five years. The Olney Times was a newspaper published in the city of Olney, and the management of that paper by appellant was therefore in open violation of the terms of the contract, which was the only material issue in the case. The testimony was therefore properly excluded.

The general rule that a writ of injunction should only issue where there is an unquestionable right, and where irreparable injury will be suffered, and there is no adequate remedy at law, either on account of the insolvency of the defendant or for some other cause, is not applicable to this case. Courts of equity will, and frequently do, interpose by injunction, thereby indirectly enforcing the performance of

[46] The statement of facts is abridged and parts of the opinion are omitted.

negative covenants by prohibiting their breach; and where there is an express negative covenant, courts of equity will entertain bills for injunctions to prevent their violation, even though the same will occasion no substantial injury, or though the remedy be adequate at law. Consolidated Coal Co. v. Schmisseur, supra; Hursen v. Gavin, supra. Nor is the position that the decree below is broader than the terms of the contract, for the reason that appellant is enjoined from engaging in the newspaper publishing or printing business in the city of Olney, while the appellant only agreed not to engage in the "newspaper business" in the city of Olney, sustained by the abstract of the record. The terms of the injunction are that "the injunction in the above entitled cause be, and the same is hereby, decreed to be in full force, etc., as prayed in complainant's bill." The abstract as presented to this court does not show that the injunction ordered is in its terms broader than the contract. If that fact appears from the record, counsel for appellant should have shown it by the abstract.[47] * * *

Decree affirmed.

[47] In Johnston v. Blanchard (Cal. App. 1911) 116 Pac. 973, which was an action to enjoin defendant from conducting the business of distributing advertising matter in the county of Los Angeles, in violation of the terms of an agreement, whereby he covenanted that he would not do so, the court said in part: "The complaint alleges that Blanchard, the defendant, notwithstanding his contract, did, a few months after making said agreement, enter into a similar business to the one sold to Lee, and at the time of the instituting of the suit he was engaged in conducting an advertising distributing business in the city of Los Angeles. The only point argued by appellant is the sufficiency of the complaint tested by a general demurrer, which was overruled. * * * The purpose of the action was to specifically enforce a negative covenant, the violation of which must necessarily constitute an invasion of plaintiff's rights. The specific point urged by appellant is that it is not alleged that defendant has succeeded in securing any of plaintiff's customers. In such case as this, the right to enforce a covenant does not depend upon a showing of the actual loss of customers who might in any event have discontinued their patronage, but upon the conclusion of the court, justified by the facts alleged, that injury to plaintiff would very probably result from defendant's acts, and that such injury would be irreparable. The re-entry of defendant in the active management of a business in Los Angeles county of like character to that which he had sold would necessarily result in depriving plaintiff of the good will of the business purchased, and hinder and obstruct the latter's successful conduct and management thereof. That defendant was actually engaged in soliciting plaintiff's customers was, not only a breach of his implied warranty (section 1776, Civ. Code), but, in effect, an impending threat of injury to the latter, for which injury, inconvenience, and perplexity the law afforded no adequate remedy. The facts alleged are ample to show not only a breach of the contract, but that plaintiff would by reason of a continuance thereof be irreparably damaged."

## PEERLESS PATTERN CO. v. GAUNTLETT DRY GOODS CO.

(Supreme Court of Michigan, 1912. 171 Mich. 158, 136 N. W. 1113, 42 L. R. A. [N. S.] 843.)

MOORE, C. J.[48] This is an injunction bill and one for specific performance of a contract. A demurrer was interposed to the bill of complaint. It was overruled, which action is sought to be reviewed here.

The complainant is the maker of paper patterns. The defendant is the proprietor of a large dry goods store. A written contract was made between the parties, the material parts of which are as follows:

"State, Mich. The Peerless Pattern Company, 192½ to 200 Greene Street, New York City: (1) Please send us an assortment of Peerless patterns including the May, 1911, issue, amounting to $200.00 at 5 cents each pattern, payable as follows: $100 in thirty days, and the balance $100 to remain as a standing debit during the term of this agreement at 4 per cent. interest per annum, payable semiannually. * * * (5) We will reorder at least once each week, all patterns that we sell, so as to keep our assortment complete. We will offer and display the patterns for sale on the main floor. We will not handle directly or indirectly any other make of pattern. We will pay for all goods on or before the tenth day of the month following the month of shipment and will pay all transportation charges to and from your New York office. (6) It is understood that you are to exchange at full purchase price all patterns in our stock that you discard in January and July for other patterns to be reordered by us thereafter. After the return by us of such discarded patterns, if our remaining stock exceeds the amount of our original assortment we may return to you the excess of such sum in Peerless patterns purchased from you to be selected out of our stock by us; such return excess patterns to be credited to our exchange account at full purchase price. * * * (7) This order is to take effect on acceptance by you and to remain in force for a term of five years from the date of the first shipment to us from term to term thereafter unless either party shall give notice of desire to cancel in writing within thirty days before the expiration of any term. If such notice is given by us, we will continue the agreement for four months thereafter in order to give you an opportunity to transfer the account. * * * Purchaser's Name, The Gauntlett Dry Goods Co. Date, March 2, 1910.

"Accepted: The Peerless Pattern Co., by E. L. Genth."

The bill of complaint, after the formal part thereof, set out the making of the contract. It avers: That complainant entered upon the performance thereof. That defendant failed and refuses to perform its part thereof. That it began selling the patterns of a rival concern and prayed:

"(2) That the said defendant, the Gauntlett Dry Goods Company, its attorneys, agents, and servants, may be restrained by an injunction of this honorable court from selling or handling, directly or indirectly, during the term of said contract or agreement, any make of pattern other than that of your orator. (3) That the said defendant, the Gauntlett Dry Goods Company, its attorneys, agents, and servants, may be decreed specifically to perform all and singular the terms, conditions, and stipulations of said agreement, by it to be performed, and it be compelled to order and buy from your orator and expose for sale, as by said agreement stipulated, the said patterns of your orator, your orator being ready, willing, and able, and hereby offering specifically to perform said contract or agreement as on its part stipulated to be

[48] Parts of the opinion are omitted.

performed. (4) That your orator may be decreed to recover from the said Gauntlett Dry Goods Company, the said defendant, for the price and value of goods, patterns, fashion guides, and fashion books prepared for the defendant and shipped to it, amounting in the neighborhood of $300."

A prayer for general relief followed.

It is claimed the demurrer should have been sustained because: First. It appears from the allegations in the bill of complaint that the complainant has a full, adequate, and complete remedy at law. That if the allegations therein contained are true, the only relief to which the complainant is entitled is a moneyed judgment at law for damages. * * *

The case at bar is more like Standard Fashion Co. v. Siegel Cooper Co., 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749, where, among other things, it is said:

"But even if upon a trial of action, specific performance of the contract in its entirety were refused as impracticable, still the bill should be retained as one permitting an injunction, in the sound discretion of the court, to restrain the defendant from violating the negative and severable covenant of the Siegel Cooper Company, that it would not sell, or allow to be sold, on its premises, during the duration of this contract, any other make of paper patterns than those of the plaintiff. The learned Appellate Division, one of the judges dissenting, overruled the demurrer on this ground, holding that the court should extend its remedy as far as it is able, and thus prevent principal defendant not only from making money by breaking its agreement, but from inflicting a double wrong upon the plaintiff, by depriving it of the right to sell, and conferring that right on a business competitor. We think this a sound and just conclusion, because it will compel the Siegel Cooper Company to either perform its agreement or lose all benefit from breaking it, and at the same time will shield the plaintiff from part of the loss caused by the breach, if persisted in. Lumley v. Wagner, 1 De G. M. & G. 604; Donnell v. Bennett, L. R. 22 Ch. Div. 835; Montague v. Flockton, L. R. 16 Eq. 189; Singer Sewing Mach. Co. v. Union Buttonhole & E. Co., Holmes, 253 [Fed. Cas. No. 12,904]; Chicago & A. R. Co. v. New York, L. E. & W. R. Co. [C. C.] 24 Fed. 516, 521; Goddard v. Wilde [C. C.] 17 Fed. 846; Western Union Teleg. Co. v. Union P. R. Co. [C. C.] 3 Fed. 423, 429; Western Union Teleg. Co. v. Rogers, 42 N. J. Eq. 311 [11 Atl. 13]. The injunction, when granted, may not be absolute, but may be based on some equitable condition that will prevent either party from taking advantage of the other, such as the waiver by the plaintiff of the breach of the contract by the principal defendant. The question raised by the demurrer does not relate to any matter of discretion or property, but to the power of the court, to grant any relief, conditional or otherwise. We are satisfied with the opinion below upon the subject, and should adopt it as our own without comment, but for a point not thus far considered, which seems to us a conclusive answer to the demurrers, and which, if overlooked, might lead to some confusion. The action is for the specific performance of a lawful contract, duly executed by both parties thereto. It is capable of performance by both, and there is no reason for nonperformance by either. A court of equity has jurisdiction of such actions, and the complainant set forth the contract, readiness to perform on one side, a refusal to perform on the other, and facts showing no adequate remedy at law. A complete cause of action is therefore alleged, and the only reason for not awarding general relief to the plaintiff is that its nature is so complicated as possibly to require multiplicity of orders by the court in its efforts to superintend the details of an extensive and peculiar business. This fact does not deprive the court of jurisdiction, but justifies a refusal, in its sound discretion, to exercise. It confers no right upon either party. The court does not refuse to act because the defendants object to its acting, for it would refuse, under the circumstances, if both parties requested it to proceed; but it refuses because the execution of its decree would require protracted supervision.

It is the difficulty of enforcing, not of rendering, judgment that causes it to hesitate. The office of a demurrer is to sweep away a defective pleading, and in the case before us it attacks the substance of the complaint; yet the complaint is good in substance, for it sets forth a cause of action in equity. It is true that the court, in its discretion, may not hear the cause, or after the hearing may refuse relief owing to the difficulty of enforcing its decree, still this does not make the complaint defective, nor authorize a general demurrer, which must be founded upon an absolute, certain, and clear proposition that, taking the charges in the bill to be true, the bill must be dismissed at the hearing. Beach, Modern Eq. Pr. No. 225. Upon the facts before us, it is in the power of the court to enforce the agreement the same as it is in the case of railroad contracts; but the difficulties attending the enforcement are so great that the court would ordinarily refuse to undertake it, as there is no public interest involved. As there was complete jurisdiction and a perfect cause of action against both defendants, the demurrers must be overruled. * * *"

The decree of the court below is affirmed, with costs, and defendant is given 20 days in which to answer.

STEERE, BROOKE, and STONE, JJ., concurred with MOORE, C. J. BLAIR, J., being ill, took no part in the decision. OSTRANDER, J., concurs upon the ground that the contract in question is not in restraint of trade within the meaning of the contract in question. MCALVAY, J., concurred with OSTRANDER, J.

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## MERCHANTS' TRADING CO. v. BANNER.

(In Chancery, 1871. L. R. 12 Eq. 18.)

This was a demurrer. The bill contained allegations to the following effect:

The plaintiffs, being the owners of a screw steamship called the Bolivian, and being desirous that certain alterations should be made in the vessel, in the month of January, 1870, entered into a contract for that purpose with a firm of W. C. Miller & Sons, then carrying on business as shipbuilders at Garston, near Liverpool. The agreement (the terms of which were in writing) provided that Messrs. W. C. Miller & Sons should cut in two, lengthen, complete and finish for the plaintiffs the screw steamship Bolivian in accordance with a specification, and would use their best endeavours to complete, finish, and duly deliver to the plaintiffs the said steamship with all reasonable despatch, and contained provisions authorizing the plaintiffs' engineer to inspect the ship at all reasonable times; and in consideration of the premises the plaintiffs agreed to pay Messrs. W. C. Miller & Sons for the price of such alterations and additions of and to the said steamship the sum of £27,600 by the instalments and at the times therein mentioned; and Messrs. W. C. Miller & Sons were to have a lien on the ship for securing the due payment of all the instalments.

The agreement then provided that the steam-vessel and its parts should be deemed to be, and should be the property of the company, without prejudice to the lien of the shipbuilders for any unpaid in-

stalments; that in case of refusal, neglect or failure of the latter to complete the vessel according to the agreement, the company should be entitled to possession of the vessel and its parts, and all articles, matters and things lying about the yard and wharf intended by the shipbuilders for the alteration and completion of the steamship, upon payment of a reasonable compensation. The agreement then proceeded as follows:

"And it is hereby further agreed that in case of such refusal or failure as aforesaid it shall and may be lawful for the said company, its successors or assigns, with workmen or others, to enter and go into the yard or dock of the said W. C. Miller & Sons wherein the said vessel shall be building or be in progress of construction, and either to take away the said steam-vessel, or parts thereof, and the said engines, boilers, and machinery, or parts thereof, or to employ workmen to finish the same, without any molestation or hindrance whatsoever from the said W. C. Miller & Sons, their executors, administrators, or assigns, or the workmen or other persons employed by them, and without making any allowance for the use of the said dockyard, machinery or premises."

Messrs. W. C. Miller & Sons subsequently to entering into the agreement took the vessel into the dock at Garston in which they carried on business, and they proceeded to cut the vessel in two, but made no further progress with the alterations. The vessel was still lying in the dock, cut in two pieces.

In November, 1870, Messrs. W. C. Miller & Sons were adjudicated bankrupts, and the defendant was appointed trustee under their bankruptcy. As such trustee the defendant caused advertisements to be issued of the sale of the graving-dock, machinery, and other property of Messrs. W. C. Miller & Sons. Amongst the property so intended to be sold were divers articles intended for the alteration and completion of the Bolivian. The advertisement took no notice of the plaintiffs' rights under their agreement.

The bill prayed for a declaration that the plaintiffs were entitled to complete the alterations in the said steamship Bolivian agreed to be executed by the said W. C. Miller & Sons, and that the plaintiffs and their workmen were entitled to enter upon, go into, and use the graving-dock, workshops, machinery, and premises of the said W. C. Miller & Sons in which the said ship was, and the said alterations were being carried on, without making any allowance for the use of the said dockyard, machinery, and premises, and that the plaintiffs were entitled to all such articles, matters, and things lying in or about the said yard or wharf of the said W. C. Miller & Sons as were intended by them for the alteration and completion of the said steamship, upon paying for such articles, matters, and things in the manner provided for by the said agreement; and for an injunction to restrain the defendant from selling or otherwise dealing with the dock in which the said steamship was lying, and the workshops, machinery, and premises in and by means of which the said alterations in the said ship were being made, in such manner as to exclude or interfere with the right of the said company, their successors or assigns, to complete the alteration in the said steam-

ship in the said dock, and their right, and the right of their workmen, to enter and go into the said dock and yard, and to use the said dock, workshops, machinery, and premises for completing the alterations in the said steamship; and that the defendant might in like manner be restrained from removing the said ship or the said machinery from the said premises, and from removing or selling the articles, matters, and things lying and being in or about the said dockyard and premises which were intended by the said W. C. Miller & Sons for the alterations and completion of the said steamship, the plaintiffs being willing, and thereby offering, to pay for such articles, matters, and things according to the said agreement.

April 21. LORD ROMILLY, M. R. I cannot avoid allowing the demurrer in this case. It appears to me totally impossible to give any relief upon this agreement in a Court of Equity. I am of opinion that this must be looked at exactly as if it were a suit for specific performance without any bankruptcy at all; and that the defendant, or rather the persons for whom the defendant is a trustee, have either refused or declined to perform the agreement. The agreement is of a singular description. If this agreement could be specifically enforced, what railway contract is there for making a tunnel, or the like, that could not be specifically enforced? The two things are really very much of the same character. There is a stipulation that if Messrs. Miller refuse or neglect to perform the contract (which in my opinion they have done, for I think that the bankruptcy amounts to that) there is a power to the plaintiff to take possession and complete the vessel. That exists in all railway contracts; and the only difference is this, that in railway contracts there is usually added (at least in all those which I have seen) a provision to charge the person with whom they have made the contract with the expenses of performing the contract. But that is not so here. It is merely a power to enter. That can make no difference, and it appears to me to be a contract which the court can not possibly perform. Then, as was laid down by Lord Eldon in Clarke v. Price, 2 Wils. C. C. 157, if the court can not perform the contract as a whole, it will not enforce performance of a part; and if there is any remedy it must be at law. In Morris v. Colman, 18 Ves. 437, and Lumley v. Wagner, 1 D. M. & G. 604, there appear to have been some grounds on which it was held that those cases were taken out of the rule. In the former case Lord Eldon granted an injunction because the defendant, as part of a partnership transaction which he and the plaintiff had entered into as proprietors of the Haymarket Theatre, had agreed to write plays for that theatre, while his partner was to get up the performances. In Lumley v. Wagner the court seems to have treated it as if there was a separate and distinct contract in which one said, "In consideration of my doing so and so, you shall not perform for anybody else." Thereupon the court enjoined the defendant from performing in any other place. At all events, I do not think any of the cases touch the real principle, which is, that where the stipulation

sought to be enforced is really a part of the contract itself, this court cannot specifically perform the contract piecemeal, but it must be performed in its entirety, if performed at all; and where the court can not perform it in its entirety, neither can it perform any particular portion of it. Here it is obvious that the contract can not be performed in its entirety. The result, no doubt, is that a very serious evil is inflicted upon the Merchants' Trading Company; but I think, under the Bankruptcy Act, the parties will be able to get such relief as in the case of any person who has a large claim upon a bankrupt which he can not obtain in any other form, or in any other way. I presume the Court of Bankruptcy will give them some means of getting their vessel out of the dock, and the like. At all events, I am of opinion that I can not do it by specific performance; and therefore I allow the demurrer.

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## LACY v. HEUCK et al.

**(Superior Court of Cincinnati, Ohio, 1883. 9 Ohio Dec. Reprint, 347.)**

Motion for temporary injunction.

PECK, J. The plaintiff alleges that in September, 1883, he entered into a written contract with the defendants for the use of Heuck's opera house for the week now next ensuing, the house to be lighted and heated by defendants, who also agreed to furnish the services of ticket sellers, door keepers, ushers, stage carpenters, an orchestra, and certain other persons necessary for the production of a play to be performed during that time by a company of actors and actresses employed by, and under the control of plaintiff. That defendants were also to perform certain services in and about advertising the play, and the parties were to be compensated respectively, by a division of the receipts from the sale of tickets in certain agreed proportions. That plaintiff is now on his way to Cincinnati with his company, where they will arrive in time to produce the play as agreed and that he is ready and willing to perform all the stipulations of the contract incumbent upon him, but that defendants have refused to perform their part of the contract, have declined to do what is required of them by its terms as to the advertising, have notified plaintiff that he cannot occupy the opera house during the period agreed upon, and are now advertising another company to appear there during that time.

The plaintiff moves the court to enjoin defendants from permitting the opera house to be occupied by others or put to other use than the production of his play, during the period named in the contract; that defendants be enjoined from advertising or permitting any other play there during the week mentioned, and also for a mandatory injunction restraining defendants from failing or refusing to provide the opera house and perform the services stipulated in the contract.

The defendants appear in person and by counsel, and have filed their affidavit. They do not deny the execution of the contract, or its intend-

ed breach, but it is claimed by their counsel that injunction is not a proper remedy for such an injury; and that presents the only question before us. The reasons assigned to support the claim that injunction is an improper remedy in such case, are two: First—that the plaintiff will have an adequate remedy at law; and second—that this is not such a contract as can be enforced in equity, either by a mandatory injunction or by means of a decree for specific performance, because it is largely a contract for personal services, and such contracts, cannot from their very nature, be specifically enforced. Port Clinton R. R. Co. v. Toledo Railroad Co., 13 Ohio St. 544.

As to the first point, it seems clear that the only remedy at law accessible to plaintiff would be an action for unliquidated damages for breach of contract. In such case it would be necessary for the jury to determine as best they might from the evidence adduced what would be the probable receipts from the performances contracted to be given. To show that it would not be impossible to furnish proof on the subject, defendants, in their affidavit, set forth the receipts during two previous weeks of performance by plaintiff's company at their theater within a year or two past, but it is obvious that even with all the aid to be derived from such testimony, the jury could not fix the amount of such receipts with any degree of certainty. That plaintiff could maintain an action for damages after the breach had occurred is beyond question, but it is not at all certain that such an action would furnish him with an adequate remedy for the wrong he had suffered.

In the language of the Lord Chancellor in Lumley v. Wagner, 1 D. G. & M., 618, a court of equity "will not suffer persons to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damage which a jury may give."

As to the other proposition that this is not such a contract as can be specifically enforced, I am inclined to the opinion that the point is well taken. The contract provides not only for the use and occupation of the opera house, but for the personal services of a large number of persons. It would be impracticable for the court to supervise or enforce the performance of such services. See Port Clinton R. R. v. Cleveland R. R., above cited; and Chapman v. R. R. Co., 6 Ohio St. 119, 139.

But there is a part of the relief asked to which the same objections do not apply. Among other things plaintiff prays that the defendants may be enjoined from putting the opera house to any use during the time covered by his contract, other than the production of the play by his company, and from advertising or permitting any other play during that time.

As to actors and singers it has been held in a number of cases in England and this country, that they may be enjoined from playing or singing at any other place than the one where they have agreed to play or sing, and in this indirect manner their contracts for personal serv-

ices have been enforced. Lumley v. Wagner, 1 D. G. M. & G., 604, and S. C. 5 De G. & S., 485; Montague v. Flockton, 16 L. R. Eq., 189; Webster v. Dillon, 3 Jur. N. S., 432; Daly v. Smith, 38 N. Y. Super. Ct., 158.

In the first case above cited the Lord Chancellor placed his decision largely upon the ground that the contract provided that the defendant should sing at a certain place and not elsewhere. The injunction was granted because of the negative words, and she was accordingly restrained from singing elsewhere, but in the latter cases that distinction is said to be ill-founded, and it has been pointed out that a contract to play at a certain place at a certain time necessarily excludes the idea that the actor may perform at another place at the same time and injunctions restraining such breaches of contract were granted in those cases, although the contract contained no negative words. There are cases in this country holding that such an injunction will not be granted as there were such decisions in England prior to Lumley v. Wagner. One of these is Delavan v. Macarte, 1 Dec. R., 226 (4 W. L. J., 555), decided in the court of common pleas of this country, in the year 1847, prior to Lumley v. Wagner, and in accord with the English authorities overruled by that case.

Under the circumstances, the question is fairly an open one in Ohio, and in that situation we should be guided by the cases best grounded in principle. The only reason assigned for the refusal to grant a mandatory injunction is that it is impracticable to apply such a remedy because it might involve the supervision and direction by the officers of the court, of the performance of the services contracted for. But how is it impracticable to afford such relief as was granted in Lumley v. Wagner? Difficult as it might be to compel a singer to sing at the proper time and place and in the proper manner, it would not be at all difficult to compel him to desist from singing except at a specified place. Such a writ might not in all cases afford a remedy to plaintiff, as the defendant might elect not to sing at all, but it is safe to believe that the ordinary motives governing human action would lead him to prefer to comply with his contract, rather than to be altogether prevented from the exercise of his talents, and such appears to have been the result in cases where this sort of relief was granted. Why then should not a plaintiff in such case have an injunction of this sort? His contract rights are clear, the proposed violation of them is clear, and here is a remedy not impracticable. It would seem to be a sound general rule that where the right of one party is plain, and the wrong done or intended to be done by the other equally plain the court should not be sparing in the application of its remedies, but rather should grant them with a liberal hand.

The case at bar differs from all the cases cited in that the position of the parties is here reversed. In those cases it was manager against actor, in this it is actor against manager but in both the personal serv-

ices of the other party are sought, and in that respect they are the same in principle. If Heuck could enjoin Lacy from performing next week in any other place than his opera house, why should not Lacy have similar relief to secure the services of Heuck and his subordinates in the management of the opera house?

The contract for the use of the opera house adds an element not found in the above cases, but there appears to be no reason why the same remedy may not be applied as to it. This part of the agreement, if it stood alone, could be enforced by mandatory injunction or decree for specific performance. Taylor on Landlord and Tenant, sec. 46, and cases cited. It has been a common practice for courts of equity to interfere to restrain a tenant from putting the property to uses other than agreed upon. 2 Daniel's Chy. Practice, 1655, et seq. Also to restrain the landlord from the violation of his covenants. Kerr on Injunctions, *417. In the case of Hooper v. Broderich, 11 Simons, 47, the vice-chancellor held that a mandatory injunction in effect requiring defendant to keep an inn upon certain premises which he had leased for that purpose ought not to have been granted, but that defendant might be restrained "from doing or causing or permitting to be done any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises." See also Tipping v. Eckersley, 1 K. & J. 264. There appears to be no reason why defendant should not be restrained from managing, advertising, assisting or providing assistance for any other play or performance at their opera house during the week covered by the contract, and from using or causing or permitting their opera house to be used for any other purpose than the production of plaintiff's play during that time, and it will be so ordered upon condition that plaintiff gives a satisfactory bond in the sum of $3,000.

The prayer for a mandatory injunction is refused.

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## JAMES JONES & SONS, Limited, v. EARL OF TANKERVILLE.

(Chancery Division. [1909] 2 Ch. Div. 440.)

The plaintiffs, James Jones & Sons, Limited, were a company carrying on business as timber merchants. In October, 1907, they entered into a contract in writing contained in letters and memoranda with the defendant, the Earl of Tankerville, for the purchase of timber growing on the Chillingham estates. By this contract the plaintiffs were to have the right to enter upon the estates and cut the timber and saw it up thereon, and for that purpose to erect sawmills and to remove the timber from the estates; the plaintiffs were to pay £1565 for the timber, and the defendant was to give free exit to hard roads for all timber and free sites for sawmills. The plaintiffs thereupon erected a sawmill and commenced to cut timber, saw it up at the mill, and remove it.

In February, 1908, a second contract was entered into whereby the plaintiffs were to pay £4310 for further timber on the estates on similar terms. They accordingly entered and erected sawmills and machinery, and proceeded to fell timber and saw it up and carry it away. In September, 1908, Lord Tankerville repudiated the contracts and demanded that further cutting should cease, and on October 27, 1908, he forcibly ousted the plaintiffs and their men from the Chillingham estates, wrecked their sawmills, and upset their machinery, buildings, and stacks of timber.

The plaintiffs brought this action against him, asking for injunctions restraining him from preventing the due execution of the contracts, and for damages. The defendant raised many defences, but the only question that calls for a report was his contention that the plaintiffs' claim for injunctions was equivalent to a claim for specific performance, and that the court would not grant specific performance of such contracts, but would leave the plaintiffs to their remedy by way of damages only.

PARKER, J.[49] * * * Equity in granting an injunction would only be restraining the violation of a legal right. An injunction restraining the revocation of the license, when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract, and protects a right in equity which but for the absence of a seal would be a right at law, and since the Judicature Act it may well be doubted whether the absence of a seal in such a case can be relied on in any Court: Walsh v. Lonsdale, 21 Ch. D. 9. I do not think, therefore, that there is any substance in the objection that a timber contract of the kind I am considering can not be specifically enforced by injunction because of a want of mutuality, and, though there is no direct authority on the point, it seems clear from the judgments in Buxton v. Lister (1746) 3 Atk. 383, and Gervais v. Edwards, 2 D. & War. 80, 83, that neither Lord Hardwicke nor Lord St. Leonards can have thought any such objection could be entertained. It is clear in both these cases that what was contemplated was specific performance in the sense of compelling the execution of an instrument under seal which would turn into legal rights what were under the contract rights in equity only, and I see no reason why the legal rights of entry which would be conferred by the execution of such an instrument would be rights which a Court of Equity would refuse to protect by injunction because the instrument might contain provisions which the court could not specifically enforce. * * *

I come to the conclusion, therefore, that the Court has ample jurisdiction to grant the injunctions asked for, though, of course, it is in its discretion, if it so thinks fit, to award damages in lieu of relief by

[49] Parts of the opinion are omitted.

way of injunction. Under the circumstances of this case, however, there is, in my opinion, every reason for not exercising this discretion.

With regard to the timber already cut which is the plaintiffs' property; with regard to their tenancy of the cattle boxes; with regard to their sawmills, machinery, and other property on the defendant's land, their rights at law under the contract have not only been infringed, but have been deliberately and wantonly disregarded with every circumstance of indignity and violence, and even if I thought that damages would be an adequate remedy for what they have suffered, I should feel it incumbent on me, if I could, to assert the authority of the law by refusing to allow the defendant to retain the benefits he has attempted to gain by his high-handed and illegal action. I propose, therefore, to grant relief by way of injunction, not by way of damages only.

(His Lordship then proceeded to assess damages to be paid by the defendant to the plaintiffs.)

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### (b) Contracts of Personal Service Not Unique

## COLUMBIA COLLEGE OF MUSIC AND SCHOOL OF DRAMATIC ART v. TUNBERG.

**(Supreme Court of Washington, 1911. 64 Wash. 19, 116 Pac. 280.)**

Action for an injunction by the Columbia College of Music and School of Dramatic Art against Karl E. Tunberg. Plaintiff nonsuited, and it appeals. Reversed and remanded for further proceedings.

Chadwick, J.[50] Respondent was employed by appellant to teach music in its school at Seattle for a term of two years beginning September 1, 1909. In consideration of 50 per cent. of all individual tuitions, respondent agreed "to give his entire time and attention, and devote his best efforts as may be required during the life of this contract, in giving instructions to such pupils as shall be assigned by the Columbia College of Music and School of Dramatic Art, to said party of the second part. The said party of the second part agrees to devote his best efforts in promoting the interest of the said Columbia College of Music and School of Dramatic Art, and to give his services in public on any occasion when the best interests of the said college may demand." It was also agreed "that the said party of the second part shall not engage himself unto nor connect himself with any other musical organization requiring pupils unless they become enrolled as regular students of said Columbia College of Music and School of Dramatic Art, and will not teach in the city of Seattle save and except

[50] Part of the opinion is omitted.

in the said College during the life of this contract." Respondent entered upon the performance of his contract, and so continued until August 1, 1910, when he resigned and refused to longer fulfill his obligations. * * * No damages are claimed in this action, but appellant has asked for an injunction restraining respondent from teaching or from giving lessons upon the piano in the city of Seattle from the time the action was instituted until the 1st day of September, 1911, and for general relief.

The rule is well settled that a court will not enjoin the breach of a contract for personal services, unless it is alleged and proven that the services of the contracting party are special, unique, or extraordinary, or the services are of such a character that they cannot be supplied elsewhere with reasonable effort, or the act is such that it cannot be done by another. 22 Cyc. 857, and citations thereunder; Universal Talking Machine Co. v. English, 34 Misc. Rep. 342, 69 N. Y. Supp. 813; Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; Cort v. Lassard, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; Taylor Iron & Steel Co. v. Nichols, 70 N. J. Eq. 541, 61 Atl. 946; Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348; Carter v. Ferguson, 58 Hun, 569, 12 N. Y. Supp. 580; Strobridge Litho. Co. v. Crane, 58 Hun, 611, 12 N. Y. Supp. 898; Johnston Co. v. Hunt, 66 Hun, 504, 21 N. Y. Supp. 314; Kessler v. Chappelle, 73 App. Div. 447, 77 N. Y. Supp. 285; Chain Belt v. Von Spreckelsen, 117 Wis. 106, 94 N. W. 78; H. W. Gossard Co. v. Crosby, 132 Iowa, 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115; Simms v. Burnette, 55 Fla. 702, 46 South. 90, 16 L. R. A. (N. S.) 389, 127 Am. St. Rep. 201, 15 Ann. Cas. 690; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627; Duff v. Russell, 133 N. Y. 678, 31 N. E. 622.

Upon oral argument this rule is admitted, but it is contended that, although respondent might sever his relations with appellant and leave it remediless to compel his future service or to restrain his employment by another, yet his conduct has been such as to bring him within the rule of those cases which hold that one who covenants that he will not engage in a particular business for a certain limited time for a consideration may be enjoined if he breach his contract. These cases usually arise where an established business has been sold; the seller's agreement to remain out of the trade for a time being a part consideration for the sale. Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11; Spier v. Lambdin, 45 Ga. 319; Brown v. Kling, 101 Cal. 295, 35 Pac. 995; Downing v. Lewis, 56 Neb. 386, 76 N. W. 900; Gordon v. Mansfield, 84 Mo. App. 367; Bailey v. Collins, 59 N. H. 459; Carter v. Alling (C. C.) 43 Fed. 208; McCaull v. Braham (C. C.) 16 Fed. 37; Hayes v. Willio, 11 Abb. Prac. (N. S., N. Y.) 167; Daly v. Smith, 49 How. Prac. (N. Y.) 150; Hursen v. Gavin, 162 Ill. 377, 44 N. E. 735; Eisel v. Hayes, 141 Ind. 41, 40 N. E. 119; Angier v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Up River Ice Co. v. Denler, 114

Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Carll v. Snyder (N. J.) 26 Atl. 977; Genelin v. Reisel, 10 N. J. Law J. 208; Stofflet v. Stofflet, 160 Pa. 529, 28 Atl. 857; Eckart v. Gerlach, 12 Phila. (Pa.) 530; Carroll v. Hickes, 10 Phila. (Pa.) 308. These authorities run upon the theory that one who has sold a business, agreeing to remain out of a like line for a definite time, cannot destroy the good will with which he has agreed that he will not interfere.

It is clear to us that, although respondent cannot be enjoined from giving piano lessons in the city of Seattle, it appearing that he is not possessed of unusual skill or craft in his profession, or that his name is of particular benefit to the appellant, and his place being supplied by another, yet he has nevertheless so conducted himself as to warrant the exercise of the restraining influence of a court of equity. He can seek his livelihood by following his profession or business, and no court will interfere; but, under the terms of his contract, he has engaged to promote the good will of appellant's business for a definite time, and he cannot solicit those known to be the clients of appellant or, for the mere sake of advancing his own interest, charge dishonorable or disreputable methods to appellant. He can build up his own business by legitimate methods, but he cannot destroy the business of his former employer by methods that do not appeal to that sense of fairness common among men.

The motion for nonsuit, in so far as it goes to the point under discussion, was based upon the ground that it had not been shown that any pupils had left the appellant's school on account of respondent's leaving its employ. We grant that the record fails to disclose this fact. But it does disclose an ill will, as well as an endeavor to influence the minds of certain of the pupils against appellant and its officers. And respondent should not be allowed to claim that immunity which equity gives to those who walk within its precepts, because his effort and his influence failed of results. His continued effort may succeed. To prevent wrong is the peculiar province of equity. His conduct has been such, and promises to be of such character, that damages may result. If so, they would be irreparable, in the sense that they could be estimated only by conjecture and not by any accurate standard. Commonwealth v. Pittsburgh, etc., R. Co., 24 Pa. 160, 62 Am. Dec. 372.

A review of the authorities relied on would be engaging to the writer and of possible interest to the profession, but would unnecessarily extend the limits of this opinion; for it is our judgment that appellant's rights depend, not so much on the simple breach of the positive covenants of its contract, as upon the general equitable doctrine that a person who has engaged to support the good will of a business will not be permitted to destroy it by unfair methods. To the observance of this duty respondent bound himself for the whole term, and, while he may relieve himself of his negative covenant, he is still bound to maintain, to the extent of inaction at least, the good will of the appel-

lant's business. That injunctions will issue within the facts of the particular case, as for instance if there be unusual talent, knowledge of trade secrets, business methods, and express covenants to maintain the good will of a business, or the good faith of a transaction, finds abundant support in the authorities.

Our conclusion is that appellant has made out a case, and, unless upon a retrial respondent makes a showing that will exonerate him, an injunction should issue restraining him from invading the good will of appellant's business, and from soliciting its clients and patrons.

Reversed, and remanded for further proceedings.

DUNBAR, C. J., and MORRIS, ELLIS, and CROW, JJ., concur.

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## WM. ROGERS MFG. CO. v. ROGERS.

(Supreme Court of Errors of Connecticut, 1890. 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278.)

Appeal from superior court, Hartford county; Fenn, Judge.

This was a suit to enjoin the violation of a contract between Frank W. Rogers and the Wm. Rogers Manufacturing Company and the Rogers Cutlery Company as follows:

"(1) That said companies will employ said Rogers in the business to be done by said companies, according to the stipulations of said agreement, for the period of twenty-five years therein named, if said Rogers shall so long live and discharge the duties devolved upon him by said Watrous as general agent and manager of the business to be done in common by said companies, under the directions and to the satisfaction of said general agent and manager; it being understood that such duties may include traveling for said companies, whenever, in the judgment of said general agent, the interest of the business will be thereby promoted. (2) The said companies agree to pay said Rogers for such services so to be rendered, at the rate of $1,000 per year for the first five years of such services, and thereafter the same or such larger salary as may be agreed upon by said Rogers and the directors of said companies, said salary to be in full during said term of all services to be rendered by said Rogers, whether as an employé or an officer of said companies, unless otherwise agreed. (3) The said Rogers, in consideration of the foregoing, agrees that he will remain with and serve said companies under the direction of said Watrous, as general agent and manager, including such duties as traveling for said companies, as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies, as said companies may desire to have him perform at the salary hereinbefore named for the first five years and at such other or further or different compensation thereafter during the remainder of the twenty-five years as he, the said Rogers, and the said companies may agree upon. (4) The said Rogers during said term stipulates and agrees that he will not be engaged or allow his name to be employed in any manner in any other hardware, cutlery, flatware, or hollow-ware business either as manufacturer or seller, but will give, while he shall be so employed by said companies, his entire time and services to the interests of said common business, diminished only by sickness, and such reasonable absence for vacations or otherwise as may be agreed upon between him and said general agent."

The complaint was held insufficient, and the plaintiffs appealed.

ANDREWS, C. J. Contracts for personal service are matters for courts of law, and equity will not undertake a specific performance.

2 Kent, Comm. 258, note b; Hamblin v. Dinneford, 2 Edw. Ch. (N. Y.) 529; Sanquirico v. Benedetti, 1 Barb. (N. Y.) 315; Haight v. Badgeley, 15 Barb. (N. Y.) 499; De Rivafinoli v. Corsetti, 4 Paige (N. Y.) 264, 25 Am. Dec. 532. A specific performance in such cases is said to be impossible because obedience to the decree cannot be compelled by the ordinary processes of the court. Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service. The courts in this country and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. 3 Wait, Act. & Def. 754; Marble Co. v. Ripley, 10 Wall. 340, 19 L. Ed. 955; Burton v. Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171; De Pol v. Sohlke, 7 Rob. (N. Y.) 280; Kemble v. Kean, 6 Sim. 333; Baldwin v. Society, 9 Sim. 393; Fothergill v. Rowland, L. R. 17 Eq. 132. The courts in both countries have, however, receded somewhat from the latter conclusion, and it is now held that where a contract stipulates for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages. 2 Story, Eq. Jur. § 958a; 3 Wait, Act. & Def. 754; 3 Pom. Eq. Jur. § 1343; California Bank v. Fresno Canal, etc., Co., 53 Cal. 201; Singer Sewing-Machine Co. v. Union Button-Hole Co., 1 Holmes, 253, Fed. Cas. No. 12,904; Lumley v. Wagner, 1 De Gex, M. & G. 604; Railroad Co. v. Wythes, 5 De Gex, M. & G. 880; Montague v. Flockton, L. R. 16 Eq. 189.

The contract between the defendant and the plaintiffs is made a part of the complaint. The services which the defendant was to perform for the plaintiffs are not specified therein, otherwise than that they were to be such as should be devolved upon him by the general manager; "it being understood that such duties may include traveling for said companies whenever, in the judgment of said general agent, the interests of the business will be thereby promoted;" and also "including such duties as traveling for said companies as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies as said companies may desire to have him perform." These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special, or unique, or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary intelligence and fair learning. If this was all there was in the con-

tract it would be almost too plain for argument that the plaintiffs should not have an injunction.

The plaintiffs, however, insist that the negative part of the contract, by which the defendant stipulated and agreed that he would not be engaged in or allow his name to be employed in any manner in any other hardware, cutlery, flatware or hollow-ware business, either as a manufacturer or seller, fully entitles them to an injunction against its violation. They aver in the complaint, on information and belief, that the defendant is planning with certain of their competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed in connection with such business as a stamp on the ware manufactured; and they say such use would do them great and irreparable injury. If the plaintiffs owned the name of the defendant as a trade-mark, they could have no difficulty in protecting their ownership; but they make no such claim, and all arguments or analogies drawn from the law of trade-marks may be laid wholly out of the case.

There is no averment in the complaint that the plaintiffs are entitled to use, or that in fact they do use, the name of the defendant as a stamp on the goods of their own manufacture, nor any averment that such use, if it exists, is of any value to them. So far as the court is informed, the defendant's name on such goods as the plaintiffs manufacture is of no more value than the names of Smith or Stiles or John Doe. There is nothing from which the court can see that the use of the defendant's name by the plaintiffs is of any value to them, or that its use as a stamp by their competitors would do them any injury other than such as might grow out of a lawful business rivalry. If by reason of extraneous facts the name of the defendant does have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals would do them some special injury, such facts ought to have been set out so that the court might pass upon them. In the absence of any allegation of such facts we must assume that none exist. The plaintiffs also aver that the defendant intends to make known to their rivals the knowledge of their business, of their customers, etc., which he has obtained while in their employ. But here they have not shown facts which bring the case within any rule that would require an employé to be enjoined from disclosing business secrets which he has learned in the course of his employment, and which he has contracted not to divulge. Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664.

There is no error in the judgment of the superior court. The other judges concurred.

### *(B) Where Agreement is Nonenforceable against Complainant*

WELTY v. JACOBS et al.

(Supreme Court of Illinois, 1898. 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98.)

Appeal from appellate court, First district.

Bill in equity by George M. Welty to restrain H. R. Jacobs from refusing to perform a contract for the use of a theater, and to enjoin Ulysses D. Newell from the use and occupation of the same. From the decree of the appellate court (64 Ill. App. 285), affirming the decree of the superior court of Cook county, in favor of defendants, plaintiff appeals.

CARTER, J.[51] This was a bill for an injunction filed December 28, 1895, in the superior court of Cook county, by the appellant, in which he alleged that he was a theatrical manager and proprietor; that on April 9, 1895, he entered into a written contract with H. R. Jacobs, manager, and representing M. J. Jacobs, proprietor, of the Alhambra Theater, in Chicago, to play his company in the "Black Crook" at such theater for seven consecutive nights, commencing December 29, 1895; that Jacobs was to furnish the house, well cleaned, lighted, and heated, together with the stock, scenery, and equipments contained therein, stage hands, stage carpenter, fly men, regular ushers, gas man, property man, janitor, ticket seller, doorkeepers, orchestra, house programmes, licenses, billboards, bill posting, distribution of printed matter, usual newspaper advertisements, and the resources of the theater in stage furniture and properties not perishable; that Welty was to furnish a company of first-class artists, to the satisfaction of Jacobs, together with special scenery, calcium lights, etc., and also, 10 days in advance, certain printing, prepaid and free from all charges, consisting of a variety of bills, etc.; that appellant was to receive 60 per cent. of the gross receipts up to $5,000, and 70 per cent. on all over $5,000; that if the company should not prove satisfactory to Jacobs, whose judgment was to be conclusive, or if the company should prove not to be as represented, then Jacobs should have the right to cancel the contract by giving appellant at least one week's notice, by mail or otherwise; that appellant's company was not to appear at any other house in the city prior to the date of the performance specified; that if, by any unforeseen accident, fire, or for any reason whatever, Jacobs could not furnish the house for said performance the contract was to become null and void.

The bill further alleged that appellant had kept and performed all his covenants; that he had tendered the printing as required, and that he was ready to furnish a satisfactory company; that he had received no notice from Jacobs that his company was not satisfactory nor as

[51] Parts of the opinion are omitted.

represented, and had been given no notice of the termination of his contract as therein provided; that within the then last 30 days Jacobs had entered into a contract with U. D. Newell for the Alhambra Theater for the same week that appellant's contract provided for; that Newell claims to be the manager of another company, also engaged in producing the "Black Crook"; that Jacobs and Newell were combining and confederating to injure and defraud appellant, as Newell had agreed to produce the play for a less percentage than appellant; that appellant had 40 performers under contract, and would be obliged to pay them their salaries whether they performed or not, and that he could procure no other place for his performance during said time, and would be compelled to remain idle, at great expense; that the money value of his contract could not be determined, either actually or approximately, in any other manner than by carrying out and fully performing it according to its conditions; that Jacobs and Newell had announced their intention of keeping appellant out of the possession and use of said theater; that appellees were financially irresponsible. The bill prays for an order enjoining appellees from hindering appellant and his company from taking possession of the Alhambra Theater, its appurtenances and stage property, and from hindering, delaying, interfering with, or preventing appellant from producing said play in accordance with said contract, and also restraining appellees from using or occupying said theater, its stock, scenery, and equipments, during said period of seven days, and from allowing any other person or company to use or occupy the same; and also restraining and enjoining appellees from refusing to furnish to appellant, during such period, the usual and necessary light, heat, music, regular stage hands, stage carpenter, etc., and for general relief.

The injunction was granted, and served on appellees December 28, 1895. On December 30, 1895, a rule was entered on appellees to show cause why they should not be punished for contempt of court in violating this injunction. The next day an order was entered modifying the injunction so as to permit Newell to produce the play at the Alhambra, and Jacobs was ordered to pay into court 60 per cent. of the entire receipts received by him at the Alhambra for the week, and to pay to Newell 30 per cent. of such receipts, and the cause was continued to January 3, 1896. On that day both appellees answered, replication was filed, and Newell moved for a dissolution of the injunction. Appellee Jacobs in his answer admitted the making of the contract with appellant, but denied that appellant's company was satisfactory or as represented, and alleged that he had notified appellant thereof, and had canceled the contract; denied all combination to injure appellant; admitted that he had made a contract with Newell for the same week he had formerly contracted to appellant; denied that appellant had furnished the printing as required; and that he was without remedy except in a court of equity. Appellee Newell in his answer alleged that he had been informed that appellant's contract had been canceled;

that on November 29, 1895, he had made a contract with Jacobs to play the Tompkins Black Crook Company in the Alhambra for seven successive nights, beginning December 29, 1895, the contract being in all particulars like appellant's, except as to the percentage of receipts; that as early as December 27th he had removed to the Alhambra a number of articles belonging to his company and had taken possession of the same; alleged various communications and negotiations between all the parties to this suit from December 16th until the bill was filed; that, becoming alarmed that Jacobs would close up the Alhambra entirely during that week, he (Newell) had procured an injunction from the circuit court on December 27, 1895, and had it served on Jacobs the same day, restraining Jacobs from closing up the theater during said week and excluding his company from presenting their play; charges appellant with laches and bad faith in suppressing all information in regard to such first injunction, and alleged that appellant's contract was in violation of the statutes, which forbid any amusement or diversion on Sunday, so that specific performance could not be enforced.

The cause was heard by the court, and a decree entered finding that the injunction had been violated by appellees, and that under the order modifying the injunction there had been paid into court $1,134.75; that the equities were with the appellees; and that the appellant had a complete and adequate remedy at law, and that the injunction was improvidently issued; and the bill was therefore dismissed, and the money ordered returned to Jacobs. Appellant appealed, and asked that the money be retained in the clerk's hands pending the appeal, which was allowed, and the money ordered left with the clerk until the final determination on appeal. The appellate court affirmed the decree, and appellant has further appealed to this court.

There was no sufficient proof that Jacobs canceled his contract with Welty on any of the grounds stipulated in it, and the question is not whether Jacobs was justified in violating the contract, but whether his bill of complaint for equitable relief can be sustained or he should be remitted to his action at law. Strictly speaking, the bill was not one for specific performance, but for injunction only. It is clear from its allegations and the authorities bearing upon the question that specific performance of the contract could not be decreed. It is not, and cannot be, contended that appellant could have been compelled, by any writ the court could have issued, to occupy the theater with his company of actors and give the performances contracted for, any more than a public singer or speaker can be compelled specifically to perform his contract to sing or speak. Negative covenants not to sing or perform elsewhere at a certain time than a designated place have been enforced by the injunctive process, but further than this such contracts have not been specifically enforced by the courts, by injunction or otherwise. Lumley v. Wagner, 1 De Gex, M. & G. 604; Daly v. Smith, 38 N. Y. Super. Ct. 158. In Lumley v. Wagner there was

an express covenant not to sing elsewhere than at the complainant's theater, and the injunction was placed on that ground.

But it is urged that negative covenants may be implied as well as expressed, and, when necessarily implied from the terms of the contract, they will be enforced in like manner. * * * While there was a negative covenant in the contract under consideration against Welty, it is not important to consider whether or not appellant might have been enjoined from performing elsewhere than at Jacobs' theater at the time in question, for it is manifest he could not have been compelled to perform at said theater. Before a contract will be specifically enforced there must be mutuality in the contract, so that it may be enforced by either; and, as this contract was of such a nature that it could not have been specifically enforced by appellee Jacobs, it should not be so enforced by appellant. * * *

But it is urged that courts of equity will by injunction restrain the violation of contracts of this character in many cases where they cannot decree specific performance, and the following among other cases are referred to: Western Union Tel. Co. v. Union Pac. Ry. Co. (C. C.) 3 Fed. 423–429; Wells v. Oregon & C. R. Co. (C. C.) 15 Fed. 561, and Wells, Fargo & Co. v. Oregon Ry. & Nav. Co. (C. C.) 18 Fed. 517; Wells, Fargo & Co. v. Northern Pac. R. Co. (C. C.) 23 Fed. 469. Without determining whether there may not be exceptional cases not falling within the general rule, we think the rule is as stated in Chicago M. G. L. & F. Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616, and the authorities there quoted. It was there said (page 60, 130 Ill., and page 619, 22 N. E.):

"The bill of complaint in this case, though not strictly a bill for the specific performance of a contract, is in substance a bill of that kind. In 3 Pom. Eq. Jur. § 1341, it is said: 'An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated, as a general proposition, that whenever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit.'"

It is plain that, as a general rule, to enjoin one from doing something in violation of his contract is an indirect mode of enforcing the affirmative provisions of such contract, although such an injunction may often fall short of accomplishing its object. It is obvious from what has been said and from the authorities that to enjoin appellee Jacobs, as prayed in the bill, from refusing to furnish the usual and necessary light, heat, music, regular stage hands, stage carpenter, ushers, equipments, etc., provided for in the contract, would be the same, in substance, as to command him to furnish them, and without them the use of the theater building would seem to be of little use. It is practically conceded by counsel for appellant that this part of the contract could not be specifically enforced as prayed, or otherwise, in equity; but it is contended that this part of the contract is merely inci-

dental to the more important part of it, which was the right to occupy and use the theater and its furnishings, and give therein the performances provided for, and to exclude from a like occupation and use the other appellee, Newell, and that the injunction was proper for that purpose. This would have been an indirect method of enforcing a part performance of the contract, and courts will not enforce specific performance of particular stipulations separated from the rest of the contract, where they do not clearly stand by themselves, unaffected by other provisions. Baldwin v. Fletcher, 48 Mich. 604, 12 N. W. 873. Even if such a decree might have been sustained, we are satisfied the sound legal discretion of the court was not violated in refusing it, or in dissolving the injunction after it was granted. Appellant's remedy, if any he had, was at law. The judgment of the appellate court is affirmed.

Judgment affirmed.

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## HARLOW et al. v. OREGONIAN PUB. CO. et al.

(Supreme Court of Oregon, 1904. 45 Or. 520, 78 Pac. 737.)

Appeal from Circuit Court, Multnomah County; John B. Cleland, M. C. George, and Alfred F. Sears, Judges.

Suit by F. E. Harlow and another against the Oregonian Publishing Company and another. From a decree in favor of defendants, complainants appeal.

On April 11, 1864, the defendant Pittock, at that time the owner and proprietor of the Daily Morning Oregonian, entered into the following written contract with one Myron M. Southworth:

"A memorandum of an agreement made this 11th day of April, A. D. 1864, between Henry L. Pittock, of the City of Portland, Oregon, and Myron M. Southworth, of the same place, that the said Henry L. Pittock has for the sum of $350 to be paid in weekly installments of $5 each, sold and transferred to the said Myron M. Southworth the sole right and privilege to carry and collect subscriptions for the Daily Morning Oregonian newspaper in all that portion of said city south of Alder street; that the said Myron M. Southworth is to have one-third of the subscription price of the said newspaper for his labor, with the privilege of selling his interest therein to a suitable party, and cannot otherwise be deprived of the advantages and benefits of this contract, although the said newspaper may change hands, unless he willfully neglects or refuses to fulfill his portion of said contract, and that said Myron M. Southworth agrees to carry faithfully and carefully the said newspaper to every paying subscriber in said district for the above-named compensation, to endeavor to increase its circulation on all occasions, to procure as much advertising patronage for it as possible without any percentage, to enter into no contract with any other newspaper published in this city without permission from the proprietor of said newspaper, to be responsible and pay weekly for all papers taken from the office and to comply with all rules and regulations not directly contrary to the above agreement, the proprietor may from time to time, as he thinks proper, to adopt for the benefit of said newspaper. It is also agreed that in case either party considers separation necessary and both cannot agree upon a proper method of doing so, each shall appoint a man to act for him; if they cannot agree they shall have power to call on a third man whose decision shall be binding. The said M. M. Southworth binds him-

self to carry the said paper for 12½ cents for each subscriber weekly, whether the subscription price be raised or not. [Signed] Henry L. Pittock. [Signed] Myron M. Southworth."

Southworth carried and delivered the paper, collected subscriptions, and otherwise fulfilled the obligations of his contract, until May 25, 1865, when he sold and assigned his interest therein to Ballard & Sappington. They performed the contract for some time, and then sold to other parties; and thus, through successive sales and purchases, it came to John Harlow in 1868. Harlow in turn carried out the contract, complying with all its terms, until his death, in 1882, when he bequeathed it to his son, the plaintiff F. E. Harlow. On the 27th of September, 1898, F. E. Harlow sold to his coplaintiff an undivided one-third interest therein. In February, 1873, the Oregonian Publishing Company succeeded to the rights of Pittock in the newspaper. During the period from the date of the Southworth contract, in 1864, until September 18, 1901, with the knowledge, consent, and acquiescence of the defendants, Southworth and his various assignees, including the plaintiffs and their father, delivered the paper and collected subscriptions in all that portion of the city of Portland south of Alder street. On September 18, 1901, the defendant publishing company notified the plaintiffs, in writing, that it had decided to confine their operations under the Southworth contract to the territory north of Alder street, which was embraced within the corporate limits of Portland at the time the contract was made in April, 1864, and that on and after November 4th following it would place other carriers in the territory theretofore covered by plaintiffs, but which was not included within such boundaries.

This suit was thereupon immediately commenced by plaintiffs to enjoin and restrain defendants from refusing to furnish them papers to deliver to subscribers residing south of Alder street, but outside the boundaries of the city as they existed in 1864, and also to enjoin and restrain defendants from undertaking on their own behalf to deliver papers or collect subscriptions in the disputed territory, on the ground that such territory was embraced within the terms of the Southworth contract. A demurrer to the complaint was overruled, and defendants answered. On April 1, 1902, but before the trial, the defendant publishing company served written notice on the plaintiffs that on and after June 7, 1902, it would cease to sell or deliver the Morning Oregonian to them or their agents or representatives for delivery to subscribers within that part of the city south of Alder street, and that it would, from and after the date mentioned, deliver or cause the papers to be delivered to subscribers residing within such territory. The plaintiffs thereupon filed a supplemental complaint, setting out the repudiation and threatened breach of the contract by the defendants, and praying for an injunction restraining them from refusing to comply with the Southworth contract, and from delivering papers or causing them to be delivered to subscribers residing within the dis-

trict covered by such contract. A demurrer to the supplemental complaint was overruled. Defendants answered, admitting the service of the notice, and that it claimed the contract to be void, but denying the other allegations therein. The cause was tried upon the pleadings and evidence, and a decree entered dismissing the suit, from which the plaintiffs appeal.

BEAN, J.[52] (after stating the facts). Assuming, for the purposes of the opinion, that the plaintiffs have legally succeeded to the rights of Southworth under the original contract, and stand in his place and stead, entitled to all the rights and privileges given him by its terms, and that it embraces all the territory claimed by them, there are two reasons why this suit could not be maintained after the repudiation of the entire contract by the defendants, and the service on the plaintiffs of notice to that effect in June, 1902: First, the plaintiffs, if they are entitled to any relief at all, have a full and complete remedy at law; and, second, the remedy by injunction or specific performance is not mutual. It could not be invoked by the defendants against the plaintiffs, as the contract is not, and never was, capable of being specifically enforced or enjoined at the suit of Pittock or the defendant publishing company. The contract between Pittock and Southworth created substantially the relation of employer and employé, and this relation continued as to those who succeeded to Southworth's interest. By its terms, Southworth (whom we shall hereafter assume includes parties who have legally succeeded to his rights), was to carry and deliver the paper to all paying subscribers within the designated territory, to endeavor to increase its circulation, to collect subscriptions therefor, and to pay weekly for all papers he took from the office, receiving as a compensation for "his labor" a certain proportion of the subscription price of the paper. * * *

Southworth paid $350 for the sole right to carry and deliver the papers, and to receive as a compensation therefor a certain portion of the subscription price. This he supposed to be a valuable right, and one which would increase largely in value, according to his industry and diligence in extending the circulation of the paper, and the character of the services which he should render to its patrons. Pittock, on the other hand, was contracting for the future circulation of his paper, and the collection of subscriptions therefor in the given territory, and this he undoubtedly believed to be of value to the paper. * * *

The only question between the parties remaining for adjustment is the amount, if any, to be paid by the defendants to the plaintiffs on account of such separation or breach. That question is not cognizable by a court of equity. An injunction to restrain the breach of a personal contract, or one relating to personal property, or a mandatory injunction to compel specific performance of such a contract, will not

[52] Parts of the opinion are omitted.

be granted when the recovery of damages at law would adequately redress the impending injury. * * *

It is admitted, as we understand it, that a court of equity will not decree a specific performance of the contract in suit because it requires varied and continuous acts on the part of the defendants, but it is argued that it will enjoin the defendants from violating the contract by delivering papers, or causing them to be sold and delivered, within the territory embraced in plaintiffs' contract, until such time as the defendants take the proper steps provided in the contract for its termination. Although the remedy suggested is negative rather than affirmative, it is, in effect, a decree for the performance of the contract. Enjoining the defendants from delivering papers or causing them to be sold and delivered in the disputed territory would practically enforce the contract, and require them to furnish the papers to the plaintiffs to be so delivered. A prohibition preventing a violation of the contract by the defendants would in this case as effectually compel its performance as an affirmative order to that effect.

The leading case holding that, although a court of equity cannot compel the specific performance of a personal service contract, it may enjoin a violation of the negative provisions thereof, is that of Lumley v. Wagner, 1 De Gex, M. & G. 604. In that case the defendant had agreed with plaintiff to sing at his theater for a definite time, and not to sing elsewhere. She threatened to sing at another theater in violation of her contract. In a suit to enjoin her from so doing, the court held that it could not enforce the affirmative part of the contract, because it could not compel the defendant to sing, but it could and would enjoin and restrain her from singing elsewhere. In this case the contract was for a definite, fixed time, and plaintiff's remedy at law was manifestly inadequate, because the damages which would accrue to him by a violation of the contract by the defendant could not be ascertained with any certainty. The same is true of Singer Sewing Machine Co. v. Union Buttonhole Co., 1 Holmes, 253, Fed. Cas. No. 12,904; Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749; Burlington v. Burlington Water Co., 86 Iowa, 266, 53 N. W. 246; and other cases cited by the plaintiffs. * * *

For these reasons, the decree of the court below should be affirmed, and it is so ordered.

## MONTGOMERY LIGHT & POWER CO. v. MONTGOMERY TRACTION CO.

(Circuit Court of the United States, M. D. Alabama, N. D., 1911. 191 Fed. 657.)

In Equity. Suit by the Montgomery Light & Power Company against the Montgomery Traction Company. On demurrer to bill.

The substance of the contract here involved and the allegations of the bill in reference to it are sufficiently stated in the opinion. On the filing of the bill a restraining order was issued prohibiting the defendant "from receiving, accepting, or using direct electrical current from any person, firm, or corporation other than the complainant until the further order of the court," and requiring defendant on a day named to appear and show cause why a preliminary injunction should not issue. The defendant made such answer, and afterwards by consent, with the approval of the court, withdrew its answer in order to test the rights of the parties on demurrer to the bill. * * *

JONES, District Judge [53] (after stating the facts as above). The demurrer, of course, admits the truth of all the facts well pleaded in the bill. We have then this case: The complainant, a quasi public corporation, engaged in the business of generating and supplying electrical current for lighting and power purposes to individuals and the public here, has a contract with the Traction Company, another quasi public corporation, engaged in the street car business, whereby the Power Company agrees, in substance, to sell and deliver for a certain price, and the Traction Company agrees to purchase and receive from it exclusively, for a period of 15 years, 7 of which have not expired, such direct electrical current as may be required for propelling its cars and those of any other corporation which it may operate or permit to use its tracks, and for lights for parks, places of amusement, offices, etc.

The complainant, immediately upon the execution of the contract, began to furnish, and the Traction Company to receive, the electrical current contracted for, and has expended some $200,000 in machinery and apparatus to enable it the better to carry out the terms of the contract, and has at all times faithfully lived up to the terms and provisions of the contract, and is ready, able, and desirous to carry out every stipulation of the contract until it expires, as required by its terms. The defendant Traction Company is about to discontinue receiving electrical current from the complainant and to take it from another source, in disregard of its contractual obligation, and without excuse for its breach.

If the Traction Company is permitted to do this, complainant will have no adequate remedy at law for the recovery of the damages it will suffer from the respondent's causeless breach of the contract. The extent of defendant's business, the lines it would construct or

[53] The statement of facts is abridged and parts of the opinion are omitted.

operate, the number of cars it would use, the conditions under which it would run them, the places of amusement it would operate, and the quantity of electrical energy it would consume, during the ensuing seven years of the life of the contract, are uncertain and speculative, and could not be recovered in an action at law. Irreparable injury would therefore be inflicted upon the complainant if the defendant be permitted to breach the contract without just cause, by refusing to take electrical power exclusively from the complainant. It would be a reproach to justice, under such circumstances, if a court of equity were powerless to intervene and charge the conscience of the defendant with the duty of not wantonly inflicting such irreparable injury upon the other party to the contract, and the court ought to prevent it, if it can give any relief, consistent with the settled principles of equity and the rights of the parties under the contract, as they themselves have therein measured and determined them.

Although counsel for respondent necessarily admit, in the present posture of the case, that there is no excuse for defendant's refusal to receive electricity from the complainant, they insist, notwithstanding, that there is no equity in the bill, as the relief sought practically amounts to specific performance of the contract, extending over a term of years, requiring the exertion of skill and the performance of personal services, which the court would be compelled to supervise, and defendant could not have a decree against the complainant for the specific performance of the contract on its part. * * *

The earlier authorities, and some comparatively late ones in this state, bear out the contention of the defendant that the court ought not to specifically enforce the negative covenant arising from the contract here, to take exclusively from complainant. The fundamental doctrines upon which courts of the United States administer equity must be the same in every state, and cannot be changed by state decisions or state statutes. Kirby v. Lake Shore R. R. Co., 120 U. S. 138, 7 Sup. Ct. 430, 30 L. Ed. 569. The decisions of the Supreme Court upon such questions necessarily control this court.

It is said in 2 High on Injunctions, § 1164, that:

"While in cases of contracts containing both affirmative and negative stipulations the authorities are exceedingly conflicting and irreconcilable as to whether equity may interfere by injunction to prevent a breach of the negative covenant, when the affirmative is of such a nature that it cannot be specifically enforced by a judicial decree, yet the later and better considered doctrine is that equity may thus interfere to restrain the violation of the negative stipulation, although it cannot specifically enforce the affirmative one."

And the statement is sustained by the numerous citations in the notes to the text.

In Waterman on Specific Performance of Contracts, §§ 203, 204, p. 271, it is said:

"It has been observed, with particular reference to specific performance, that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily expanded, and no inflexible rule has

been permitted to circumscribe them. The jurisdiction of courts of equity is not now, therefore, confined in the narrow limits that once bound it; but the constant tendency has been to broaden their power, and especially has this been true in suits for specific performance."

Pomeroy, in his work on Equity Jurisprudence (section 769), says:

"The frequent statement of the rule of mutuality—'that the contract to be specifically enforced must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other'—is open to so many exceptions that it is of little value as a rule."

Touching the same subject, he says in his work on Specific Performance (section 169):

"It is evidently based on no principle of abstract justice or right, but at most upon notions of expediency, and the arguments offered in its support are but mere repetition of time-honored verbal formulæ, which when closely analyzed are found to be of little or no force or meaning."

A clear statement of the rule is found in Northern Central Railway Company v. Walworth, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683:

"The principle that contracts must be mutual, must bind both parties or neither, does not mean that in every case each party must have the same remedy for a breach by the other. Covenant may lie against one, where only assumpsit can be maintained against the other. * * * The mutuality required is that which is necessary for creating a contract on both sides in some manner, but not necessarily enforceable on both sides by specific performance."

Other courts have met the objection (when lack of mutuality is urged to the indirect enforcement of a contract by an injunction against the violation of the negative clause of the defendant's agreement) by a conditional decree (an injunction good so long as plaintiff continues to do his part, but dissolvable on his failure to perform). Though clearly lack of mutuality may exist in the terms of the agreement, inasmuch as some of the terms are unenforceable in equity, yet the final test shows that the remedy of a conditional decree does not leave the defendant to a legal remedy, as plaintiff must give performance as long as he receives it. See Pomeroy's Equity Jurisprudence, § 775, and the authorities in the note. The doctrine thus laid down has received the approval of the Supreme Court in three late cases, specifically enforcing contracts similar in character to that involved here. Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776; Joy v. St. Louis Railroad Co., 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; and Union Pacific Railroad v. Chicago Ry. Co., 163 U. S. 564, 601, 16 Sup. 1173, 41 L. Ed. 265. * * *

Under the authorities and in the light of reason, the court has no doubt of its jurisdiction to prevent the irreparable injury threatened by defendant's arbitrary refusal to receive the electric current, and that it is its duty to do so in the present posture of the case, to the extent of enjoining the defendant from refusing to receive the electric current until it has been judicially ascertained, by some tribunal, either

in this court by the taking of proof or by judgment in some other court, that the defendant has the right to treat the contract as abrogated, because complainant has not performed it. * * *

In such a situation it is the duty of the court to preserve the status quo, until it can ascertain the facts which must determine whether the decree shall go for or against the complainant on the final hearing. Pending the dispute between the parties as to their respective rights, the court should make such decree as will save both the parties harmless, no matter what may be the final result, rather than make one which may irreparably injure one of the parties to the suit, if its contentions turn out to be correct. When the actual situation is disclosed by the answer and the complainant takes issue upon it, the nature of the relief which may be proper can better be determined. No order will be made now except that the demurrers be overruled, and that respondent, according to the agreement of counsel, file its answer within five days from this date.[54]

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## *(C) Enforcement of Part of Defendant's Contracts Not Enforceable as a Whole*

### (a) INDIRECT ENFORCEMENT

### LANE v. NEWDIGATE.

(In Chancery before Lord Eldon, 1804. 10 Ves. 192.)

The Plaintiff was assignee of a lease, granted by the Defendant, for the purpose of erecting mills, and other buildings; with covenants for the supply of water from canals and reservoirs, on the Defendant's estates, reserving to the Defendant the right of working and using his then or future collieries, either with regard to the supply of water, or other use of the collieries, or any locks for the passage of his boats or otherwise: the liberties and privileges granted being, as expressed in the lease, intended to be subordinate to the use and enjoyment of the collieries: the Defendant to have due regard to the mills, &c. and doing as little mischief as the nature of the case would admit.

[54] See Pollard v. Clayton (1855) 1 Kay & Johnson's V. C. Reports, 462, at 474, where the court distinguishes between a "substantial contract" and a mere negative covenant as follows: "This demurrer must be allowed. Mr. Speed has argued it extremely well and extremely fairly. He has not rested it on the minor question which I thought might possibly be raised, namely, whether a negative contract was not involved, so as to disable the defendants from supplying other persons with coal, they having contracted to sell the whole to the plaintiff. He has exercised a very proper discretion as counsel in not pressing that point. I do not think it could have been sustained, the contract here being a substantial contract, not a mere negative contract, designed to prevent the defendants from dealing with other parties to the prejudice of one who wishes to exercise a monopoly. The bill simply avers a contract for the sale of all the coal."

The bill prayed, that the Defendant may be decreed so to use and manage the waters of the canals as not to injure the Plaintiff in the occupation of his manufactory; and, in particular, that he may be restrained from using the locks, and thereby drawing off the waters, which would otherwise run to and supply the manufactory; and that he may be decreed to restore the cut for carrying the waste waters from the Arbury canal to Kenilworth pool, and to restore Kenilworth stop-gate, and the banks of the canal to their former height; and also to repair such stop-gates, bridges, canals, and towing-paths, as were made previously to granting the lease; and that he may be decreed to make compensation for the injury sustained by their having been suffered to go out of repair; and that he may be decreed to remove the locks, which have been made since the lease, and to make compensation for the injury sustained by the said locks having been made so near the manufactory; thereby injuring the machinery; and, that he may be decreed to pay the Plaintiff the expense he has been put to by working the steam engine, to supply the want of water.

The Lord Chancellor, upon the motion for the injunction, expressed a difficulty, whether it is according to the practice of the Court to decree, or order, repairs to be done.

Mr. Romilly, in support of the Injunction, said, the repairs to be done in this case are in effect nothing more than was done in Robinson v. Lord Byron, 1 Bro. C. C. 588, viz. raising the damheads, so that the water shall not escape; as it will otherwise.

THE LORD CHANCELLOR. So, as to restoring the stop-gate, the same difficulty occurs. The question is, whether the Court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction, I shall order, will create the necessity of restoring the stop-gate; and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works.

The order pronounced was, that the Defendant, his agents, &c. be restrained until further order, from further impeding, obstructing, or hindering, the Plaintiff from navigating the canal for the necessary purposes of the mill, or from using and enjoying the demised premises, and the mills and buildings erected thereon, or the liberties and privileges, granted by the indenture of lease, &c. contrary to the covenant, by continuing to keep the said canals, or the banks, gates, locks, or works, of the same respectively, out of good repair, order, or condition; and also from further troubling, molesting, and preventing, the Plaintiff, contrary to the covenant, in the use and enjoyment of the said mills and buildings, or the liberty, privilege and power, of drawing for the use of the said mill from the canals, &c. a sufficient quantity of water for the use and working of the said mill, by diverting, draining, or drawing off water; or preventing the same by the use of any lock or locks, erected by the Defendant, from remaining and continuing in the said canals, or by continuing the removal of the stop-gate, men-

tioned in the pleadings in the action, brought by the Plaintiff, to have been erected; and by means of which the water could and would have been kept and retained in the said pool for the use of the mill; but nothing in this order is to extend to diminish, lessen, hinder, or prejudice, the working, using, or enjoying, by the Defendant or his present and future collieries, either with regard to the supply of water for his fire-engine, or other uses of the collieries, or of any locks to be erected for the passage of his boats, or otherwise: the Defendant having due regard to the said mills, and doing as little damage thereto, as the nature of the case will admit.

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## YORKSHIRE MINERS' ASS'N et al. v. HOWDEN et al.

(House of Lords. [1905] App. Cas. 256.)

The Yorkshire Miners' Association had registered their rules under the Trade Union Acts, 1871 and 1876. Among the objects for which the trade union was established was—rule 3 (g)—to provide a weekly allowance for the support of members and their families who might be locked out or on strike. By rule 3 (j) the whole of the moneys received by the association should be applied to carrying out the specified objects according to rules. Rules 64 and 65 stated the conditions under which support might be given to members or branches on strike. The respondent Howden, a miner and member of the association, brought this action against the association and some of its officials claiming an injunction to restrain them from misapplying the funds of the association by the payment of strike moneys contrary (as was alleged) to the rules. The circumstances under which the payments were being made are fully set out in the report of the decision below and need not be repeated here. The main question was whether the action fell within the scope of the Trade Union Act, 1871 (c. 31), s. 4, which provides that nothing in the Act shall enable any court to entertain any legal proceeding instituted with the object of "directly enforcing" or recovering damages for the breach of any of the following agreements * * * (3) an agreement for the application of the funds of a trade union, (a) to provide benefits to members. Grantham, J., who tried the case with a special jury held that the payments were not authorized by the rules and that the action could be maintained, and gave judgment for the plaintiff for an injunction restraining the defendants from misapplying the funds of the association and dealing with them contrary to the rules. This decision was affirmed by the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L. JJ.) with a variation extending the injunction to the trustees of the association who were added as defendants. [1903] 1 K. B. 308.

The House took time for consideration.

April 14. EARL OF HALSBURY, L. C. (read by LORD MACNAGHTEN). My Lords, in this case the plaintiff, a member of the Yorkshire

Miners' Association, a trades union registered under the Act of 1871, complains that the funds of that society are being diverted from their proper object, and seeks by injunction to prevent that misapplication.

It appears to me that the sole question in this case is whether the plaintiff is at liberty to bring the action, or whether the action is one which is prohibited by the provision in the Act of 1871, which provides that nothing in the Act shall enable any court to entertain any legal proceedings with the object of directly enforcing or recovering damages for the breach of any of the following agreements, and then the agreements are inserted which the court are in effect prohibited from directly enforcing. But for the differences of judicial opinion which have arisen upon the construction of this provision, it would have been, to my mind, enough to say that this action does not seek directly to enforce any one of the agreements referred to in the statute, or to seek damages for their breach; but, inasmuch as the question has been raised and argued at great length, I do not feel at liberty to dispose of it in so summary a manner.

The question is not a new one. It was raised twenty-three years ago before Fry, J., and, in my judgment, rightly decided. Fry, J., says, upon the exact question which is here in debate:

"An order that the defendant should pay money to the plaintiff would be a direct enforcement of the agreement for the application of the funds, but all that is sought here is to prevent the payment of the money to somebody else. Either that is no enforcement of an agreement at all or it is an indirect enforcement."

My Lords, I cannot escape from this reasoning, nor do I see any inconsistency between that decision and the case before Sir George Jessel, and a long line of judicial decisions has recognized the distinction which the learned judge himself pointed out between the case before him and the decision given by Sir George Jessel. I am bound, however, to say if that decision ever came up for review I think it would have to be considered whether it does not strike the word "direct" out of the statute.

My Lords, I do not think that if this provision is out of the way the plaintiff's claim can be seriously contested. That the proposed use of the funds which he seeks to restrain is a flagrant violation of their own rules seems to me to be proved, and the language and object of the 4th section of the Act seems to me not at all what the argument on the other side assumes it to be. That argument seems to assume that the object of the enactment was to keep the trades unions out of the jurisdiction of the court altogether. I do not think it does anything of the kind. It recites with great care what the courts are not to interfere with, and that exemption from their jurisdiction is very precisely limited.

It seems to me that it would have been a very colourable concession to the trades unions if the legislature had left their funds, which under the arrangement made constituted a trust for particular purposes, without any protection against those entrusted with the distribution of

their funds. That the court should not interfere with their distribution according to their own rules when such distribution was within the purposes of the trust is one thing, but that there should be no recourse to the courts where it is threatened to divert them is another.

What can be the object of registering, as is required by the 3rd section, the purposes for which the funds are available? Its trustees are the persons in whom their property is vested. What is there to prevent the operation of the ordinary law which protects trust property from being diverted from its proper objects? Of course, there is nothing except the section to which I have referred, and surely that section can not mean that, because the preservation of the property in trust is one that indirectly will benefit the beneficiaries, therefore it is a suit for enforcing one of the recited agreements which certainly in their terms are inapplicable.

I therefore move your Lordships that the appeal be dismissed with costs.

LORD DAVEY.[55] * * * Now, my Lords, I cannot doubt that the object of this action is to enforce what I have called the negative stipulation in the agreement, and that it is in fact and in truth for specific performance of the agreement. In Lumley v. Wagner (1852) 1 D. M. & G. 604, Lord St. Leonards could not compel Miss Wagner to sing for Mr. Lumley, but he could prevent her from singing elsewhere in breach of her agreement. Is it doubtful that the court was thereby directly enforcing the performance of the agreement in the only manner in which it could be enforced by a court of equity? * * *

My Lords, I must apologize for having troubled you at such great length; but as I have the misfortune to differ from the unanimous judgment of the court below and from the majority of your Lordships, I thought it my duty to state the reasons for the opinion I have formed fully, even at the risk of trespassing on the patience of your Lordships.

In my opinion the appeal should be allowed, and the action dismissed with costs here and below. * * *

Order of the court of appeal discharged and order of the King's Bench Division varied as proposed by Lord Macnaghten: appeal dismissed with costs: cause remitted to the King's Bench Division.

Lords' Journals, April 14, 1905.

[55] Parts of the opinion of Lord Davey and the concurring opinions of Lords Lindley, Macnaghten, James, and Robertson are omitted.

(b) SUBSIDIARY OR INTERDEPENDENT PARTS AS DISTINGUISHED FROM SUBSTANTIAL OR EQUAL AND INDEPENDENT PARTS OF POSITIVE AND NEGATIVE CONTRACTS

## SOUTH WALES RY. CO. v. WYTHES.

(In Chancery, 1854. 5 De Gex, M. & G. 880.)

THE LORD JUSTICE KNIGHT BRUCE.[56] There are several very satisfactory reasons in my opinion disabling a Court of Equity from enforcing a specific performance of a contract such as this of the 1st of August, 1851. I will mention some, I do not say all of those reasons. In the first place, by the agreement it is provided, in the most vague terms, that the plaintiffs shall find the land—the land, I suppose, for the stations—within a reasonable time, and build the stations; then the contractors are to give a bond for £50,000 to secure the performance of the contract, and they are to undertake to execute the works for a double line of railway according to the terms of the specification to be prepared by the engineer for the time being of the company for the sum of £290,000 with interest. It is obvious that the engineer of one day may not be the engineer of the day following, and that, skilful, experienced, and honourable as the engineer of the present day may be, the engineer of the company who may have to prepare the specification may be incompetent and dishonest. In my opinion, it is not within the proper province of a Court of Equity to enforce a contract of this description against any man or body of men. But then it has been said that a specification has been prepared by the gentleman who was at first, and happens to be still, the engineer of the company, Mr. Brunel. That circumstance, I think, is nothing. Whether it would have made any difference if such a specification had not only been prepared, but had been approved and accepted by the defendants, I need not and do not say, because there is no such allegation in the bill, the only statement being that the contents of a particular letter are true, which letter merely states that the writer believed that the specification had been approved of.

It has been said, however, that at all events the Court may enforce specific performance, so far as regards the execution and delivery of a bond for £50,000 to secure the performance of the contract. For this the authority of the case of Lumley v. Wagner, 1 De G., M. & G. 604, has been cited. Assuming, again, for the sake of the argument, that the agreement is intelligible, and acceding as I do to the authority of Lumley v. Wagner and other cases of that description, I cannot accede to the propriety of their application to a case where the main part of an agreement is not fit to be specifically enforced in equity, and where it is sought to enforce the performance of a subsidiary part of it, and more especially where that subsidiary part is of such a nature as that

[56] The statement of facts and parts of the opinions are omitted.

which in the present case the Court is asked to be instrumental in enforcing. * * *

THE LORD JUSTICE TURNER. * * * It has been argued that the case of Lumley v. Wagner, 1 De G., M. & G. 604, and cases of that kind, afford some authority for such a bill. I think they afford no authority for it. In Lumley v. Wagner the negative covenant was a distinct and substantive part of the agreement. But here the other parts are the whole substance of the contract, and the agreement to give the bond is a mere incident to the rest of the contract. That distinction takes the case out of the authority of Lumley v. Wagner as to the bond; for if the Court refuses to enforce the performance of the principal contract, it will not decree the execution of that which is merely incidental to it. The case of Avery v. Langford, Kay, 663, has been relied upon as an authority for enforcing a bond; but the contract there was enforced, and the bond as incidental to it. I entirely agree that this appeal must be dismissed with costs.[57]

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## RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASS'N.

**(Court of Appeal. [1893] 1 Ch. 116.)**

Appeal from the judgment of Mr. Justice A. L. Smith, sitting for Mr. Justice Romer. [1892] 1 Ch. 427.

The action was brought upon a covenant in a lease, by which the defendants demised to the plaintiff for twenty-one years a residential flat in a building known as Westminster Chambers, which was let in flats to several tenants. * * * By the covenant sued upon it was agreed and declared by and between the parties to the lease that the premises were let subject to the regulations made by the lessors, with respect to among other things the duties of the resident porter, which were set forth in a schedule thereto. These regulations, in effect, provided that the block of buildings should be in charge of a resident porter, appointed by the lessors, who was to act as the servant of the tenants in the block, to be constantly in attendance either by himself or, in his temporary absence, by some trustworthy assistant, and to perform certain services specified by the regulations. * * *

The action was commenced on the 24th of December, 1890. The statement of claim alleged that since the date of the lease the plaintiff had occupied the demised premises and paid his rent and performed

[57] In Whittaker et al. v. Howe (1841) 3 Beav. 383, Lord Langdale, M. R., says: "The motion is for an injunction to restrain the defendant from detaining and keeping possession of, or destroying certain documents, and also to restrain him from practicing or carrying on business as an attorney and solicitor. * * * I do not think that this court can refuse to grant an injunction to restrain the violation of a contract or covenant, because there may be some part of the agreement which the court could not compel the defendant specifically to perform."

his covenants, but that the defendants had omitted and refused to appoint a resident porter to take charge of the block in which the plaintiff's premises were situate, to be and act as the plaintiff's servant according to the regulations in the schedule. The plaintiff also alleged that a porter had been appointed by the defendants, but that such porter was not constantly in attendance in the section of the building committed to his charge, either by himself or, in his temporary absence, by some trustworthy assistant, and that such porter had wilfully and persistently omitted and neglected to attend on the plaintiff according to the said regulations, and to receive and deliver to the plaintiff all letters, parcels, and messages; and that such porter had not been available when required for the plaintiff to arrange with him for any extra services not inconsistent with his general duties. The plaintiff claimed—(1) an injunction against the defendants to restrain them from employing as the porter in charge of the said block any person who is not resident and constantly in attendance therein, and able and willing to act as the servant of the plaintiff, according to the regulations contained in the said schedule; (2) specific performance of the agreement to appoint a resident porter in charge of the said block; (3) £100 damages for breaches of covenant.

The facts proved at the trial with regard to the alleged breach of covenant were as follows: The plaintiff became lessee of the flat as from midsummer, 1889. There was only one other residential set of chambers in the block besides that of the plaintiff; but there were several sets of business chambers in such block. In 1887 a man named Benton was appointed to the situation of porter, who, with his wife, resided on the premises. Benton was by avocation a cook, and at that time was acting as chef at a city hotel or restaurant, and continued so to act till July, 1889. From November, 1890, till August, 1891, he had, at the instance of the directors of the defendant company, been employed from 11 A. M. to 3 P. M. on weekdays at a luncheon club at 3 Victoria Street, Westminster. He was at home on Sundays; but on that day an old woman usually acted for him in his duties as porter; and he was backwards and forwards on weekdays. He had the assistance of a lad in the performance of his duties, who, however, did not reside on the premises. It was proved by the plaintiff and his witnesses that Benton rarely acted as porter; that the door was occasionally opened by his wife, or niece, or by a charwoman, but usually by a boy in his shirt-sleeves, and wearing an apron; and that boys and charwomen were the persons who really performed the duties assigned by the regulations to the porter.

The learned Judge gave judgment for the plaintiff, concluding in these terms ([1892]1 Ch. 433):

"My judgment, is that the defendants appoint a resident male porter pursuant to the covenant. I will grant an injunction, or decree specific performance of the covenant, if that is the more appropriate course; and in case it is held in the court of appeal that I ought not to have done so, I assess the damages down to date of action brought at £25."

The judgment of the court as drawn up between the parties was: (1) The court doth order that the defendants be restrained from employing as a porter in charge of the block No. 7, Victoria Street, any person who is not resident and constantly in attendance therein, and able and willing to act as the servant of the plaintiff according to the regulations contained or referred to in the lease. (2) The court doth declare that the agreement contained or referred to in the lease to appoint a resident porter in charge of the said block ought to be specifically performed, and doth order and adjudge the same accordingly.

LORD ESHER, M. R.[58] I do not think that the points on which we are about to decide this case were brought so fully before the learned judge below as they have been before us. It seems to me that this case comes within one or the other, according to the point of view from which it is regarded, of two well-recognised rules of chancery practice, which prevent the application of the remedy by compelling specific performance. I do not myself put this case as coming within any rule as to contracts to perform personal services. It is not necessary for me therefore to express any opinion as to such a rule. The contract sought to be enforced here is not a contract with a person employed as a servant. It is a contract between a person who has to employ a servant and a person for whose benefit the employment of such servant is to take place. It is a contract between a landlord and his tenant, by which the former undertakes to employ a porter to perform certain services for the benefit of the latter. The contract, therefore, is not merely that the landlord shall employ a porter, but that he shall employ a porter who shall do certain specified work for the benefit of the tenant. That is, in my opinion, one indivisible contract. The performance of what is suggested to be the first part of the contract, viz., the agreement to employ a porter, would be of no use whatever to the tenant unless he performed the services specified. The right of the tenant under the contract is really an entirety, viz., to have a porter employed by whom these services shall be performed; and the breach of the contract substantially is that these services were not performed. The contract is that these services shall be performed during the whole term of the tenancy; it is therefore a long-continuing contract, to be performed from day to day, and under which the circumstances of non-performance might vary from day to day. I apprehend, therefore, that the execution of it would require that constant superintendence by the court, which the court in such cases has always declined to give. Therefore, if the contract is regarded as a whole, there is good ground for saying that it is not one of which the court could compel specific performance. It was contended that the court could grant specific performance of the defendants' obligation to appoint a porter. But then the case is brought within another rule, viz., that, when the court cannot compel specific performance of the contract as

[58] The statement of facts is abridged and parts of the opinions of Lopes and Kay, L. JJ., are omitted.

a whole, it will not interfere to compel specific performance of part of a contract. That clearly appears to be a rule of chancery practice on the subject. Therefore, if it is urged that what the judge has ordered to be performed is merely the obligation to appoint a porter, the case falls within that rule, and on that ground his decision must be reversed. It was argued that the case of Rigby v. Great Western Railway Company, 15 L. J. Ch. 266, shewed that a contract such as this might be severed, and that performance of part of it could be enforced. But that is not what the case appears to have decided. It decided that, where in one contract there were really several wholly independent stipulations, the court could grant specific performance of one of them. It is no authority for the proposition that the court can separate part of what is really one single indivisible contract and grant specific performance of that part. Then it was said that this case fell within the exception which has been established in the railway cases. That is admitted to be an exception grafted upon the chancery jurisdiction by decisions, in which the court, for the reasons stated, treated cases where railway companies had taken land on condition of doing works as exceptional, and granted specific performance. But being admittedly exceptions, these cases do not do away with the general rule, which appears to be applicable to the case before us. The language used by James, V. C., in Wilson v. Furness Railway Company, Law Rep. 9 Eq. 28, was cited to us as an authority to shew that the court ought in this case to grant specific performance. That language, as applied by the counsel for the defendants, is really cited as an authority for the proposition that the court of chancery will always, regardless of any rules, do what the justice of the particular case requires. But the answer is that the court of chancery has never acted on any such proposition. Then the judgment of Lord Eldon in Lane v. Newdigate, 10 Ves. 192 was cited, in which that learned judge appears on that occasion to have deliberately held that the court ought to do indirectly that which it had no power to do directly. That is a doctrine that I, for one, must decline to follow. It appears to me that the appeal must be allowed, and the judgment for the plaintiff must stand only for the damages found by the learned Judge.

LOPES, L. J. * * * I think that it is an entire contract. If that be so, it is clear that it is such a contract that, in order to give effect to it by an order for specific performance, the court would have to watch over and supervise its execution. But it is a recognized rule that the court cannot enforce a contract by compelling specific performance, where the execution of the contract requires such watching over and supervision by the court. It is another rule that the court will only interfere by way of compelling specific performance, where it can give specific performance of the contract as a whole; and that it will not interfere to compel specific performance of part of an entire contract. On that ground, I think the remedy asked for cannot be given. Another ground on which the plaintiff fails, in my opinion is

this. The court will not compel specific performance when there is another adequate remedy. Here there is such a remedy, viz., by compensation in damages for breach of the contract. The judge has found £25 to be adequate damages in respect of the breach of the contract up to the time of action brought. But there does not appear to be anything to prevent the plaintiff from bringing fresh actions for future breaches of the covenant, and obtaining in this way an adequate remedy.

KAY, L. J. I agree. This remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary, and confined within well-known rules. * * *

The lessors' covenant, being in substance that the lessee should have the advantage of the performance of certain services by the porter, a covenant which I cannot conceive to be divisible, as was ingeniously suggested, the plaintiff's claim is shaped thus. It is alleged that the lessee took possession under the lease, but that a proper porter was not appointed, and the lessee does not get the advantage of the performance of the porter's duties. He therefore asks for some remedy by means of which he may have these duties performed. That is really the nature of the action. But now it is sought to overlook that, and to say that, though a contract that the lessee shall have the benefit of the performance by the porter of his duties is not the sort of contract of which the plaintiff can have specific performance, yet he can claim to have the contract performed specifically to this extent: he can ask the court to compel the appointment of a proper porter, though, when he is appointed, the court is not asked to compel performance of his duties. As I have said, the contract is really a single contract—viz., that the plaintiff shall have the advantage of performance by the porter of his duties; and I dissent entirely from the notion that this contract can be divided into two parts in the way suggested, and the court asked to grant specific performance of one part, but not of the other.

There are, no doubt, certain cases where a contract may be treated as divisible for the purpose of specific performance. The common case is where there is a contract like that in Lumley v. Wagner, 1 D. M. & G. 604; in which case the contract was to sing for the plaintiff, and also not to sing for others. The court says in such cases, though we cannot enforce performance of the contract to sing for a particular person, and so cannot enforce the whole contract; nevertheless, there being the independent negative stipulation against singing for others, we can enforce that by injunction. In the case of Lumley v. Wagner, the Lord Chancellor, in the passage which I cited in Whitwood Chemical Company v. Hardman, [1891] 2 Ch. 416, expressly said that, if he had had to deal with the affirmative covenant only, that

the defendant would sing for the plaintiff, he would not have granted an injunction. That is one exception to the rule. * * *

For these reasons I differ respectfully from the learned judge, and think that nothing but a judgment for the damages found by him should be given.

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(c) ENFORCEMENT OF NEGATIVE PART OF CONTRACT WHERE AFFIRMATIVE PART IS UNENFORCEABLE, WITH PARTICULAR REFERENCE TO CONTRACTS FOR SERVICE

## KIMBERLEY v. JENNINGS.

(In Chancery before Sir Lancelot Shadwell, 1836. 6 Sim. 340.)

The Bill stated that the Plaintiffs carried on the business of Factors and Merchants, in co-partnership, at Birmingham; that on the 27th of January, 1834, they took into their employment the Defendant Jennings, as their Clerk, upon the terms and conditions after mentioned; and, thereupon, the Plaintiffs and the Defendant duly made and executed an Agreement, dated the 27th of January, 1834, and which was as follows:

"The said John Richard Jennings, for the considerations hereinafter mentioned, doth hire himself to the said James Kimberley and William Kimberley, and the Survivor of them, and he doth hereby undertake and agree that he will serve them and the Survivor of them, for the term of Six Years, to commence and be computed from the day of the date of these Presents, and work for and be employed by and in the name and on the behalf of the said James Kimberley and William Kimberley and the Survivor of them, in the capacities of a Clerk, Traveller and Bookkeeper, in the trade or business of Factors now carried on by said James Kimberley and William Kimberley, in Birmingham aforesaid, and in obtaining orders for and selling all sorts of Goods, Wares, Merchandize and Commodities belonging thereto, and receiving the prices for the same, as they the said James Kimberley and William Kimberley or the Survivor of them, shall order and direct, * * * and also shall not nor will, during the said term of Six Years, work for, or for the use or benefit of, or be otherwise engaged or employed by any other Person or Persons other than the said James Kimberley and William Kimberley, or the Survivor of them, in the capacities aforesaid, or in any other Trade, Business, Profession or Employment whatsoever, without the license or consent of the said James Kimberley and William Kimberley, or the Survivor of them, in writing, under their or his hands or hand, for that purpose, first had and obtained: * * * Provided that, in case the said John Richard Jennings shall, during the said term of Six Years, become and be incapable, from illness or indisposition, of serving the said James Kimberley and William Kimberley or the Survivor of them, in the capacities aforesaid or otherwise in the said Trade or Business according to the true intent and meaning of these Presents, or shall absent himself from or neglect the service of the said James Kimberley and William Kimberley, without their, or one of their, license and consent, in writing, under their, or one of their hands or hand, for that purpose, first had and obtained, then, and in either of the said Cases, it shall be lawful for the said James Kimberley and William Kimberley and the Survivor of them, wholly and absolutely to dismiss and discharge the said John Richards Jennings from their service, and to discontinue the payment of the said Salary or Wages from thenceforth, * * *"

The Bill then stated that, for some time after the Agreement was made, the Plaintiffs employed the Defendant to travel for them, in

various parts of the Country, in the way of their Business, in selling and obtaining orders for Goods and Merchandizes in which they dealt, and in receiving Monies for the same, subject, however, to such directions as the Plaintiffs thought proper, from time to time, to give him. * * *

The Bill then alleged that the Defendant, in his subsequent dealings with the Plaintiffs' Customers, greatly relaxed in his diligence and efforts to serve the Plaintiffs; and, on that account, they, in October 1835, deemed it expedient to employ him, as a Clerk and Bookkeeper, in their Counting-house, instead of sending him on Journies; but he refused to be so employed, and quitted their Service, on the 6th November 1835, without their consent: that the Plaintiffs always had been, and still were ready to perform their parts of the Agreements of January 1834 and January 1835: that the Defendant had lately commenced Business, as a Factor and General Merchant, in Birmingham, in opposition to the Plaintiffs and contrary to the true intent and meaning of the first Agreement; and threatened to engage himself with other Factors and Merchants, and to act for them as their Traveller, either separate, or in addition to the said Business on his own account. The Bill prayed that the Defendant might be restrained, by the Decree of the Court, and, in the meantime, by the Order of the Court during the remainder of the term of Six Years mentioned in the first Agreement, from working for or for the use or benefit of, or otherwise being engaged or employed by any other person or persons than the Plaintiffs, in the capacities in that Agreement mentioned, or in any other Trade, Business, Profession or Employment whatsoever, without the consent of the Plaintiffs, and, in particular, from carrying on the Trade which he was then carrying on, the Plaintiffs being ready and willing and thereby offering to perform the two Agreements on their parts.

The Defendant demurred for want of Equity.

THE VICE-CHANCELLOR.[59] It does not clearly appear to be the meaning of the Agreement, that, if the event happened that the Defendant did not continue, during the whole term of Six Years, in the Service of the Plaintiffs, he should be disabled from engaging in any other Service or Employment for the remainder of the term. It has been assumed, in the course of the Argument, that this part of the Agreement is to be taken by itself, and that, whatever might happen during the term, the Defendant should not engage in any other Employment. But, attending to the whole of the Agreement, the true Construction of it seems to be that, during such portion of the term as the Defendant should continue in the Service of the Plaintiffs, he should not enter into any other Employment; but, if he should be dismissed during the term, then that he might engage himself in the Service of other Persons. * * *

[59] The statement of facts is abridged and part of the opinion is omitted.

Then it was said that the Court might execute a negative Contract. I admit it. I remember a Case in which a Nephew wished to go on the Stage, and his Uncle gave him a large sum of Money in consideration of his covenanting not to perform within a particular District; the Court would execute such a Covenant, on the ground that a valuable Consideration had been given for it. But here the negative Covenant does not stand by itself: it is coupled with the Agreement for Service for a certain number of Years, and then for taking the Defendant into Partnership.

In the first place, this Agreement cannot be performed in the whole, and therefore, this Court cannot perform any part of it; in the next place, it is not to be construed as the Plaintiffs contend for: and, lastly, it is a Hard Bargain, and, therefore, this Court will not interfere.

Demurrer allowed.

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## MORRIS v. COLMAN.

(In Chancery before Lord Eldon, 1812. 18 Ves. Jr. 437, 34 E. R. 382.)

Various disputes having arisen among the proprietors of the Theatre in the Haymarket, a bill was filed; praying an execution of the articles of agreement, an injunction to restrain Mr. Colman from acting as manager, and a reference to the Master for the appointment of a manager.

An injunction was granted; and a reference directed to the Master to inquire, whether the Defendant Mr. Colman had performed the duties of manager, and what he was doing and could do in the discharge of those duties. Upon a motion to dissolve the injunction a question arose upon the validity of a clause in the articles, restraining Mr. Colman from writing dramatic pieces for any other theatre, or, as the construction was represented for the Plaintiff, giving the Haymarket Theatre a right of pre-emption.

Mr. Hart, and Mr. Shadwell, for the Defendant Colman, in support of the Motion, compared this provision to covenants in restraint of trade; which are void on principles of public policy.

Sir Samuel Romilly, and Mr. Bell, for the Plaintiff, contended, that this provision was no more against public policy than a stipulation, that Mr. Garrick should not perform at any other theatre than that, at which he was engaged, would have been.

THE LORD CHANCELLOR. I cannot perceive any violation of public policy in this provision. The case of trade, to which it has been compared, is perfectly distinct. It is well settled upon that principle, that notwithstanding such a covenant, restraining trade in general, a man shall be at liberty to engage in commerce: but that has been broken in upon to the extent of giving effect to covenants restraining trade within particular limits; and in partnership engagements a covenant, that the partners shall not carry on for their private benefit that par-

ticular commercial concern, in which they are jointly engaged, is not only permitted, but is the constant course.

If that is so with regard to trade, it is impossible to maintain, that theatrical performers, who act only under a license, and are treated as vagrants, if not licensed, may not enter into such engagements. The contract is not unreasonable upon either construction; whether it is, that Mr. Colman shall not write for any other theatre without the license of the proprietors of the Haymarket Theatre; or whether it gives to those proprietors merely a right of pre-emption. If Mr. Garrick was now living, would it be unreasonable, that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for that theatre alone? Why should they not thus engage for the talents of each other? The ground might be supposed, that nothing could be made of the theatre without exhibiting the talents of such a man; and in this instance that he may get more to himself and the other proprietors by this contract than he could by hard bargains at other theatres.

I cannot therefore see any thing unreasonable in this: on the contrary, it is a contract, which all parties may consider as affording the most eligible, if not the only, means of making this Theatre profitable to them all, as proprietors, authors, or in any other character, which they are by the contract to hold.[60]

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## KEMBLE v. KEAN.

**(In Chancery before Sir Lancelot Shadwell, 1829. 6 Sim. 333.)**

In February 1828 an Agreement in writing to the following effect, was made between the Plaintiffs, who were the Proprietors of Coventgarden Theatre, and the Defendant, a celebrated Actor: that the Defendant should act at the Theatre for 24 Nights, at a Salary of £50 for each Night: that the Engagement should commence on the 1st October, and conclude before Christmas then next: that the Defendant should give the preference, to the Plaintiffs, in the renewal of an Engagement, and should not perform at any other Theatre in London during the period of his Engagement.

The Defendant, accordingly, acted 16 Nights; but was unable to complete his Engagement before Christmas 1828, in consequence of an accident that happened to the Gas-works in the Theatre. An Agree-

[60] As to the jurisdiction upon this subject, considered as a partnership, see Waters v. Taylor (1808) 15 Ves. 10; Ex parte Ford (1802) 7 Ves. 617; Ex parte O'Reily (1790) 1 Ves. Jr. 112.—*Rep.*

In Scott v. Rayment (1868) L. R. 7 Eq. Cas. 114, at 115, Sir G. M. Giffard lays down the rule thus: "In the first place, I do not hesitate to say, that as a general rule the court will not decree specific performance of an agreement to perform and carry on a partnership. There may be exceptions, but very limited exceptions, to that rule, such, for instance, as the court going the length of decreeing the execution of a deed."

ment was then made between the Parties, for a new Engagement to commence after Christmas 1828, for 12 Nights performance, (instead of the eight that remained under the first Engagement) upon the same terms as before. The Defendant, accordingly, acted on the Nights of the 5th and 8th of January 1829, and was to have acted again on the 12th, but, on that Night, he was unable to appear before the Public. Shortly Afterwards, the Defendant having expressed a wish to suspend his performance in London and retire into the Country to recruit his Health and study some new Parts, the Plaintiff Kemble informed him, by Letter dated the 21st January 1829, that the Plaintiffs acceded to his Wish, it being understood that he would be ready, on the commencement of the Season 1830–31, to return, when required, to his Engagement, of which 10 Nights remained uncompleted, and that, in the meantime, he was not to act in London. The Defendant wrote an Answer to this Letter, on the 22d of January, stating that he accepted the Proposals made by the Plaintiffs.

In November 1830, the Defendant returned to London, and, shortly afterwards, entered into an Engagement to act at Drury-lane Theatre; upon which the Bill in this cause was filed, praying that the Defendant might be decreed specifically to perform his Agreement with the Plaintiffs, contained in the Letter of the 21st of January 1829, and that, in the meantime, he might be restrained from acting at Drury-lane Theatre, or at any other Place in London.

On the 28th of November, Lord Lyndhurst, C., granted an Injunction, ex parte, restraining the Defendant from acting at Drury-lane or any other Place in London, until he should have acted 10 Nights at Covent-garden, with Liberty to the Defendant to move to dissolve the Injunction before The Vice-Chancellor.

The Motion to dissolve was now made by Mr. Knight and Mr. Wright, and opposed by Mr. Pemberton.

THE VICE-CHANCELLOR. The Agreement in question is such an one as this Court cannot perform.

In the case of a mere Contract between two persons who are both carrying on the same trade, that one shall not carry on his trade within a limited distance in which the Party contracted with intends to carry on his trade, the whole Agreement is of so genuine a kind, that the Court would enforce the Performance of the Agreement by restraining the Party, by Injunction, from breaking the Agreement so made.

In the Case where the Parties are Partners, and one of the Partners contracts that he shall exert himself for the benefit of the Partnership, though the Court, it is true, cannot compel a Specific Performance of that part of the Agreement, yet, there being a Partnership subsisting, the Court will restrain that Party (if he has covenanted that he will not carry on the same trade with other Persons) from breaking that part of the Agreement. That is in case of a Partnership.

In the Case of Morris v. Colman, 18 Ves. 437, the Bill was filed by Morris against Colman, for the purpose of having a question upon the

Articles of Partnership, determined, and for restraining Colman from doing many acts which he was disposed to do; and I think, in that case (for I was Counsel for Colman from the beginning to the end), that Colman always stood on the defensive. The only question was whether Colman should be at liberty to do certain acts which he insisted he was at liberty to do, and Morris contended he was not. Now I apprehend that what Lord Eldon says, in giving his Judgment upon that point, must be taken with reference to the subject that was before him: and I perfectly well recollect the time when the Injunction was granted to restrain Mr. Colman, but I am not quite sure it is exactly in the way in which the Report represents; but Colman insisted, generally, that he had a right to write Dramatic Pieces for other Theatres; and then there was an Injunction granted to restrain the Representation of one of the Pieces which he had written, and which was intended to be represented, I think, at Covent-garden Theatre. In the Argument it was said that the particular Provision which is stated in the Case, was a Provision restraining Colman from writing Dramatic Pieces for any other Theatre; and, in the Argument, it was said, by the Counsel for the Plaintiff, that that Provision was no more against public policy than a Stipulation that Mr. Garrick should not perform at any other Theatre than that at which he was engaged, would have been. Now, with reference to what was said, by Counsel, upon arguing the Case of a Partnership, Lord Eldon says:

"If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for that Theatre alone. Why should they not thus engage for the talents of each other?"

That mode of putting the question appears to me to show that Lord Eldon is speaking of a Case where the Parties are in Partnership together; because it would be a strange thing that one should contract to perform only at the Haymarket Theatre, and the other, to write for that Theatre alone, except in the Case of a Partnership, where both Parties would be exerting themselves for their mutual benefit; because, if they were not in Partnership, the effect of such an Agreement might be that neither might exert his talents at all. In this Case, however, there is no Partnership whatever between the Proprietors of Covent-garden Theatre and Mr. Kean; but the Contract is nothing more than this, that Mr. Kean shall, for a given Remuneration, act a certain number of Nights at Covent-garden Theatre, with a Proviso that, in the meantime he shall not act at any other Theatre; and it is quite clear that this Bill is filed for the purpose of having the Performance of an Agreement with regard to his Contract to act.

[His Honor here stated the substance of the Bill, and then proceeded:] So that it was an Agreement to act at Covent-garden Theatre, a certain number of Nights in the Season 1830-31, and that, in the meantime, the Defendant should not act in London: and the Bill is filed for the purpose of enforcing the performance of that Agree-

ment, which mainly consists in the fact of his acting; and it appears to me, that it is utterly impossible that this Court can execute such an Agreement.

In the first place, independently of the difficulty of compelling a man to act, there is no time stated; and it is not stated in what Characters he shall act; and the thing is, altogether, so loose that it is perfectly impossible for the Court to determine upon what scheme of things Mr. Kean shall perform his Agreement. There can be no prospective declaration or direction of the Court, as to the performance of the Agreement; and, supposing Mr. Kean should resist, how is such an Agreement to be performed by the Court? Sequestration is out of the question; and can it be said that a man can be compelled to perform an Agreement to act at a Theatre by this Court sending him to the Fleet for refusing to act at all? There is no method of arriving at that which is the substance of the Contract between the parties, by means of any process which this Court is enabled to issue; and therefore (unless there is some positive authority to the contrary) my opinion is that, where the Agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this Court, and it is only guarded by a negative Provision, this Court will leave the parties, altogether, to a Court of Law, and will not give partial relief by enforcing only a negative stipulation. I think, for the reasons which I have stated, that what Lord Eldon has said in the case of Morris v. Colman bears upon this Case.

In Clark v. Price, 2 J. Wilson's C. C. 157, (in which, also, I was of Counsel,) there was a positive stipulation by Price, that he would write Reports for Clarke the Bookseller. Lord Eldon says, in his Judgment upon that Case:

"The Case of Morris v. Colman is essentially different from the present. In that Case, Morris, Colman and other Persons were engaged in a Partnership in the Haymarket Theatre, which was to have continuance for a very long period, as long indeed as the Theatre should exist. Colman had entered into an Agreement which I was very unwilling to enforce, not that he would write for the Haymarket Theatre, but that he would not write for any other Theatre. It appeared to me that the Court could enforce that Agreement by restraining him from writing for any other Theatre. The Court could not compel him to write for the Haymarket Theatre; but it did the only thing in its power, it induced him, indirectly, to do one thing by prohibiting him from doing another. There was an express Covenant on his part, contained in the Articles of Partnership. But the terms of the prayer of this Bill do not solve the difficulty; for, if this Contract is one which the Court will not carry into execution, the Court cannot, indirectly, enforce it by restraining Mr. Price from doing some other act."

His Lordship then proceeds to observe upon the express terms of the Contract, and says that he will not, in that case, interfere to enforce an implied, negative stipulation; for that is the utmost that can be made of his Lordship's observations in that Case.

For the reasons which I have stated, I am of opinion that, if this Cause were now being heard, and the Agreement were admitted to be

such as it appears to be, this Court could not make any Decree, but must dismiss the Bill.

I should be extremely unwilling to have it thought that I am setting my judgment in opposition to any express opinion of The Lord Chancellor's. I have always thought it to be the duty of a Judge of this Court, knowing the opinion upon any point expressed by The Lord Chancellor, to follow it, as the immediate consequence of not following it, would be an appeal to him. It does not however appear that the attention of The Lord Chancellor was particularly called to this point. The application was an application ex parte; and, therefore, I may, without impropriety, say that my opinion is that this Injunction ought to be dissolved.

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## BARNUM v. RANDALL.

**(Chancery Court of New York, 1844. 2 West. Law J. 96.)**

In July last, a bill was filed by Mr. Barnum, of the American Museum, for an injunction to restrain Randall, the Giant, and his wife, from exhibiting, except for the benefit of Mr. Barnum, &c. The injunction was granted. There was a writ of ne exeat (prohibiting Randall from leaving the city) also granted, but which was subsequently discharged. Randall and his wife have since been to Philadelphia. Motion was made yesterday by Mr. Price, Counsel for Randall, that the injunction be dissolved. Mr. P. cited the case of Hamblin v. Dineford, and the cases there cited, to show that a contract for mere personal service cannot be enforced in this way; that there was a remedy at law. Mr. P. also cited the case of Revivonello, 2 Edwards' Chancery Reports, which was a breach of contract for not singing at the Italian Opera House. Mr. P. contended that the injunction should be dissolved. The motion was opposed by Mr. Niles, solicitor of the complainant, who contended that there was no analogy between the cases—the one being for personal services, and the other a mere exhibition, the same as exhibiting a piece of statuary or a picture. Mr. Niles also moved for an attachment against Randall for violating the injunction by exhibiting at Philadelphia, and also against his solicitor, Mr. Watson, for drawing up the contract between Randall and third parties, by which he was enabled to exhibit, &c.

THE VICE CHANCELLOR, in his decision, remarked that under the decision of Hamblin v. Dinneford, he should dissolve the injunction—that contracts for mere personal services afford a remedy at law, and cannot be enforced by injunction. As to the application for attachment against Randall and the solicitor for violation of the injunction, he would take the papers and make up his mind.

## BUTLER v. GALLETTI.

(Superior Court of New York, 1861. 21 How. Prac. 465.)

The plaintiff is proprietor of a music hall in Broadway and the defendant is a danseuse. The defendant was engaged by the plaintiff in her vocation, at $50 per week, but some misunderstanding occurring between the parties, she transferred her services to the Melodeon. Plaintiff moves for an injunction.

HOFFMAN, Justice. The complaint sets forth the following agreement:

"R. W. Butler, of the city and county of New York, of the first part, and Annetta Galletti, of the same city and county, of the second part, witnesseth that the said Annetta Galletti, of the second part, agrees to dance at the Broadway Music Hall, or American Music Hall, or such place or places as the said party of the first part may require, for the term of six months, commencing on the 8th day of September, 1861, at the weekly salary of fifty dollars per week, payable on the usual salary days, accustomed to the establishment wherein performing. The said party of the second part agrees to exercise her utmost abilities for the promotion of the exhibition wherein she may perform for the above specified term, and will conform to all the rules and regulations of said establishment.

"Given under my hand and seal this third day of June, 1861.

"Annetta Galletti.
"R. W. Butler.
"Jno. Sunsford."

It then alleges that the defendant, with the design and intent to avoid the said contract on her part, some time during last week entered into an agreement with one Lea, a proprietor or manager of the "Melodeon," a place of public amusement in Broadway, in said city, to appear and render her services as such dancer at said "Melodeon," and is advertised to dance there this evening.

Affidavits have been used by the defendant, and answering affidavits on the part of the plaintiff, upon the motion. They bear so slightly upon the questions, that I do not deem it necessary to comment upon them. The case depends upon the agreement merely. It is simply an engagement to dance at the plaintiff's theatre, or where he shall prescribe. There are no negative or restrictive clauses.

The authorities were examined in Fredricks v. Mayer, 13 How. 566, and in 14 N. Y. Super. Ct. 227. I am unwilling to hold and do not think I am bound by the cases to hold, that where there are clear and absolute negative stipulations on the part of the party, upon a subject involving in part the exercise of intellectual qualities, and a special case of the impossibility or great difficulty of measuring damages is presented, that the jurisdiction to forbid the violation of such covenants does not exist. But the present case is far from being one of such character, and falls within the authorities in our own state, in which an injunction has been refused.

Motion for injunction denied, and temporary injunction vacated, without costs.

## LUMLEY v. WAGNER.

(In Chancery before Lord St. Leonards, 1852. 1 De Gex, M. & G. 604.)

The bill in this suit was filed on the 22d April, 1852, by Benjamin Lumley, the lessee of her Majesty's Theatre, against Johanna Wagner, Albert Wagner, her father, and Frederick Gye, the lessee of Covent Garden Theatre: it stated that in November, 1851, Joseph Bacher, as the agent of the defendants Albert Wagner and Johanna Wagner, came to and concluded at Berlin an agreement in writing in the French language, bearing date the 9th November, 1851, and which agreement, being translated into English, was as follows:

"The undersigned Mr. Benjamin Lumley, possessor of her Majesty's Theatre at London, and of the Italian Opera at Paris, of the one part, and Mademoiselle Johanna Wagner, cantatrice of the Court of his Majesty the King of Prussia, with the consent of her father, Mr. A. Wagner, residing at Berlin, of the other part, have concerted and concluded the following contract. First, Mademoiselle Johanna Wagner binds herself to sing three months at the theatre of Mr. Lumley, her Majesty's, at London, to date from the 1st of April, 1852 (the time necessary for the journey comprised therein). * * * Fifth, Mademoiselle Johanna Wagner binds herself to sing twice a week during the run of the three months; however, if she herself was hindered from singing twice in any week whatever, she will have the right to give at a later period the omitted representation. Sixth, If Mademoiselle Wagner, fulfilling the wishes of the direction, consent to sing more than twice a week in the course of three months, this last will give to Mademoiselle Wagner £50 sterling for each representation extra. Seventh, Mr. Lumley engages to pay Mademoiselle Wagner a salary of £400 sterling per month, and payment will take place in such manner that she will receive £100 sterling each week. * * *"

The bill then stated, that in November, 1851, Joseph Bacher met the plaintiff in Paris, when the plaintiff objected to the agreement as not containing an usual and necessary clause, preventing the defendant Johanna Wagner from exercising her professional abilities in England without the consent of the plaintiff, whereupon Joseph Bacher, as the agent of the defendants Johanna Wagner and Albert Wagner, and being fully authorized by them for the purpose, added an article in writing in the French language to the agreement, and which, being translated into English, was as follows:

"Mademoiselle Wagner engages herself not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley. Dr. Joseph Bacher,
"For Mademoiselle Johanna Wagner,
and Authorized by Her."

The bill then stated that the defendants J. and A. Wagner subsequently made another engagement with the defendant F. Gye, by which it was agreed that the defendant J. Wagner should, for a larger sum than that stipulated by the agreement with the plaintiff, sing at the Royal Italian Opera, Covent Garden, and abandon the agreement with the plaintiff. The bill then stated that the defendant F. Gye had full knowledge of the previous agreement with the plaintiff, and that the plaintiff had received a protest from the defendants J. and A. Wag-

ner, repudiating the agreement on the allegation that the plaintiff had failed to fulfil the pecuniary portion of the agreement.

The bill prayed that the defendants Johanna Wagner and Albert Wagner might be restrained from violating or committing any breach of the last article of the agreement; that the defendant Johanna Wagner might be restrained from singing and performing, or singing at the Royal Italian Opera, Covent Garden, or at any other theatre or place without the sanction or permission in writing of the plaintiff during the existence of the agreement with the plaintiff; and that the defendant Albert Wagner might be restrained from permitting or sanctioning the defendant Johanna Wagner singing and performing, or singing as aforesaid; that the defendant Frederick Gye might be restrained from accepting the professional services of the defendant Johanna Wagner as a singer and performer, or singer at the said Royal Italian Opera, Covent Garden, or at any other theatre or place, and from permitting her to sing and perform or to sing at the Royal Italian Opera, Covent Garden, during the existence of the agreement with the plaintiff, without the permission or sanction of the plaintiff. * * *

The plaintiff having obtained an injunction from the Vice-Chancellor Sir James Parker on the 9th May, 1852, the defendants now moved, by way of appeal before the Lord Chancellor, to discharge his Honor's order.

We [defendants] contend that the agreement is a purely personal contract, for the infraction of which damages are a complete and ample remedy: the agreement is in fact nothing more than a contract of hiring and service, and whatever the relation between the employer and employed may be, whether master and servant, or principal and agent, or manager and actor, this Court will, in all such cases, abstain from interfering, either directly or indirectly. Kemble v. Kean, 6 Sim. 333; Kimberley v. Jennings, 6 Sim. 340; Stocker v. Brockelbank, 3 Mac. & G. 250.

[THE LORD CHANCELLOR. In the case of Stocker v. Brockelbank, there was no negative covenant.] [61] * * *

In Morris v. Colman, 18 Ves. 437, the injunction was granted upon the ground of partnership, as shown by Lord Eldon in the case of Clarke v. Price, 2 Wils. 157; and, applying the language of his Lordship in that case to the present, we say that if the agreement is one which the Court will not carry into execution (and this must be admitted) the Court cannot indirectly enforce it.

[THE LORD CHANCELLOR observed that in the case of Blakemore v. The Glamorganshire Canal Navigation, 1 M. & K. 154, Lord Eldon had got over his scruples; for he there granted an injunction, the effect of which was indirectly to compel the company to restore certain works to the state in which they originally stood. His Lordship added

[61] The statement of facts is abridged and parts of the opinion are omitted.

that he had always felt some difficulty in acquiescing in the propriety of that decision.] * * *

Wherever there is a clear legal remedy, as exists in the present instance, this Court will decline to interfere in cases arising out of the doctrine of specific performance. Collins v. Plumb, 16 Ves. 454.

[THE LORD CHANCELLOR. This Court interferes by injunction in the case of articled clerks, surgeons' apprentices, &c., who have covenanted, after they leave their Masters not to practise within certain limits, although no question of specific performance is involved.] * *

THE LORD CHANCELLOR. The question which I have to decide in the present case arises out of a very simple contract, the effect of which is, that the defendant Johanna Wagner should sing at her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel in support of this appeal, they in effect come to this; namely, that a Court of Equity ought not to grant an injunction except in cases connected with specific performance, or where the injunction being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted.

I have then to consider how the question stands on principle and on authority, and in so doing I shall observe upon some of the cases which have been referred to and commented upon by the defendants in support of their contention. The first was that of Martin v. Nutkin, 2 P. W. 266, in which the Court issued an injunction restraining an act from being done where it clearly could not have granted any specific performance: but then it was said that that case fell within one of the exceptions which the defendants admit are proper cases for the interference of the Court, because there the ringing of the bells, sought to be restrained, had been agreed to be suspended by the defendant in consideration of the erection by the plaintiffs of a cupola and clock, the agreement being in effect the price stipulated for the defendant's relinquishing bell-ringing at stated periods; the defendant having accepted the benefit, but rejected the corresponding obligation, Lord Macclesfield first granted the injunction which the Lords Commissioners, at the hearing of the cause, continued for the lives of the plaintiffs. That case therefore, however it may be explained as one of the exceptional cases, is nevertheless a clear authority showing that this Court has granted an injunction prohibiting the commission of an act in respect of which the Court could never have interfered by way of specific performance. * * *

The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this Court could not interfere to enforce the specific perform-

ance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion, that if she had attempted, even in the absence of any negative stipulation to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered.

Wherever this Court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. * * *

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this Court had no power to compel her to perform at her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfill her engagement. The jurisdiction which I now exercise is wholly within the power of the Court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect too of the injunction, in restraining J. Wagner from singing elsewhere may, in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre: the injunction may also, as I have said, tend to the fulfillment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

Referring again to the authorities, I am well aware that they have not been uniform, and that there undoubtedly has been a difference of decision on the question now revived before me; but, after the best consideration which I have been enabled to give to the subject, the conclusion at which I have arrived is, I conceive, supported by the greatest weight of authority. The earliest case most directly bearing on the point is that of Morris v. Colman, 18 Ves. 437: there Mr. Colman was a part proprietor with Mr. Morris of the Haymarket Theatre, and they were partners in that concern, and by the deed of partnership Mr. Colman agreed that he would not exercise his dramatic abilities for any other theatre than the Haymarket; he did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other the-

atre than the Haymarket. Lord Eldon granted an injunction against Mr. Colman writing for any other theatre than the Haymarket; and the ground on which Lord Eldon assumed that jurisdiction was the subject of some discussion at the bar. It was truly said for the defendants that that was a case of partnership; and it was said, moreover, that Lord Cottenham was mistaken in the case of Dietrichsen v. Cabburn, 2 Phil. 52, when he said that Lord Eldon had not decided Morris v. Colman on the ground of there being a partnership. I agree that the observations which fell from Lord Eldon in the subsequent case of Clarke v. Price, 2 Wils. 157, show that he did mainly decide it on the ground of partnership; but he did not decide it exclusively on that ground. In the argument of Morris v. Colman, 18 Ves. 437, Sir Samuel Romilly suggested a case almost identical with the present: he contended that the clause restraining Mr. Colman from writing for any other theatre was no more against public policy than a stipulation that Mr. Garrick should not perform at any other theatre than that at which he was engaged would have been. Lord Eldon, adverting in his judgment to the case put at the bar, said:

"If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for the theatre alone? Why should they not thus engage for the talents of each other?"

He gives the clearest enunciation of his opinion, that that would be an agreement which this Court would enforce by way of injunction.

The late Vice-Chancellor Shadwell, of whom I always wish to be understood to speak with the greatest respect, decided in a different way, in the cases of Kemble v. Kean, 6 Sim. 333, and Kimberley v. Jennings, 6 Sim. 340, on which I shall presently make a few observations. In the former case, he observed that Lord Eldon must be understood, in the case of Morris v. Colman, 18 Ves. 437, to have spoken according to the subject-matter before him, and must there be considered to be addressing himself to a case in which Colman and Garrick would both have had a partnership interest in the theatre. I must, however, entirely dissent from that interpretation. Lord Eldon's words are perfectly plain; they want no comment upon them; they speak for themselves. He was alluding to a case in which Garrick, as a performer, would have had nothing to do with the theatre beyond the implied engagement that he would not perform anywhere else; and I have come to a very clear conclusion that Lord Eldon would have granted the injunction in that case, although there had been no partnership.

The authority of Clarke v. Price, 2 Wils. 157, was much pressed upon me by the learned counsel for the defendants; but that is a case which does not properly belong to their argument, because there was no negative stipulation, and I quite admit that this Court cannot enforce the performance of such an affirmative stipulation as is to be found in that case; there the defendant having agreed to take notes of

cases in the Court of Exchequer, and compose reports for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and Lord Eldon, when refusing the injunction, in effect said, I cannot compel Mr. Price to sit in the Court of Exchequer and take notes and compose reports; and the whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant, on the part of the defendant, that he would not compose reports for any other person. The expressions in the judgment are: "I cannot, as in the other case" [referring to Morris v. Colman, 18 Ves. 437, "say that I will induce him to write for the plaintiff by preventing him from writing for any other person;" and then come these important words: "for that is not the nature of the agreement." Lord Eldon therefore was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he therefore, very properly as I conceive, refused that injunction; that case, therefore, in no respect touches the question now before me, and I may at once declare, that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at her Majesty's Theatre, I should not have granted any injunction.

Thus far, I think, the authorities are very strong against the defendants' contention; but the case of Kemble v. Kean, 6 Sim. 333, to which I have already alluded, is the first case which has in point of fact introduced all the difficulties on this part of the law. There Mr. Kean entered into an agreement precisely similar to the present: he agreed that he would perform for Mr. Kemble at Drury Lane, and that he would not perform anywhere else during the time that he had stipulated to perform for Mr. Kemble. Mr. Kean broke his engagement, a bill was filed, and the Vice-Chancellor Shadwell was of opinion that he could not grant an injunction to restrain Mr. Kean from performing elsewhere, which he was either about to do or actually doing, because the Court could not enforce the performance of the affirmative covenant that he would perform at Drury Lane for Mr. Kemble. Being pressed by that passage which I have read from in the Lord Chancellor's judgment in Morris v. Colman, 18 Ves. 437, he put that paraphrase or commentary upon it which I have referred to; that is, he says: "Lord Eldon is speaking of a case where the parties are in partnership together." I have come to a different conclusion; and I am bound to say that, in my apprehension, the case of Kemble v. Kean was wrongly decided and cannot be maintained. * * *

From a careful examination of all these authorities I am of opinion that the principles and rules deducible from them are in direct contravention of those principles and rules which were so elaborately pressed upon me during the argument; and I wish it to be distinctly understood that I entertain no doubt whatever that the point of law has been properly decided in the Court below. It was nevertheless,

and with some reason, said, that although the point of law should be decided in the plaintiff's favour, still he might be excluded from having the benefit of it on the merits of the case.

His Lordship here entered into a minute examination of the statements in the answers and affidavits as to the unauthorized addition of the restrictive clause, and as to the non-fulfillment by the plaintiff of his portion of the agreement. In reference to those points he observed that, whether the clause was originally added with or without authority, the evidence showed a clear acquiescence on the part of the defendants to its remaining in the agreement; that the operation of the agreement had been in the first instance postponed to suit the convenience of the defendants; and that as to the payment of the £300, although the plaintiff could not have come into a Court of Equity to enforce the contract without having tendered the amount stipulated to be paid, yet it was distinctly proved that it had in fact been paid to the common agent of both parties for the purpose of being handed to the defendants. His Lordship concluded by saying that, looking at the merits and circumstances of the case, as well as at the point of law raised, he must refuse this motion with costs. * * *

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## MUTUAL RESERVE FUND LIFE ASS'N v. NEW YORK LIFE INS. CO. and HARVEY.

(Court of Appeal, 1896. 75 Law T. R. 528.)

Appeal from the Queen's Bench Division.

The plaintiffs in this action were the Mutual Reserve Fund Life Association, which are an American association duly established according to American law, the head office of which is situate at New York. The plaintiffs have a branch office in Great Britain, situate in the City of London, where they carry on business as an insurance company.

The defendant Alfred Robert Harvey was an insurance agent, carrying on business at Liverpool.

The New York Life Insurance Company is an American company having a branch office in London.

By an agreement in writing, dated the 16th June 1894, the defendant Harvey was appointed supervisor of the plaintiff association for the purpose of procuring, effecting, and completing satisfactory applications for membership in the plaintiff association, and for the purpose of collecting the first payment on the applications so effected, and also for the purpose of appointing competent and acceptable agents in any unoccupied territory in England, Scotland, Ireland, Wales, or the Isle of Man.

By the agreement the defendant Harvey agreed to "act exclusively for" the plaintiff association, in so far as to tender to them all risks obtained by him or under his control; to thoroughly and efficiently occupy

the territory specified in the agreement, by the appointment of competent and satisfactory agents, and to faithfully discharge all the duties of his appointment as such supervisor; to devote his time and best energies to the service of the plaintiff association, and efficiently occupy and work the territory assigned to him, otherwise the agreement, so far as it related to future new business, was to be void and of no effect; and to guard the interests of the plaintiff association, and encourage members in the payment of their premium calls.

Upon the condition that the terms and provisions of the agreement were complied with by the defendant Harvey, the contract was to continue in force for the period of five years from the date thereof, unless the said defendant failed to obtain a volume of business satisfactory to the president or executive committee at the home office of the plaintiff association in New York.

On the 20th June 1896, the defendant Harvey entered into an agreement with the defendant company whereby he was appointed agency director of that company for the Kingdom of Great Britain and Ireland, for the purpose of canvassing for applications for assurance on the lives of individuals to that company and of organizing agencies for that company in Great Britain and Ireland.

The plaintiff association thereupon commenced this action against the defendant Harvey, and the defendant company, alleging by their statement of claim that subsequent to the date of the agreement, and before the expiration of the period of five years referred to therein, the defendant company well knowing that the defendant Harvey was in the service and employment of the plaintiff association under the agreement, and in order to secure to the defendant company the business connection of the plaintiff association, and in order to damage and injure the plaintiff association in their business, wrongfully enticed and procured the defendant Harvey, unlawfully and without the consent and against the will of the plaintiff association, to depart from the service of the plaintiff association, and to enter the defendant company's service, and to break his aforesaid agreement with the plaintiff association in the following particulars: (a) By entering the service and employment of the defendant company before the expiration of the said period of five years; (b) by wholly repudiating the agreement and refusing to be bound thereby; (c) by neglecting to perform the agreement or any part thereof; (d) by not tendering to the plaintiff association all risks obtained by him or under his control, and by tendering the same to the defendant company; (e) by endeavouring to induce the agents of the plaintiff association to depart from their service, and to enter the employment of the defendant company; and (f) by endeavouring to alienate, and alienating from the plaintiff association, their policy-holders and intending policy-holders.

The plaintiff association accordingly claimed (a) a declaration that they were exclusively entitled to the services of the defendant Harvey for a period of five years from the 16th June, 1894, in accordance with

the provisions of the agreement; (b) an injunction to restrain the defendant company, until after the expiration of the said period of five years, from retaining the services of, or employing or continuing to employ the defendant Harvey as supervisor or as director of agents, or in any capacity whatsoever not in accordance with the provisions of the agreement; (c) an injunction to restrain the defendant Harvey, until after the expiration of the said period of five years, from acting, or continuing to act for, or being employed by, the defendant company, or any other person or body corporate, in the capacity of supervisor or director of agents, clerk, agent, servant, or in any capacity whatsoever not in accordance with the provisions of the agreement, and from alienating or seeking to alienate from the plaintiff association their policy-holders or intending policy-holders, and from tendering to any person or persons other than the plaintiff association, any insurance risk or risks obtained by him, his servants or agents, or under his control; and (d) an inquiry as to what policies had been issued by the defendant company since the 16th June 1894, in respect of risks obtained by the defendant Harvey, his servants or agents, or under his control.

The plaintiff association claimed also against each defendant £5000 damages for the wrongful acts complained of.

Subsequently the plaintiff association took out a summons for an interlocutory injunction. The master refused the application, and his refusal was affirmed by Pollock, B., sitting at chambers on the 12th Aug. 1896.

The plaintiff association now appealed.

LINDLEY, L. J.[62] This case is, like many others, rather near the line. It must turn on the true construction of the contract of the 16th June 1894, and the true application, when that contract is properly construed, of the principles on which the court is in the habit of acting in such cases as the present. As regards those principles, I do not think that I need do more than refer to the case which has been cited, of The Whitwood Chemical Company v. Hardman (64 L. T. Rep. 716; [1891] 2 Ch. 416), because the principles, so far as I am acquainted with them, will be found most fully explained there. I quite agree that, although there may not be a covenant which is absolutely and clearly negative in terms, still, if you can extract from a contract of this kind a negative covenant which is sufficiently clear and definite to enable you—as I used the expression before—to put your finger upon it, and state exactly what a man is not to do, that is as good as a covenant absolutely and clearly negative in terms. The difficulty I have here is in coming to the conclusion that the implied negative covenant is sufficiently definite to warrant the court in granting an injunction as asked. My impression is that it is not. I think

[62] Parts of both opinions are omitted.

that the plaintiffs have taken a much wider view of their rights than the contract justifies. Now, I say nothing at all about the release of the contract or the cancellation of it, or the substance of it. Let me deal with it on the assumption that it is a subsisting contract between the plaintiffs and Mr. Harvey. One thing the contract does not contemplate, and it is all important. It certainly does not contemplate that Mr. Harvey is to do no business of any kind except performing the duties of his agency for the plaintiffs. He is at liberty to do anything he likes that is consistent with that, and when we come to look at the supposed negative covenant, or the clause that imports a negative covenant, we shall find that it is very carefully and very narrowly restricted. * * *

Then we come to a clause, and the only clause which can be said to import a negative covenant. The supervisor, Mr. Harvey, agrees to "act exclusively for" the plaintiffs in so far as to tender to them all risks obtained by him or under his control. * * *

Bearing in mind that Mr. Harvey is bound to do the best he can under that clause for the plaintiffs, what does it mean? Does it mean that he is to do more than to send to the plaintiffs such life assurance risks as he can procure for them? * * *

The plaintiffs have put a construction on the terms of the contract far wider than they are justified in doing when you come to work the matter out, bearing in mind that you have not got any clear definite negative covenant, nor anything to show what is the exact limitation of the negative covenant. Here the contract appears to me to be of sufficient vagueness to bring this case within the principle of the authority, to which I have already referred, of The Whitwood Chemical Company v. Hardman (ubi sup.), and not of Lumley v. Wagner (19 L. T. Rep. O. S. 264, 1 De G., M. & G. 604). As I have pointed out, and I repeat it, I do not think that it is, in accordance with the view taken in this class of case, desirable to extend the principle established thereby. I look upon Lumley v. Wagner (ubi sup.) and the whole of the cases of that class as rather anomalous. I should be bound by them, and of course follow them, where I have to decide cases of a similar kind. But before an injunction can be granted, in order to enforce a written contract of personal service—because this is a contract of personal service—there must be a clear and definite negative covenant; or, if one is to be implied, which is quite possible, it must be so definite that the court can see exactly the limit of the injunction that it is to grant. I think that this contract is far too hazy, far too indefinite, to do anything of the kind. Therefore it appears to me that the appeal ought to be dismissed, and dismissed with costs.

SMITH, L. J. I agree. * * *

Now, as I have before observed, the authority has been cited in this court of The Whitwood Chemical Company v. Hardman (ubi sup.), in which it was held—and I have no doubt rightly held—that where there is a contract for a man to give his whole time to another,

there is no negative implied covenant there that he will not act for another. Where a person has contracted to act exclusively for another, how can this court logically say, if the case of The Whitwood Chemical Company v. Hardman (ubi sup.) stands, which I apprehend is good law, that there is a negative covenant? I cannot myself bring my mind to a point so fine as that, and I have expressed my opinion on what I think is the true construction of this contract. But I declare that, if I had been sitting at chambers I should have done exactly what apparently Pollock, B., did—that is, say that I did not find any negative covenant in this case, or any such implied covenant, not to do that which the defendant is asked to be restrained from doing. This case comes, in my opinion, within The Whitwood Chemical Company v. Hardman (ubi sup.), which is a binding authority upon us. For these reasons I think that this appeal ought to be dismissed, and with costs.

Appeal dismissed.[68]

[68] In Whitwood Chemical Co. v. Hardman, [1891] 2 Chan. 416, at 426, where the defendant had agreed to give the whole of his time to the plaintiffs as manager of its business, the Court of Appeal refused to grant an injunction, and declined to imply an enjoinable negative clause not to serve as director in another company. In reversing Kekewich, J., of the court below, Lindley, L. J., said: "The first point to observe is, that there is no negative covenant at all, in terms, contained in the agreement on which the plaintiffs are suing—that is to say, the parties have not expressly stipulated that the defendant shall not do any particular thing. The agreement is wholly an affirmative agreement, and the substantial part of it is that the defendant has agreed to give 'the whole of his time' to the plaintiff company. That is important in this respect, that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, such as there was in Lumley v. Wagner (1852) 1 De G., M. & G. 604, and in some of the other cases, we should have been relieved from the difficulty of speculating what they had been thinking about. We should have seen that they had had their attention drawn to certain specific points, and that they had come to an agreement upon those specific points. In this case, we are left more or less in the dark about that, because, as I have said, there is nothing that shows that anything definite was in the minds of these parties beyond this, that the defendant was to give the whole of his time to the plaintiffs' business. Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on ad infinitum; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will. We are dealing here with a contract of a particular class. It is a contract involving the performance of a personal service, and, as a rule, the court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained more or less definitely in Lumley v. Wagner (1852) 1 De G., M. & G. 604,—that is to say, where a person has engaged not to serve any other master, or not to perform at any other place, the court can lay hold of that, and restrain him from so doing; and there are observations, in which I concur, made by Lord Selborne in the Wolverhampton and Walsall Railway Company v. London and North Western Railway Company (1873) Law Rep. 16 Eq. 433, to the effect that the principle does not depend upon whether you have an actual negative clause, if you can say that the parties

## EHRMAN v. BARTHOLOMEW.

(Chancery Division. [1898] 1 Ch. Div. 671.)

Motion.

In August, 1897, the defendant entered the employ of the plaintiffs, a firm of wine merchants, as a traveller at a salary, under the terms and conditions of an agreement which, so far as material, provided, that the employment should continue for a term of ten years from August 30, 1897, and be terminable by the plaintiffs after the first year by three months' notice in writing. Clause 3 of the agreement was as follows:

"The traveller shall diligently and continuously employ himself as the traveller of the firm for the purpose of selling the firm's goods, and shall use his best endeavours to obtain new customers for the firm, and to extend business, and shall devote the whole of his time during the usual business hours in the transaction of the business of the firm, and shall not in any manner directly or indirectly engage or employ himself in any other business, or transact any business with or for any person or persons other than the firm during the continuance of this agreement."

The agreement also provided (clause 13) that after the termination of the employment by any means, the defendant should not, either on his sole account or jointly with any other person, directly or indirectly supply any of the then or past customers of the firm with wines, liqueurs or spirits, or solicit for orders any such customers; and should not be employed in any capacity whatsoever, or be concerned, engaged or employed in any business of a wine or spirit merchant in which any former partner of the firm was engaged; and in case of any breach of this provision, then the defendant was to pay the firm £1000 as liquidated damages.

In March, 1898, the defendant left the plaintiffs' employment and entered the service of another firm of wine merchants. The defendant wrote resigning his place with the plaintiffs; but they declined to accept his resignation, and commenced the present action, by which they claimed an injunction to restrain the defendant from "in any manner directly or indirectly engaging or employing himself in any business other than that of the plaintiffs' firm, and from transacting any business with or for any person or persons other than the plain-

were contracting in the sense that one should not do this, or the other—some specific thing upon which you can put your finger. But there is this to be considered. What are we to say in this particular case? What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything which, when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond Lumley v. Wagner, and every case except Montague v. Flockton (1873) Law Rep. 16 Eq. 189. The principle is that the court does not decree specific performance of contracts for personal service, and the question is, whether there is anything in this case which takes it out of that principle. I cannot see that there is. Reliance was placed on Montague v. Flockton, in which also there was no negative clause."

tiffs' firm, and in particular from acting as a traveller for Messrs. Marzell & Co., and from soliciting orders for and on behalf of the said Messrs. Marzell & Co. during the term of ten years from August 30, 1897."

The plaintiffs now moved for an interim injunction in the terms of their claim.

April 26. ROMER, J. In my opinion the injunction asked for by the notice of motion ought not to be granted. The application is based on clause 3 of the agreement between the parties, which contains a negative stipulation, and so far distinguishes this case from that of Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416.

In the first place, having regard to clause 13, I doubt whether clause 3 was intended to apply to the state of things now existing, when the defendant is no longer acting as a servant of the plaintiffs, and cannot be compelled so to act, though his refusal to do so is in breach of his contract to act for the ten years mentioned in the agreement. But if I assume that clause 3 was intended to apply to the existing circumstances, then the serious question arises whether the Court ought to enforce such a negative stipulation as is there contained. That clause would in terms prevent the defendant, at any rate during the usual business hours, from engaging or employing himself in any business other than that of the plaintiffs, and from transacting any business with or for any person or persons other than the plaintiffs; and this for a period of ten years from August 30, 1897, or for so much of that period as the plaintiffs choose. And it is clear that in this clause the word "business" cannot be held limited by the context to a wine merchant's business or in any similar way. So that the Court, while unable to order the defendant to work for the plaintiffs, is asked indirectly to make him do so by otherwise compelling him to abstain wholly from business, at any rate during all usual business hours. In my opinion such a stipulation is unreasonable and ought not to be enforced by the Court. As the present Master of the Rolls stated in Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416, cases where negative stipulations in contracts of service are enforced by the Court ought not to be extended, and are to be regarded as anomalies which it would be very dangerous to extend. To enforce such a general negative stipulation as I find here would be in my opinion a dangerous extension, for here the stipulation extends to business of any kind, while the negative stipulations enforced in the prior cases, such as Lumley v. Wagner, 5 De G. & Sm. 485, 1 D., M. & G. 604, were confined to special services. For these reasons I refuse the motion, but looking at the conduct of the defendant, I do so without costs. Of course by this order the plaintiffs will in nowise be prevented from enforcing clause 13 of the agreement should they think fit to do so.

## METROPOLITAN ELECTRIC SUPPLY CO., Limited, v. GINDER.

(Chancery Division. [1901] 2 Ch. 799.)

The plaintiffs were a company who supplied electricity in a large district in London, and this was a motion by them to restrain the defendant from taking the electric energy required for his licensed public-house, known as the Red Lion, No. 72, High Holborn, from any person, firm, or company other than the plaintiffs, in breach of an alleged agreement.

On November 16, 1898, the defendant had signed what was called a contract, but in point of fact was a statutory form of request to the plaintiffs, as follows:

"I the undersigned request you to supply electric energy as specified below, and I agree to take all such electric energy subject to such of the clauses of the Electric Lighting Acts and the company's provisional orders as relate to the supply of electricity for the parish in which the premises to be supplied are situate, and also subject to the following terms and conditions, viz.: (1.) the consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years; (2.) the charge for electric energy to be 4½d. per Board of Trade unit."

Then followed provisions for registering the supply by meter, power of lamps, repairs, &c., but there was no covenant by the company to supply energy, nor by the defendant to take any. The final clause was as follows:

"In the event of the company's standard rate of charges being reduced below the price herein quoted during the continuance of this agreement the consumer is to have the benefit of such reduced rate."

Similar forms of request had been signed by other persons for different terms of years, and in one case at the rate of 4d. per unit.

In February, 1901, the defendant gave notice to the plaintiffs to disconnect his premises from their system, and made arrangements to get a supply from a rival company, on the ground, as he alleged, that the energy supplied by the plaintiffs was insufficient.

The plaintiffs thereupon commenced this action against the defendant, and moved for an interim injunction.

The motion was not heard out, but the hearing of the action was accelerated and the case was heard with witnesses upon the issues raised in the affidavits.

BUCKLEY, J.[64] * * * held on the evidence that the energy supplied by the plaintiffs was reasonably such as the defendant was entitled to receive, and continued:—One of the first defences which is raised is this: it is said that the language of the contract is affirmative and not negative, and that the Court is asked to grant an injunction upon the footing that there is a negative covenant, when in point of

[64] Part of the opinion is omitted.

fact there is none. Now, in dealing with that contention it appears to me that my first duty is to construe the contract, and that, for the purpose of arriving at the true construction of the contract, I must disregard what would be the legal consequences of my construing it in the one way or the other way. I must first find out what it means; and when I have found out what it means, then I must apply proper legal principles to the contract as construed. There is a passage in the judgment of Lord Selborne in Wolverhampton and Walsall Ry. Co. v. London and North Western Ry. Co., L. R. 16 Eq. 433, 440, which I desire to read on this part of the case. Referring to Lumley v. Wagner, 1 D. M. & G. 604, Lord Selborne said:

"With regard to the case of Lumley v. Wagner, to which reference was made, really when it comes to be examined it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance: the technical distinction being made, that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

The cases since that, I think, have gone to show that that which Lord Selborne says would be the true principle if it should eventually be adopted by this Court, has really now been adopted by this Court. The language here is that the consumer agrees to take the whole of the electric energy required for his premises from A. The company was bound to supply under the statute if asked. The consumer asks. The result is that he thereupon had a right as against the plaintiffs to be supplied. The only question for bargain then was the price, which was fixed at 4½d. They were contracting, not affirmatively for the supply of something, but negatively that the defendant would not take from somebody else. There is no affirmative contract here to take anything at all. Ginder does not agree that he will take any energy from the plaintiffs. He says he will take the whole of the electric energy required. It is competent to him to burn gas if he likes, and require no energy. The only thing he was contracting to do was that if he took electric energy he would take it from the plaintiffs. It seems to me the whole essence of that contract is that which is not expressed in words, I agree, but which by implication is really the only thing existing, a contract that he will not take from somebody else. He agrees to take the whole from A., which necessarily implies that he will not take from B. As matter of construction, therefore, not by express words but by necessary implication, I think there is here an agreement not to take from others. In that state of things, how do

the authorities stand? In the first place, it is said that in the recent case of Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416, the language was that A. would give the whole of his time to the company's business, which implied that he would not give any to anybody else. I agree that is exactly similar to this in the sense that here it is an agreement that he will take the whole of his required supply, and in Whitwood Chemical Co. v. Hardman it was that he would give the whole of his time. But when I read the judgments in that case it appears to me that the Lords Justices founded themselves entirely on this—that what they were dealing with was a contract for personal service, which of course this Court will not in general specifically perform. What they pointed out was that the parties were not thinking of contracting there about excluding the manager from acting for another: that was not in their contemplation. What was in their contemplation was that they should enjoy his whole time—that he should give them his service without reservation, but they did not contemplate the negative stipulation that he should not serve others. It being a contract of personal service, it is quite plain, I think, that the Court of Appeal were not prepared to extend the doctrine of Lumley v. Wagner, 1 D., M. & G. 604, as to contracts of personal service beyond the case where there exists, as there did in Lumley v. Wagner, express negative words. But, on the other hand, there is Catt v. Tourle, L. R. 4 Ch. 654, a case equally on all fours with the present as regards the expression, but not a case of personal service. There the words were that the plaintiff should have the exclusive right of supplying all ale, and he asked for an injunction to restrain a person from supplying the ale himself or obtaining it from another person; and succeeded in getting it. * * *

The contract really is a contract, the whole of which is in substance the negative part of it, that he will take the whole from them, involving that he will not take any from anybody else. I therefore think that the fact that the contract is affirmative in form and not negative in form is no ground for refusing an injunction. * * *

I fail to find in the facts of this case that there has been any undue preference. Mr. Page, who is the person principally representing the plaintiffs in making these contracts, told me, as I should expect, that he takes the circumstances of each case into consideration, and the price which has to be charged is fixed accordingly.

It seems to me that this is a contract which it was competent for the plaintiffs to make, and that they are entitled to succeed in the action.

I must, therefore, grant an injunction to restrain the defendant, during the residue of the term of five years which is mentioned in the contract of November 16, 1898, from taking the electric energy required for his premises from any person other than the plaintiffs; but I think I must reserve liberty to the defendant to apply, by which I mean this —that if at any time the plaintiffs are not prepared to supply the energy which he wants, or if they supply an energy which is not an effi-

cient supply such as they are bound to give by the Act of Parliament, then I think he ought to be at liberty to apply to be relieved from the operation of the injunction.

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## KIRCHNER & CO. v. GRUBAN.

(Chancery Division. [1909] 1 Ch. 413.)

Adjourned summons and motion.

By an agreement dated June 30, 1905, and made between the plaintiffs Kirchner & Co., of Leipzig, and the defendant Gruban, a German subject, the defendant was engaged as representative of the plaintiff firm for the United Kingdom, with domicil in London, for the sale of the goods manufactured and sold by the plaintiffs at a remuneration consisting of a fixed salary and certain commissions on sales.

The following material clauses of the agreement are taken from a translation of the German original supplied by the plaintiffs:

"6. Mr. Gruban agrees to devote all his activity and industry exclusively to the sale of the machines and other articles of the firm Kirchner & Co., Leipzig, not to make gains by another business of any kind, not to divulge any business matters to any one and to follow exactly and conscientiously all instructions and directions of the firm Kirchner & Co., Leipzig. * * *

"7. Mr. Gruban agrees under a penalty of twenty thousand marks to remain in his position and not to give notice before July 1, 1910 (three months). A penalty of twenty thousand marks comes into force if Mr. Gruban by neglect of duty or other permanent abuse of his position of trust shows himself unworthy to remain in his position so that according to the German Commercial Code dismissal is justified. Should such an event take place Kirchner & Co. secure themselves in the first place by the security paid by Mr. Gruban and further by the commissions due or falling due later. Kirchner & Co. agree not to give notice to Mr. Gruban before the 1st day of July 1910 (three months) provided that Mr. Gruban does not give cause for lawful dismissal."

"12a. The contracting parties submit themselves in all cases of dispute to the exclusive jurisdiction of the Royal Landgericht or of the Amtsgericht at Leipzig, and the German law shall exclusively hold good. * * *"

According to the defendant, the more correct and literal translation of the last sentence was, and in fact it is, "and to the exclusive applicability of the German law." The original German sentence ran "und der ausschliesslichen Anwendbarkeit des deutschen Rechtes."

The agreement contained no restriction against the defendant entering the employment of any rival firm after the termination of his contract with the plaintiffs.

From the date of the agreement the defendant acted as agent for the plaintiff firm, but by the end of 1907 he became desirous of determining his engagement with the plaintiffs, on the ground of certain alleged complaints against them. He gave three months' notice to the plaintiffs of his intention to determine the agreement, and on May 1, 1908, after the expiration of the notice, he left their employment and entered into the employ of a rival English firm with whom in the month of February, 1908, he had entered into a conditional agreement for em-

ployment of a similar nature in the event of the determination of his employment with the plaintiffs.

On June 9, 1908, the plaintiffs issued a writ for an injunction to restrain the defendant from engaging in any other business than that of the plaintiffs until after July 1, 1910; an injunction to restrain him from divulging to any one any matters relating to the plaintiffs' business; and account of commissions; damages, incidental relief, and costs.

On June 18 the defendant entered a conditional appearance to the writ, and on June 20 issued a summons asking that the writ of summons and service thereof might be set aside, or in the alternative that all proceedings in this action might be stayed "on the ground that it was agreed between the parties that for any dispute at law the parties agreed to submit to the exclusive competency of the Royal Provincial Court, respectively the county court at Leipzig and to the exclusive applicability of the German law," and for costs.

On August 28 the plaintiffs served a notice of motion for an injunction restraining the defendant from engaging in any business other than that of the plaintiffs until after July 1, 1910, or alternatively until after the matters in dispute between the plaintiffs and the defendant had been submitted to the jurisdiction of the Royal Courts of Saxony holden at Leipzig and a final order made in respect of such matters as provided by the agreement; and also an injunction to restrain the defendant from divulging to any one any matters relating to the plaintiffs' business until after July 1, 1910, or, alternatively, until after such final order had been made as aforesaid.

The plaintiffs filed evidence alleging that the defendant had divulged certain matters relating to their business and had solicited their customers.

There was evidence also to the effect that the decision of the Leipzig Court mentioned in clause 12a would not necessarily be final, but that an appeal from it would lie to another Court.

The summons and motion now both came on to be heard together.

EVE, J.,[65] stated the facts as above set out and continued: * * * It is admitted, or conceded, I think I may say, by counsel for the plaintiffs that if this were a mere affirmative agreement by the defendant to serve the plaintiffs until July 1, 1910, and he had refused to continue that service, the Court would not, according to the well-settled practice, interfere by an injunction to compel him to render his services to the plaintiffs down to the date at which in the ordinary course the engagement of service would come to an end. But it is urged here that it is not merely an affirmative covenant, but that there is in this document a negative stipulation which the Court, according to the practice, can enforce by restraining the defendant in the terms of the covenant. The negative stipulation is to be found in clause 7 of the

[65] Parts of the opinion are omitted. A part of what is here omitted is printed at page 1059, infra.

agreement. "Mr. Gruban"—that is the defendant—"agrees under a penalty of 20,000 marks to remain in his position and not to give notice before July 1, 1910."

Now it is said that what he has done is a breach of his agreement not to terminate the service before July 1, 1910, and if the matter were entirely free from authority that would be an argument to which I think I should have had to give very much more weight than I am able to do in the present state of the authorities. The question as to the practice of the Court to enforce affirmative covenants of this sort was dealt with and finally disposed of, at any rate for the present, by the case of Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416, and at a later date the principle upon which that and similar cases had been determined came up for consideration before the late Kekewich, J., in the case to which I am about to refer, the case of Davis v. Foreman, [1894] 3 Ch. 654, 655, 657. There the form of the agreement between the employer and the employed was this:

"The employer hereby agrees with the manager that he will not, except in the case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period that he shall draw from the said business £15 each and every month."

There was an agreement in the negative by the employer that so long as a certain state of things continued to exist he would not give notice to the employee determining the engagement. Kekewich, J., having heard all that was to be said on behalf of the plaintiff, who in that case was the employee seeking to restrain the employer from acting upon the notice, gave his judgment, in which he arrives at this conclusion, that though in form the stipulation or agreement is negative in substance, it is really affirmative and positive, that an agreement not to give notice to determine his employment is for all practical purposes an agreement to continue the employment, and having come to that conclusion he says:

"Having regard to the principle expounded by the Court of Appeal in Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416, and recognized again in the case of Ryan v. Mutual Tontine Westminster Chambers Association, [1893] 1 Ch. 116, which is not directly in point, what ought I to do here, in dealing with a covenant or stipulation which, as I have said, though negative in form is positive in substance? There is a clause in the agreement that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ—in other words, give him notice to quit. That is, to my mind, distinctly equivalent to a stipulation by the employer that he will retain the manager in his employ. It is only the form that is negative. If the Court comes to the conclusion that that is really the substance of the agreement (which, being an agreement of service, cannot be specifically enforced), is it right, having regard to the line the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted? To my mind I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of Lumley v. Wagner [1852] 1 D., M. & G. 604, which is not to be extended, to a case of this character."

It seems to me that every word of that judgment is applicable to the present case, and that I should be disregarding an authority which is certainly binding upon me if I were to hold that merely because Mr.

Gruban has entered into a contract not to terminate the engagement before July 1, 1910, I could grant an injunction the effect of which would be as against him to order specific performance of an agreement to continue to serve the plaintiffs down to July 1, 1910. So that on the first part of the motion I hold that, apart from all other considerations, the plaintiffs would not be entitled to the order for which they ask. * * *[66]

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## MEASURES BROS., Limited, v. MEASURES.

(Court of Appeal. [1910] 2 Ch. 248.)

Appeal from a decision of Joyce, J. * * *

Defendant in 1903 entered into agreement with plaintiff company, of which he was a director, to serve as manager and director for seven years at a yearly salary of £1000 and percentage of profits, and agreed that so long as he held office and for seven years after ceasing to hold office he would not be interested in, or carry on, as manager or otherwise, any business that would compete with plaintiff company. In 1909 a receiver was appointed to wind up the business, who gave notice to the defendant to leave, and declined to pay him further salary. Defendant then entered into business as engineer and ironfounder, for himself, in competition with the plaintiff company. The receiver, under direction of the Court, brought this action for an injunction.[67]

JOYCE, J., held that the winding-up order operated as a wrongful dismissal of the defendant, and that, applying the principle of General Billposting Co. v. Atkinson, [1909] A. C. 118, he was no longer bound by his covenant.

May 11. COZENS-HARDY, M. R. The question in this appeal is whether an injunction ought to be granted to restrain the defendant from breaking a negative covenant contained in an agreement of July 14, 1903. [Having stated the facts and documents as above, his Lordship continued:]

I do not think it necessary to consider whether the mutual obligations contained in the agreement of July, 1903, are strictly interdependent, although my impression is that they are so. I prefer to base my judgment upon the ground that the plaintiffs, who are seeking equitable relief by way of injunction, cannot obtain such relief unless they allege and prove that they have performed their part of the bargain hitherto and are ready and able also to perform their part in the future. The consideration which the defendant was to receive for his covenant from the company was (1) the position of a director of the company; (2) the salary of £1000 a year; and (3) a contingent share of the profits. The plaintiffs have not given, and cannot in future

[66] The court made an order on the summons staying the action.

[67] The statement of facts is abbreviated and parts of the opinions of Buckley and Kennedy, L. JJ., are omitted.

give, the defendant this consideration. The contract on their part has been broken. It is not necessary that the breach should be wilful in the sense of being intentional. It suffices that by an act brought about by the company's own default, namely, the omission to pay debts incurred by the company, the contract has been broken. As Joyce, J., said, the plaintiffs are not entitled against this defendant to specific performance—because that is what it amounts to—of clause 5 of the special agreement without performing, and they cannot perform, the clauses which that agreement contains in favour of the defendant. In my opinion it would be inequitable if the plaintiffs could have that relief. If authority is wanted for this proposition I would refer to Peto v. Brighton, Uckfield, and Tunbridge Wells Ry. Co., 1 H. & M. 468, 483, and Telegraph Despatch and Intelligence Co. v. McLean, L. R. 8 Ch. 658. In my opinion this appeal fails and must be dismissed with costs.

BUCKLEY, L. J. * * * What has happened is that the plaintiffs did not by affirmative action on their part determine the employment either rightly or wrongly, but that by the operation of a winding-up order made on October 13, 1909, the office itself came to an end. * * *

He has ceased to hold his office, and the contract upon its true construction, I think, is that when he ceases to hold his office, whether under clause 4 by the operation of some event mentioned in article 102 by vacation of his office or in any other way, not being a wrongful dismissal, which brings General Billposting Co. v. Atkinson, [1909] A. C. 118, into play, he shall be bound by the restrictive covenant. If I am right in holding that clauses 1 and 5 are not interdependent contracts, that the performance of clause 1 is not a condition precedent to the continuance of the restriction in clause 5, it results that in the events which have happened Clause 5 remains binding upon the defendant. For these reasons I think that the plaintiff company are entitled to an injunction.

KENNEDY, L. J. * * * In my opinion the appeal should be dismissed with costs.

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## McCAULL v. BRAHAM.

(Circuit Court of the United States, S. D. New York, 1883. 16 Fed. 37.)

BROWN, District Judge. This action was brought in the state court to restrain the defendant, Helen Braham, otherwise known as Lilian Russell, from violating her agreement with the plaintiff by singing during the current season in any other employment than at the plaintiff's theater, which the complaint alleges she is about to do. A preliminary injunction having been obtained at the time of the commencement of the action, the cause was removed by the plaintiff to this court before answer; and the defendant now moves upon affidavits to dis-

solve the injunction. By the agreement in writing between the parties, the defendant agreed to sing in comic opera in the employment of the plaintiff whenever required during the season of 1882 to 1883, commencing on or about September 1, 1882, at a stipulated weekly salary. By article 1 the agreement provides that:

"The artist is engaged exclusively for Mr. John McCaull, and during the continuance of this engagement will not perform, sing, dance, or otherwise exercise her talent in theater, concert halls, churches, or elsewhere, either gratuitously or for her remuneration or advantage, or for that of any other person or other theater or establishment (although not thereby prevented from fulfilling her engagement with Mr. McCaull) without having first obtained permission in writing of Mr. McCaull; and for each and every breach of this rule the artist shall forfeit one week's salary, or her engagement, at the option of Mr. McCaull; but such forfeiture of one week's salary shall not be held to debar Mr. McCaull from enforcing the fulfillment of this contract in such a manner as he may think fit."

By article 3 it is provided that:

"No salaries will be paid for any night or days on which the artist may not be able to perform through illness or other unavoidable cause; and the artist absenting herself, except from illness or other unavoidable cause, will forfeit one week's salary, or her engagement, at the option of Mr. McCaull, and will also be held liable for any loss that may be sustained by Mr. McCaull owing to such absence. Illness, to be accepted as an excuse, must be attested by a medical certificate, which must be delivered to Mr. McCaull or his representative as early as possible, and before the commencement of the performance. Should such absence exceed two weeks, the engagement may be canceled at the option of Mr. McCaull."

The defendant entered upon the performance of her engagement at the Bijou Opera House in this city in September, 1882, with great success, which was continued until prevented from further performance by protracted illness. Having partially recovered, she attempted to renew her appearances, but after three nights' performances, in December, she suffered a relapse from which she did not recover until about the middle of February, 1883.

By the written contract the plaintiff was to furnish all costumes. This was modified, prior to September, by an oral agreement by which the plaintiff was to pay a larger salary and the defendant to furnish her own costumes. Both parties agree as to the modification of the contract to this extent. The defendant contends that in addition to the above the oral contract was further modified by the plaintiff agreeing to pay her weekly salary as at first fixed during the continuance of any illness; that the sum of about $350, paid to her by the plaintiff during her illness, was paid in pursuance of this modification of the contract; and that since the middle of December the plaintiff has refused to continue such payment during that part of her illness, in violation of the agreement as modified.

The plaintiff denies that the modification of the contract included any agreement to pay her during illness, and asserts that the moneys actually paid her while ill were merely advances on account of future salary to be earned, and so expressly stated at the time. Each party sustains its respective claims in this respect by several witnesses. They

leave this branch of the subject in so much doubt that I feel obliged to reject it from consideration, without prejudice to either in regard to their mutual claims in respect to it, since neither party made it a ground of terminating the contract.

Up to the time this action was commenced the defendant had given no notice to the plaintiff terminating the agreement; nor had the plaintiff, as he might have done according to the express provision of the agreement, notified the defendant that it was canceled, owing to her absence beyond two weeks. I must, therefore, hold the agreement as still in force. Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity. That violation of such covenants will be restrained by injunction, is now the settled law of England. Lumley v. Wagner, 1 De G., M. & G. 604; Montague v. Flockton, L. R. 16 Eq. 189, 199.

The subject was exhaustively considered by Freedman, J., in the case of Daly v. Smith, 49 How. Prac. (N. Y.) 150, in whose conclusions, in accordance with the English cases above cited, I fully concur. In the present case it is, however, urged that the remedy by injunction should not be allowed, on the ground that the plaintiff's damages have been liquidated by the first article of the contract above quoted; namely, that "for each and every breach of this rule the artist shall forfeit one week's salary;" and the cases of Barnes v. McAllister, 18 How. Prac. (N. Y.) 534; Nessle v. Reese, 29 How. Prac. (N. Y.) 382; Mott v. Mott, 11 Barb. (N. Y.) 127, 134; and Trenor v. Jackson, 46 How. Prac. (N. Y.) 389, are cited in support of this view.

There is no doubt of the general principle that where the damages for the violation of a covenant are either liquidated by the agreement, or may be easily and definitely ascertained, the parties will be left to their remedy at law. But it is clear that in cases of contract like the present, the damages are not capable of being definitely ascertained or measured; and in the cases first above cited, injunctions were for that reason allowed. The only question in this case, therefore, which distinguishes the present agreement from those, is whether the provision for the forfeiture of a week's wages for every violation of article 1 is such a liquidation of the damages as bars the remedy by injunction. In Barnes v. McAllister and in Nessle v. Reese and Mott v. Mott, supra, there was a covenant to pay a specific sum for failure to observe the covenant in these cases; and these sums were held by the court to be strictly liquidated damages.

Where the provision of the contract is in the nature of a penalty, and not liquidated damages, it is well settled that such a provision will not prevent the remedy by injunction to enforce the covenant specifically; and the provision will be construed as a penalty, and not as liqui-

dated damages, where its plain object is to secure a performance of the covenant, and not intended as the price or equivalent to be paid for a non-observance of it. Howard v. Hopkyns, 2 Atk. 371; Bird v. Lake, 1 Hem. & M. 111; Fox v. Scard, 33 Beav. 327; Sloman v. Walter, 1 Brown, C. C. 418; Jones v. Heavens, 4 Ch. Div. 636.

Whether the language of the contract is to be construed as a penalty or as liquidated damages is to be determined from its language and its presumed intent to be gathered from the circumstances of the parties and the nature of the agreement.

"A penalty," says Lord Loughborough, in Hardy v. Martin, 1 Cox, Ch. 26, "is never considered in this court as the price of doing a thing which a man has expressly agreed not to do; but if the real meaning and intent of the contract is that a man should have the power, if he chooses, to do a particular act upon the payment of a certain specified sum, the power to do the act upon the payment of the sum agreed on is part of the express contract between the parties." Vincent v. King, 13 How. Prac. (N. Y.) 234–238; Kerr, Inj. 409.

In Coles v. Sims, 5 De Gex, M. & G. 1, Lord Justice Turner says, upon this point:

"The question in such cases, as I conceive, is, whether the clause is inserted by way of penalty or whether it amounts to a stipulation for liberty to do a certain act on the payment of a certain sum."

That the clause providing for the forfeiture of one week's salary for each violation of this contract was in the nature of a penalty, and designed solely to secure the observance of article 1, is manifest both from the general nature of the employment and the requirements of a manager of opera, as well as the express language of this article; because (1) the stipulation is not for the payment of a certain sum as liquidated damages, but only for the forfeiture of a week's salary; (2) it gives an option to the plaintiff, instead of such forfeiture, to annul the engagement; (3) it declares that such forfeiture shall not disbar the plaintiff from enforcing the fulfillment of this contract in such a manner as he shall think fit, i. e., by any available legal or equitable remedy. As the remedy by injunction is one of the remedies available, this language is equivalent to an express declaration that the provision for the forfeiture of a week's salary for each violation shall not affect his right to a remedy by injunction. This last stipulation would not, indeed, influence the court, provided it was clear that the damages were intended to be liquidated at a specific sum, for which the defendant was to have the option of singing at any other theater. But these several clauses taken together show conclusively that no such thing was intended, and that the sole object was to secure the specific observance of the contract that the defendant should not sing elsewhere; and the plaintiff is therefore entitled to restrain the violation of it. As the season will close on May 15th and the contract then terminate, there are certain equitable conditions which should be observed, and which it is competent for the court, in continuing the injunction, to impose. Russell v. Farley, 105 U. S. 433, 438, 26 L. Ed. 1060.

The injunction of this court must not be used directly or indirectly to enforce the collection by the plaintiff of his alleged but disputed claim for previous advances, through the non-payment of salary hereafter earned, at least until his right is legally adjudicated. (2) Considering the short period remaining, the defendant must not be sent to California, where by the contract she might have been taken without salary en route going and returning; nor, having respect to her precarious health, should she be sent to any very distant point; (3) the plaintiff should furnish satisfactory security for the prompt payment weekly for the defendant's services at the rate of $150 per week, the contract price, from the time the defendant gives notice in writing of her readiness to sing under the contract, so long as she shall continue in readiness to perform her duties.

In case of failure to pay any future salary earned, the defendant may apply, on two days' notice, to the plaintiff's attorneys for the dissolution of this injunction.

An order may be entered continuing the injunction subject to the above provisions and conditions.[68]

[68] For a review of the development of the doctrine of injunction relative to negative covenants, see the valuable note of Benjamin Vaughan Abbott in 16 Fed. 42. See, also, Iron Age Publishing Co. v. Western Union Telegraph Co. (1887) 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758, in which is found the following clear statement of the principles discussed in the principal case: "A further question of great importance arises under the issue made by the eighth assignment of demurrer. Is the contract in question one which, in its nature, is practically to be enforced by a court of equity, so, to do substantial justice to both of the contracting parties,—the Iron Age Publishing Company and the New York Associated Press,—admitting, for the sake of argument, the jurisdiction by the court of the subject-matter and the parties, it is insisted for the appellees that the contract, being one for the performance of personal services by the Associated Press, involving the exercise of special skill, judgment, and discretion, and which are continuous in their nature, running through an indefinite period of time, the enforcement by specific performance is impracticable, and jurisdiction must be declined. It is unquestionable that the courts of equity will not interfere to affirmatively compel specific executions in cases of this kind, because this is impracticable; the only power of the court being at most to punish the defendant by fine and imprisonment for refusing to obey its mandates, (Clark's Case, 1 Blackf. [Ind.] 122, 12 Am. Dec. 213, and note, 217; Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; Pom. Cont. § 310;) and in many cases the courts have refused to interfere, by injunction or otherwise, to prevent the breach of such contracts, although the remedy by damages at law was not adequate. This was put on the ground that if the court was unable to enforce the affirmative part of a contract, it would refuse to restrain the violation of the negative part of it. The subject has been elaborately discussed, both in England and in this country, chiefly in cases where injunctions have been sought to prevent the breach of agreement made by operatic singers and theatrical performers to sing or perform exclusively for one employer during a given period of time. In the earlier cases in England, commencing with that leading case of Kemble v. Kean, 6 Sim. 333, it was held that for the breach of such contract, except in certain cases of partnership, the complaining parties must seek their remedy at law, and that chancery would decline to interfere by injunctive relief. The authority of this case and others following it has, however, been entirely overthrown, and in the case of Lumley v. Wagner, 1 De Gex, M. & G. 604, 13 Eng. Law & Eq. 252, the contrary doctrine was established, and has

## SECTION 2.—EQUITABLE VIEW OF THE CONTRACT COMPARED WITH THE LEGAL VIEW

### I. CONSIDERATION

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### TUMLINSON'S ADM'R v. YORK'S ADM'R.

(Supreme Court of Texas, 1858. 20 Tex. 694.)

Appeal from De Witt. Tried below before the Hon. Fielding Jones.

Petition of John York's administrator, filed in the county court on the 9th of December, 1854, alleging the execution of a bond for title to land, by John Tumlinson, in his lifetime, which bond was filed as part of the petition; the death of Tumlinson; administration on his

since been firmly adhered to by the English courts. In that case, the defendant agreed to sing at plaintiff's theater, upon certain terms, and for a stipulated time, and during such period to sing nowhere else. She made an engagement during this time to sing at a rival theater, and refused to perform her contract with the plaintiff. Although unable to enforce the contract specifically, the court did not hesitate to interfere by injunction to prevent the violation of the negative stipulation by which the defendant bound herself not to sing anywhere else than at the plaintiff's theater. This case expressly overruled Kemble v. Kean and other decisions following it. The principle was soon extended, and like relief granted in cases where the negative promise was not expressed, but implied from the contract of the parties. Anson, Cont. (3d Amer. Ed. 1887,) 413, and note 1; 3 Pom. Eq. Jur. § 1345; Pom. Cont. §§ 24, 25, 310, 311. The American courts have generally been disposed to follow the rule declared in Kemble v. Kean, and as said by Mr. Pomeroy, they exhibited a strange disinclination to adopt the modern English rule declared in Lumley v. Wagner, enforcing the specific performance of such contracts negatively by means of injunction restraining their violation. The American cases are divided, however, on this subject, with a numerical weight of authority, perhaps, against the later English rule; but, as we apprehend, with a disposition recently to fall into line with the more reasonable doctrine of Lumley v. Wagner. We leave this important question open, however, as we shall decide the case upon another point, conceding, for the purposes of this case, the right and propriety of exercising such jurisdiction at the instance of complainant. Injunctions of this character, especially under the American rulings, are granted with great caution by the courts. We cite the following authorities on the subject, all of which we have examined, with many more: Machine Co. v. Embroidery Co., Holmes, 253, Fed. Cas. No. 12,904 (1873); Hayes v. Willio, 11 Abb. Prac. N. S. (N. Y.) 167; Telegraph Co. v. Railway Co. (C. C. 1880) 1 McCrary, 558, 3 Fed. 423; Daly v. Smith, 49 How. Prac. (N. Y.) 150; Fredricks v. Mayer, 13 How. Prac. (N. Y.) 566; Clark's Case, 12 Am. Dec. 213, note, 217; Casey v. Holmes, 10 Ala. 776; Hamblin v. Dinneford, 2 Edw. Ch. (N. Y.) 529; Sanquirico v. Benedetti, 1 Barb. (N. Y.) 315; Butler v. Galletti, 21 How. Prac. (N. Y.) 465; De Pol v. Sohike, 30 N. Y. Super. Ct. 280; De Rivafinoli v. Corsetti, 4 Paige (N. Y.) 270, 25 Am. Dec. 532; Ford v. Jermon, 6 Phila. (Pa.) 6; Railroad Co. v. Railroad Co., 13 Ohio St. 544; 3 Pom. Eq. Jur. §§ 1343, 1344; Pom. Cont. §§ 24, 25, 310, 311; Anson, Cont. 413; Hahn v. Concordia Soc., 42 Md. 460; Wat. Spec. Perf. § 117, and notes; Caswell v. Gibbs, 33 Mich. 331; Kerr, Inj. 503; High, Inj. §§ 485, 486; Manufacturing Co. v. Stock-Yard Co., 23 N. J. Eq. 161."

estate in that county; that said title had never been made; prayer for specific performance. Said bond was as follows:

The State of Texas, County of De Witt.

Know all men by these presents that I, John Tumlinson, of said county, am held and firmly bound unto John York, of said county, in the sum of five hundred dollars, good and lawful money of the United States; and for the faithful payment of which I, the said John Tumlinson, bind myself, and each of my heirs, executors, and administrators, jointly and severally, firmly by these presents, unto the aforesaid John York and his heirs and assigns. Given under my hand and seal, this fourth day of January, in the year eighteen hundred and forty-seven. The condition of the above obligation is such, that whereas the above bound has sold unto the said John York the undivided one-half of the headright one-fourth of the league of land granted to ——— Harris, statute, lying, and being in the county of Grimes, and bounded on the south by the tract of land which Mr. Roann now lives on; now, therefore, if the above bound shall make, or cause to be made, a good and perfect title to the above described land and premises, in fee simple, to the aforesaid John York, his heirs or assigns, within the term of twelve months, the above obligation shall be null and void, otherwise be and remain in full force and effect in law. It is expressly understood, that the above bond is given in place of one of the same character, for the same land, to James Cox, and transferred to the said York, which is alleged to be lost or mislaid; and the compliance of the above bond shall make void the one reputed to be lost. Given under my hand and seal the date above written.

Tumlinson's administrator demurred, and for special ground showed, that it did not appear from the petition, that the title to the land was in the defendant's intestate at the time of his decease; and for answer that the cause of action was stale, and barred by limitation. Demurrer to petition overruled, and the matter being submitted to the court, judgment for defendant. Plaintiff appealed to the district court, where the case was submitted to the court upon the same pleadings, and after hearing the evidence, and argument of counsel, judgment for plaintiff. No statement of facts.

HEMPHILL, C. J. This was a suit for specific performance of a bond for title to land. It was commenced in the county court, where the prayer for performance was refused. On appeal to the district court, this judgment was reversed, and the cause has been brought by appeal to this court. We are of opinion that there was error in the judgment of the district court. The bond does not recite any consideration. There is no allegation in the petition, that a valuable consideration was paid by the vendee, and although there is no statement of facts, and we cannot ascertain from the record what facts were in proof, yet there being no allegation of the essential fact of valuable consideration, we cannot presume that, in violation of the rules of evidence, such fact was established by proof. The averments and proof must correspond; and this being the rule, we must presume there was no evidence of valuable consideration.

It is a well established rule, that specific performance of an agreement to convey land will not be enforced, unless founded on a valuable consideration. Where the receipt of such consideration is expressed in the agreement, or bond, its existence would be prima facie presumed; but where not so expressed, or admitted by the vendor in

the pleadings, it must be established by proof; and being a material fact, it must be averred, that the proof may be admitted. Boze v. Davis, 14 Tex. 331; Short v. Price, 17 Tex. 397. In the latter case, reference was had to art. 710 of the Digest, and it was held inapplicable to cases where the plaintiff must show a valuable consideration as prerequisite to the decree, and where, on principles of equity jurisprudence, the seal imparts no efficacy to the instrument on which the suit is brought; that the only effect of the article would, in such cases, be, that where a valuable consideration is expressed in the instrument, it could not be impeached by the defendant, unless under oath; whereas on general principles of equity, this would not be required.

The first error in this case was the overruling, by the county court, of the demurrer to the petition. This should have been sustained by that court, and its judgment on the demurrer should have been reversed by the district court. The question as to the statute of limitations need not be considered, as on a new trial there may, on proper pleading, be proof of valuable consideration; and if so the point of limitation, under the facts, would not arise. We are of opinion that there was error in the judgment of the court below, and that the same be reversed and the cause remanded for a new trial.

Reversed and remanded.[69]

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## BUFORD'S HEIRS v. McKEE.

**(Court of Appeals of Kentucky, 1833. 31 Ky. [1 Dana] 107.)**

NICHOLAS, J.[70] The heirs of Henry P. Buford filed their bill against the devisee of Henry Paulding, to obtain specific performance of an alleged covenant from Paulding, for the conveyance, at his death, of a tract of land to Buford. The defendants deny that the covenant was executed by Paulding, or, if genuine, that it was given for any valuable consideration.

We shall waive a decision of the question, whether the covenant was executed by Paulding, inasmuch as we are clearly of opinion, that if it was signed by him, it was merely intended as a gift to his nephew, Henry P. Buford, and that Paulding received no valuable consideration therefor; and consequently, that we are bound to affirm the decree dismissing the bill.

[69] "It is urged on behalf of the defendant, that the agreement was voluntary, and such as this court will not decree to be specifically performed. Of the general doctrine of the court on this subject there is no doubt whatever. This court will not perform a voluntary agreement, or, what is more, a voluntary covenant under seal. Want of consideration is a sufficient reason for refusing the assistance of the court." Houghton v. Lees (1854) 1 Jur. (N. S.) 862, at 863.

In the case of Penn v. Lord Baltimore (1750) 1 Vesey, Sr., Lord Eldon states the rule: "The court never decrees specifically without a consideration."

[70] Part of the opinion is omitted.

In exercising the discretion, which the chancellor retains to himself, over applications for the specific performance of contracts, it has always been deemed an essential prerequisite, that the contract he is called upon thus to enforce, should be based upon, either a valuable, or what is termed a meritorious consideration. The moral obligation to provide for a wife or a child, constitutes such a meritorious consideration as will induce a specific performance of an agreement in their favor, and some of the cases have declared, that grand-children come within the rule; but we have been able to find no authoritative case where a voluntary agreement has been specifically enforced in favor of a collateral relation, such as a nephew, unless there was some other controlling circumstance besides the mere affinity. The cases where relief has been extended in favor of collaterals, either expressly recognize the doctrine, that some additional circumstance is necessary to call forth the interposition of the chancellor in their behalf, or by the stress laid upon such additional and controlling circumstance, indicate clearly that such is the rule of the court. See Newland on Contracts, 71 to 77, and cases there cited.

The whole foundation of the principle which turns mere gratuitous engagements and voluntary promises of bounty and munificence, into contracts of obligatory efficacy, is of such doubtful equity, that we feel no disposition to carry it farther than it has already gone.

The idea, which seems to have had some countenance from a few old cases, that an agreement in writing would be specifically enforced, merely because it was solemnized by the signature and seal of the party, has been long exploded. * * *

Decree affirmed, with costs.

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## II. Title in Land Contracts

### ROAKE v. KIDD.

(In Chancery before Lord Loughborough, 1800. 5 Ves. 646.)

The bill was filed for specific performance of an agreement for the sale of an estate to the defendant. Exceptions were taken, founded upon objections to the title, involving several very doubtful questions upon the point, whether the limitations after the estate for life of the plaintiff were contingent remainders or executory devises: the plaintiff contending, that they were contingent remainders; and resting his title upon the destruction of those estates; there being no estate in trustees to support the contingent remainders.

Mr. Lloyd and Mr. Alexander for the defendant insisted, that a purchaser could not be compelled to take so doubtful a title.

Mr. Richards and Mr. Wear for the plaintiff observing, that this was a legal question, desired, that a case might be directed; as in Cheveley's case, lately.

LORD CHANCELLOR. In that case the party was not adverse. If in this case the purchaser was willing to have the opinion of a Court of Law, I would very willingly send it to law: but I do not know how to compel a purchaser to take a title he must go to law for immediately. I do not much like a tenant for life destroying contingent remainders, taking advantage of the want of trustees in the will, and then coming to this Court to give a sanction to that title. Has a case ever occurred, in which this Court has established such a title, and forced a purchaser to take it? [71]

The exceptions were allowed.

THE LORD CHANCELLOR observed, that it had been intended to bring a bill into Parliament to prevent the necessity of trustees to preserve contingent remainders; but that intention never was carried into effect.

[71] In Scott v. Alvarez, [1895] 2 Ch. 603, 612, Lindley, L. J., said: "It appears that a small leasehold property was put up for sale and was described in attractive form as 'a small safe investment arising from a certain dwelling house,' and so on, 'held for a term of 99 years from the 25th of March, 1865 (70½ years unexpired), at a moderate ground-rent of £5 per annum'; and the unfortunate defendant has bought this for a sum of over £300, and, instead of finding he has bought 'a small safe investment,' he is embarked in two lawsuits and two appeals, and is threatened with more. * * * The extraordinary remedy by specific performance is always more or less open to discretion; and I am not aware of any case in which, unless the condition has been extremely clear, a court of equity has ever forced a purchaser to take a title which is shewn to be bad, and which will expose the purchaser to an immediate lawsuit, against which he will have no defence. That is what we are asked to do under the stringency of this condition. Mr. Farwell referred us to several cases, and among them to Hume v. Bentley (1852) 5 De G. & Sm. 520; Duke v. Barnett (1846) 2 Coll. 337, and Cattell v. Corrall (1839) 3 Y. & C. Ex. 413; but, on looking at them, I am not satisfied that in any one the court thought the title which it did force the purchaser to take would be a bad title in the sense in which this title is bad. When you say a title is bad, the expression is ambiguous, and must be contrasted with what is called a good title. I understand a good title to be one which an unwilling purchaser can be compelled to take. Contrasted with that, any title which an unwilling purchaser cannot be forced to take is a bad one. But there are bad titles and bad titles; bad titles which are good holding titles, although they may be open to objections which are not serious, are bad titles in a conveyancer's point of view, but good in a business man's point of view; and I do not know of any case in which a court of equity has decreed specific performance of and compelled the purchaser to pay his money for nothing at all when he shews the court that the title he is asked to have forced on him is bad in that sense, that he can be turned out of possession tomorrow. I do not say that a condition might not be so clear and explicit as to remove the difficulty; but I am not aware of any case of the kind; and, so far as those cases referred to by Mr. Farwell are concerned, I am convinced they are cases in which the title was bad in a technical conveyancing point of view, but not in a business point of view, and did not expose the purchaser to immediate eviction, as it does here. When, therefore, we are asked to decree specific performance of this contract, we are asked to do that which the court does not do as a matter of course, but the court considers whether it is just to adopt such a course. In a case like this, it appears to me the true rule is to leave the parties to their legal remedies. If they have a contract let their legal rights prevail. There are remedies open which we are all familiar with; but the vendor must not come and invoke the extraordinary jurisdiction of a court of equity to do what would be a manifest injustice."

## DOWNEY v. SEIB.

(Supreme Court of New York, Appellate Division, Second Department, 1905. 102 App. Div. 317, 92 N. Y. Supp. 431.)

Submission of controversy on agreed facts by Margaret F. Downey against George Dan Seib.

Argued before BARTLETT, JENKS, HOOKER, RICH, and MILLER, JJ.

RICH, J. It appears that John Scott, the father of the plaintiff, and then owner of real estate in Brooklyn, conveyed the same to the plaintiff for the term of her natural life, the deed running to her as party of the second part, and to his sons John, James, and William as parties of the third part, as follows:

"To and for her and their sole use, benefit and behoof for and during and until the full end and term of her natural life. And from and after the death of the said Margaret, the said John and Ann the said parties hereto of the first part, do hereby grant and convey all the aforesaid Tract, Piece or Parcel of Land, and the aforesaid tenements, hereditaments and appurtenances, rents, issues and profits, and all the remainder of the estate, right, title, interest, dower, right of dower, property, possession, claim and demand whatsoever, as well in law as in Equity, of the said parties hereto of the first part, in and to the said Tract, Piece or Parcel of Land, with the appurtenances, which remained in them, the said parties of the first part, or either of them, after the granting of the aforesaid estate for life unto the child or children lawfully begotten of the said party of the second part who may be living at the time of her death and the issue, if any, of such of her children lawfully begotten, as may then be dead in such shares that each such child of the said party of the second part hereto, living at the time of her death shall take one equal share and the child, children or issue (if any) of each such child of the said party of the second part as may at that time be dead shall take, if but one solely and if more than one collectively, one like equal share. To have and to hold the said Tract, Piece or Parcel of Land and the aforesaid tenements, hereditaments and appurtenances, rents, issues and profits and all the aforesaid remainder unto the aforesaid Children and Issue of the said Margaret in the manner and shares aforesaid and to their heirs and assigns to their sole use benefit and behoof from the day of the death of the said Margaret thenceforth forever. But and if it shall so happen that the said Margaret shall depart this life without leaving her surviving at the time of her death any lawful child or children nor any lawful child, children or issue of any such child deceased, then and in that case from and after the death of the said Margaret, We, the said John Scott and Ann his wife, the parties of the first part hereto, do hereby grant and convey unto the said John, James and William, the parties of the third part hereto or to the survivors or survivor of them living at the time of the death of the said Margaret and the lawful children and issue, if any, of such of said three sons as may then be dead, in such shares that each of the said three sons of the said John Scott, living at the time of the death of the said Margaret, shall take one equal share and the child, children or issue (if any) of each of said three sons who may then be dead shall take, if one solely if more than one collectively, one like equal share, the same as the parent or ancestor would have taken if then living."

Subsequently, and on or about the 20th day of October, 1892, John Scott, Jr., James Scott, and William Scott, parties of the third part in the deed above referred to, executed and delivered to the plaintiff a conveyance purporting to convey to her the said premises in fee. John Scott, the original grantor, died November 5, 1902, and an action was thereafter brought by this plaintiff against John Scott,

individually and as executor of the last will and testament of John Scott, deceased, James Scott, William Scott, and Ann Scott, widow of John Scott, for the purpose of having the original deed reformed so that it should transfer and convey the title to the premises therein described to the plaintiff in fee simple absolute, and such proceedings were had in said action that on the 2d day of November, 1903, a decree was entered therein adjudging and decreeing a reformation of said instrument so that it should purport to transfer and convey the premises to plaintiff in fee simple.

William Scott died, never having married; John and James both married, and their respective wives are living. John Scott, Jr., has two children, and James one, while the plaintiff has no issue. Her husband, Peter F. Downey, is now living. On the 29th day of February, 1904, plaintiff, being in possession of the premises, claiming to own and hold the same under said deeds, entered into an agreement with the defendant to convey the absolute fee of said premises free and clear from all incumbrances, except certain restrictions about which no question is raised here; in consideration of which the defendant agreed to pay $9,000, $200 of which was paid upon the execution of the contract, and $8,800 to be paid on the delivery of a deed of the premises, March 26, 1904. On that day the plaintiff was ready and willing to comply with the terms of the contract, and deliver to the defendant a full covenant and warranty deed of the premises. The defendant, however, refused to accept the deed and pay the consideration agreed upon, on the ground, as claimed, of plaintiff's inability to give a valid title. Plaintiff now demands judgment that defendant perform said agreement.

A vendee is entitled to a marketable title. A title open to a reasonable doubt is not a marketable title. To entitle a vendor to specific performance, he must be able to tender such a title as will enable the vendee to hold his land free from probable claim by another, and such that, if he wishes to sell, will be reasonably free from any doubt which would interfere with or affect its market value. If it may be fairly questioned, specific performance will be refused. Shriver v. Shriver, 86 N. Y. 575, 584; Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905; Vought v. Williams, 120 N. Y. 253, 257, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634; McPherson v. Schade, 149 N. Y. 16, 21, 43 N. E. 527; Abbott v. James, 111 N. Y. 673, 19 N. E. 434; Moore v. Appleby, 108 N. Y. 237, 15 N. E. 377; Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. 925; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527. A marketable title was not taken by plaintiff under the deeds mentioned, and the question is now presented whether, in consequence of the judgment, plaintiff had such a title on March 26, 1904.

It is quite likely, in view of the opinions of physicians and surgeons, that plaintiff will never become a mother, and yet they may be mistaken. The rights of possible children of plaintiff were not protected, and no party to the action represented the unborn children of the plaintiff or the living children of the defendants (in that action)—John Scott, Jr.,

and James Scott. John and James had conveyed their interest in the premises to the plaintiff, and no party to that action had any interest in the result, save only the plaintiff, and her interest was adverse to the children living, as well as those unborn. The rights of children unborn were wholly unprotected and uncared for in the action for reformation. It follows, therefore, that the unborn children of the plaintiff, as well as the living children of John and James, were not concluded by the judgment reforming the deed, and that the title tendered to the defendant was not marketable, or at least, that there is such a reasonable doubt as to the title which the defendant would take under the conveyance tendered that the burden of defending it ought not to be imposed upon him. The defendant is therefore entitled to judgment relieving him from his purchase and contract, and that he recover of the plaintiff $200, the amount paid upon the contract at the time of its execution, together with $75, the amount stipulated as being the reasonable expenses incurred in investigating the title, with the costs of this action.

Let judgment be entered accordingly. All concur; HOOKER, J., not voting.

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## WETMORE v. BRUCE.

(Court of Appeals of New York, Second Division, 1890. 118 N. Y. 319, 23 N. E. 303.)

Appeal from superior court of New York city, general term.

PARKER, J.[12] This action was brought to compel the defendant to specifically perform an agreement made by her to purchase the house and lot No. 19 Washington square north, in the city of New York. The defendant in her answer, among other objections to the title, averred that the former owners of the land in the block in which the house and lot are situated had mutually covenanted and agreed that 12 feet of the front of the lot in question, and of the other lots in the block, should not at any time be built upon, but should be forever left open for court-yards; that such agreement was in full force, and constituted a restriction and incumbrance which depreciated the value of the property. The defendant, by way of counter-claim, alleged that she had sustained damages, because of the inability of plaintiff to give a title free and clear of all incumbrances, consisting of the percentage paid on account of the purchase price, the auctioneer's fees, and the expenses paid for examining the title. The plaintiff in his reply admitted the making of the agreement set forth in the answer, but denied that it amounted to an incumbrance or restriction, in the proper meaning of the words, or that it impaired the value of the premises.

It is entirely competent for adjoining owners of land, by grant, to impose mutual and corresponding restrictions upon the lands belong-

[12] Part of the opinion is omitted.

ing to each, for the purpose of securing uniformity in the position of buildings. The covenants being mutual, and imposing such restriction in perpetuity, are, in effect, reciprocal easements, the right to the enjoyment of which passes as appurtenant to the premises. Observances of such a covenant will be enforced by a court of equity. Lattimer v. Livermore, 72 N. Y. 174; Trustees v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Insurance Co. v. Insurance Co., 87 N. Y. 400; Perkins v. Coddington, 4 Rob. (N. Y.) 647. The title, then, which the plaintiff tendered, was not free and clear from all incumbrance; for certainly a covenant, valid and enforceable in equity, which so limits and restricts the use of 12 feet in depth along the entire front of a city lot as to prevent building thereon, is an incumbrance.

Upon the trial the plaintiff, by evidence tending to show that the existence of the agreement did not depreciate but rather enhanced the value of the premises, sought to bring the case within the decision of this court in Riggs v. Pursell, 66 N. Y. 193. In that case the purchaser at a judicial sale refused to take title. The court said:

"While the agreement requires that a court-yard shall be left in front of this lot, for the benefit of the other lots on the street, it also requires that a court-yard shall be left in front of all the other lots for the benefit of this, and all the houses on the street have been built in conformity to this agreement. While this agreement may in one sense be regarded as an incumbrance upon this lot, it cannot be assumed, without proof, that it injuriously affects its value to any extent whatever;" and it was held to be an immaterial defect.

But in the case before us the trial court found that the restriction and incumbrance created by the covenant and agreement did in fact damage the property, and injure its salability and marketability. The general term having affirmed the finding, it cannot be reviewed here, as there is some evidence to support it. As the case is now presented, therefore, Riggs v. Pursell cannot be invoked in aid of the appellant, and it is unnecessary to consider whether the doctrine of that case would be applicable to a private sale, where the vendor contracts to give a good title in fee-simple, free and clear of all incumbrances. It follows that the refusal of the court to decree specific performance must be sustained. * * *

The judgment should be affirmed. All concur, except HAIGHT, J., not voting.

## III. Certainty

### GRIFFIN v. COLEMAN.

(In Chancery before Vice-Chancellor Bacon, 1873. 28 L. T. R. [N. S.] 493.)

At the date of the agreement hereinafter stated the defendant was entitled to certain freehold and copyhold lands situate at Barrington, in the county of Cambridge, the copyhold lands being held of the manors of Haslerton Chatteris and Lancaster, in Barrington.

On the 11th April 1863 the plaintiff and defendants entered into an agreement which recited that the lords of the said manors had granted to the defendant license to dig and carry away minerals known by the name of coprolites out of certain copyhold lands held of the said manors, or one of them in Middle-field, in Barrington; and in the said agreement described, subject to the payment to the said lords, of the sum of £30 per acre for every acre of the said lands so dug, and to the conditions and abatement therein mentioned. The agreement also contained the following clauses:

The said Luke Griffin shall pay to the said John Coleman for the right to work and use the said lands hereinbefore described in manner following (that is to say) the sum of £110 on the execution of these presents as for one acre of the said lands and immediately after such and every subsequent entire acre, except the last acre of the said lands, shall have been worked as hereinafter mentioned, or the said Luke Griffin shall have declined to work or to continue to work the same, the further sum of £110, and upon receiving any such sums of money from the said Luke Griffin, the said John Coleman shall immediately pay over the sum of £30 to the said lords. But, nevertheless, the said Luke Griffin shall be at liberty to decline to work any part of the said lands, where the coprolites do not lie within a depth of twelve feet from the surface of the earth.

If coprolites be found in any land of the said John Coleman, situate at Barrington, other than the lands hereinbefore mentioned, the said Luke Griffin shall be at liberty to enter upon such land for the purpose of obtaining such coprolites on the same terms as regards price, and with similar stipulations and conditions as are contained in these presents, and the said John Coleman and Luke Griffin will execute a proper agreement before such entry takes place, provided always that the said John Coleman can obtain all such consents and authorities as would be required to authorize him in this behalf.

On the 26th October 1871, the plaintiff filed a bill stating that he had become desirous of digging under the agreement, another field of the defendant's, called "The Moor," which was also held of the same manors, and as to which the defendant had obtained, or could obtain, the consent of the lords of the manor to the coprolites being removed therefrom; but that the defendant refused to allow him to enter thereupon.

The bill prayed specific performance of the agreement of the 11th April, 1863.

It appeared that the lords of the manor had granted the requisite consent to the defendant, but at an increased royalty of £35 per acre in place of the £30 formerly paid by him.

A question arose on the hearing as to the effect of the second clause of the agreement as above set out, the plaintiff claiming to be entitled under his agreement to dig the "moor," on paying the defendant the former rent of £110 per acre, notwithstanding the increase of £5 per acre in the royalty payable by the defendant to the lords of the manor.

The defendant's view of the contract was that he was entitled to receive a clear profit rent of £80 per acre, and that the increased royalty ought to be borne by the plaintiff. The defendant by his affidavit swore with reference to the contract:

"I say that no question as to the payment of an increased royalty was ever raised, nor did I ever contemplate such a case."

THE VICE-CHANCELLOR was of opinion that the bill could not be sustained. The agreement in the first instance clearly was that the plaintiff should pay a beneficial rent of £80 per acre to the defendant, and, as to the lands in respect of which a license should be subsequently obtained by the defendant from the lords of the manor, the rent to be paid was to depend upon that license. As a matter of construction he did not entertain the slightest doubt; but it was enough that the evidence satisfied him that the intention of the defendant on the execution of the contract was not according to the plaintiff's view. There was no concord between the parties. Specific performance would not be granted, and the bill must be dismissed with costs.[73]

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## EATON et al. v. WILKINS et al.

**(Supreme Court of California, 1912. 163 Cal. 742, 127 Pac. 71.)**

Department 2. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by M. D. Eaton and another against W. H. Wilkins and others. From a judgment for defendants, plaintiffs appeal.

MELVIN, J.[74] * * * The first contention of respondents in defense of the court's ruling sustaining the demurrer is that the contract is too indefinite to be specifically enforced. We think this position

[73] Justice Story, sitting in circuit, said in Kendall v. Almy (1835) 14 Fed. Cas. 300, 301, No. 7,690: "If the bill is to be treated as founded upon a parol contract of assignment, the evidence of what that contract was, in terms or in purport, is so loose, indeterminate, and unsatisfactory, that it would be impossible to act upon it with any approximation to certainty. * * * There is no just ground to call upon a court of equity to enforce a specific performance of a contract where its terms are not clear, definite, and positive."

[74] Parts of the opinion are omitted.

must be sustained. We have in mind the liberal rule with reference to indefinite descriptions capable of being made certain; but here the description of the real property as "our land of 1,060 acres," in a contract dated "Wilkins Ranch, September 22, 1909," is not sufficient. There is an allegation, as we have shown, that Wilkins intended by this vague description to designate the land in San Joaquin county, which is particularly described in the complaint; but that averment is of a bald conclusion, and is by no means sufficient. Marriner v. Dennison, 78 Cal. 210, 20 Pac. 386. There is no pleading of extrinsic facts which would support this conclusion, as, for instance, that the tract of land which plaintiffs desired to secure by this action was known as "Wilkins Ranch," or was the only realty containing 1,060 acres possessed by Wilkins. From the contract itself, it is impossible to determine whether or not the land is situated within the state of California. The description of the land to be conveyed is one of the most essential parts of an agreement to sell. Such a contract must be in writing, subscribed by the party to be charged, and must contain such description of the land, either in terms or by reference, that the property may be identified without resort to parol evidence. Craig v. Zelian, 137 Cal. 105, 69 Pac. 853.

The contract here pleaded is one which, in and of itself, gives no clue to the property involved, and the complaint states no facts which would clarify the obscure references therein contained. The circumstance that in the agreement Wilkins promises to furnish, and did subsequently furnish, abstracts of title does not help the matter. The description in the contract must be sufficient to bind interested parties, and cannot be made to depend for its very existence upon the subsequent action of one of them. The demurrer was therefore properly sustained because of the failure of the complaint to set forth a definite and enforceable contract as a basis for the action. * * *[75]

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

[75] In Lonergan v. Daily et al. (1914) 266 Ill. 189, 107 N. E. 460, the court says: "The rule is well settled in this state that a parol contract for the conveyance of real estate will not be specifically enforced in a court of equity unless it appears to be certain, definite, and unequivocal in its terms; that, to take it out of the statute of frauds on account of part performance, all acts performed thereunder must be clear and definite and referable exclusively to the contract; that the proof upon which the conveyance is asked must be established so convincingly as to leave 'no reasonable doubt in the mind of the court.' Langston v. Bates (1877) 84 Ill. 524, 25 Am. Rep. 466; Seitman v. Seitman (1903) 204 Ill. 504, 68 N. E. 461; Casstevens v. Casstevens (1907) 227 Ill. 547, 81 N. E. 709, 118 Am. St. Rep. 291; Vail v. Rynearson (1911) 249 Ill. 501, 94 N. E. 942; Patterson v. Patterson (1911) 251 Ill. 153, 95 N. E. 1051. Mere declarations of the promisor or donor do not constitute such clear and unequivocal testimony. Worth v. Worth (1877) 84 Ill. 442; Geer v. Goudy (1898) 174 Ill. 514, 51 N. E. 623."

In Clayton v. Newberry (1912) 138 Ga. 735, 76 S. E. 63, a written contract described land as "part of lot No. 200 in the sixth district and second section of said county, containing 15 acres, more or less." The county was elsewhere named. In an action for specific performance, the superior court

## SECTION 3.—EQUITABLE INTERESTS AND BURDENS OF VENDOR AND PURCHASER AND THEIR REPRESENTATIVES ARISING FROM THE CONTRACT—SO-CALLED CONVERSION

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### BADEN & Al' Creditores PHILLIPPI nuper Com' PEMBROKE, Plaintiffs; Comitiss. PEMBROKE, Dom' JEFFERIES, & Domina CHARLOTTE Ux' ejus' fil' & hæres dicti PHILLIPPI Com' PEMBROKE, Defendants.

**(In Chancery before the Lord Commissioners, 1690. 2 Vern. 213.)**

Phillip, late Earl of Pembroke, after charging his estate with an annuity of one thousand five hundred pounds per annum to the Countess of Pembroke, in November, 1682, demised the manor of Patney in Wilts, for one thousand years, to one Clerke, as a collateral security for his enjoyment of the manor of East Overton, which he had bought of the late Earl.

And June 18, 1683, by articles under hand and seal, did covenant for him and his heirs for five thousand two hundred pounds, to convey to Pinseint and his heirs, the manor of Patney, and Pinseint covenanted in a week after the conveyance made, to pay the five thousand two hundred pounds. Pinseint pays part of the purchase-money to pay off an old statute and other incumbrances, and before any conveyance made, the Earl dies, greatly indebted by bond and otherwise.

Upon the first hearing of this cause by the Lord Chancellor Jefferies on July 11, 1688, assisted by the Master of the Rolls, Mr. Justice Lutwich and Baron Powell, it was decreed that the term for ninety-nine years raised for securing the one thousand five hundred pounds per ann. to the Countess for life, was raised only for a particular purpose, and that being done, then to attend the inheritance, and go to the heir, and not to be taken as a term in gross, to be assets to answer debts by simple contract; and that Pinseint being willing to go off,

gave a judgment for plaintiff, which was reversed without written opinion on appeal.

In Zeringue v. Texas & P. R. Co. (United States Circuit Court, E. D. Louisiana, 1888) 34 Fed. 239, at 243, Pardee, J., for the court said: "It remains, then, that the only stipulation in the said deed and compromise judgment that the vendee or his assigns should perform any act or thing remaining unperformed, is the stipulation that they 'shall build and keep in repair such bridges as may be necessary over the lands herein acquired.' This stipulation is too indefinite to be the subject of a bill and decree for specific performance, for there is no sufficiently defined agreement to enforce. The bridges to be built and kept in repair, as to size, capacity, construction, and place are all to be determined by necessity, and the necessity of one time may not be the necessity of another. For the text-book law on this subject see Pom. Spec. Perf. §§ 5, 6. There seems to be no case here for a specific performance."

he should be repaid, and his purchase discharged, and reserved the consideration of the other points for further debate.

Now upon debate before the Lords Commissioners, they were of opinion that the mortgaged terms derived out of the Earl's inheritance, were assets, and liable to bond-debts only, and not to debts by simple contract; and decreed Pinseint's purchase should go on, and the heir convey, and the purchase money be paid to the executors.

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## BEST v. STAMFORD.

(In Chancery, 1706. 1 Salk. 154.)

Feme sole seised in fee, upon her marriage with A., makes a lease, to trustees for 100 years, in trust for the husband for his life, remainder to herself for life, remainder to the issue of that marriage, remainder to the wife, her executors and administrators; husband dies without issue; she marries a second husband, and dies: Whether this term should be attendant upon the inheritance, or should go to the husband as a term in gross, was the question.

Et Per Cur. It is a term attendant, because the trust for which it was created is at an end, the first husband being dead without issue: As where a term is created to raise portions, and the portions are paid; or a termor purchases the inheritance in trust, the term shall be attendant. And as for the second husband, it cannot be intended that he was then thought of.

"Money articled to be laid out in land, shall be taken as land, in equity; for this Court is to enforce the execution of agreements, and therefore looks upon land agreed to be sold, as money, and money agreed to be laid out in land, to be in fact a real estate, which shall descend to the heir: Sed quære, If money be articled to be laid out in land, in a marriage settlement, upon failure of issue, and there is no issue, but debts by simple contract; whether this money shall be taken as land, and thereby defeat creditors?"

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## FLETCHER v. ASHBURNER.

(In Chancery, 1779. 1 Bro. C. C. 497.)

John Fletcher, by his will, devised his burgage houses and free rents, in Kendall, and all his personal estate to trustees and the survivor, and the heirs, executors, and administrators of such survivor, in trust to sell so much as should be sufficient to pay his debts, and then to permit his wife Agnes to enjoy the residue during her life, if she so long continued his chaste widow; and after her decease, to sell and dispose thereof, and the money arising thereby, after deducting

charges, and half a guinea each to the trustees for their trouble, to pay to, and between his son William and daughter Mary, share and share alike, provided that if his wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his son William, and daughter Mary, share and share alike, equally; and in case either his son William, or his daughter Mary should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them: The testator died leaving Agnes his widow, William his only son and heir at law, and Mary his daughter; Agnes, by the custom of burgage tenure, was entitled to hold the burgage houses in Kendall during her chaste viduity, against the disposition of her husband by will; Mary attained twenty-one, but died unmarried in the life of her mother and brother. William was twenty-one at the death of the testator, and died without issue in the life of his mother; the mother died the widow of the testator: upon her death a bill was filed by the heir at law of William and John the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates devised by the will, to the plaintiff, the heir at law. The representative of the widow, who was the sole next of kin of William the son, by answer, claimed the property as personal; alleging that by the direction to the trustees to sell the real estates, they become as personal property, and as such, were to go to the personal representative of William the son, who survied his sister.

In June, his Honor [SIR THOMAS SEWELL, M. R.] [16] gave his opinion; he observed that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land. The cases established this rule universally. If any difficulty has arisen, it has arisen from special circumstances. In the case of Sweetapple v. Bindon, 2 Vern. 536, it was determined that a husband was entitled to money to be laid out in land, as tenant by the courtesy, and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held because cases have been determined, and not from any principle. The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land. The principal cases have been

[16] Part of the opinion is omitted.

where real estates have been directed to be sold, and some part of the disposition has failed, so that something has resulted to the heir at law, as in case of Emblyn v. Freeman, Pre. in Cha. 541; and Cruse v. Barley and Banson, 3 P. Wms. 20. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir at law of the testator. The case of Durour v. Motteux, 1 Ves. 320, is a strong case to the point now before the Court; and if any thing could strengthen the general rule, the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them, without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of Durour v. Motteux, Lord Hardwicke made this a principal ground for considering the whole fund as personal estate. In the present case, it might be uncertain, till the death of the widow, whether the estates must not be absolutely sold: both the children, indeed, died before her; but she might have married before the death of one or both. The interests of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother. There could be no election to take the fund as land or money; for where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold; the question therefore is merely between the real and personal representatives of the son, whether the personal representative shall take the fund as personal property, according to the will, or the heir at law shall take it, as if no will had been made. The case of Flanagan v. Flanagan [1 Bro. c. c. 513] is a strong authority that it shall be taken as personal estate, according to the will. In that case the testatrix, Sarah Wooley, by will, dated 28th March, 1749, gave and devised all her real and personal estates to Francis Plumtree, in trust, in the first place, out of her personal estate, as far as it would extend, and, in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and after payment thereof, in trust to convey the residue of the real estate, which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father James Flanagan, and her brother James Flanagan, their heirs, executors, and administrators, equally. A bill was brought, by the creditors, for sale of the real estate, to supply the deficiency of the personal estate for payment of debts; and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to James Flanagan the father, and James Flanagan the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs equally: after the decree, James Flanagan the son died, leaving a daughter, and a son born after his death; part of

the estate was sold, and afterwards James Flanagan the grandfather died, leaving his grandson his heir, and his grandson and grand-daughter his sole next of kin: after the death of the grandfather, a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies: it appeared, however, that the produce of the first sale was sufficient. A bill was, afterwards, brought by the son of James Flanagan the son, claiming a moiety of the surplus, as the real estate of James Flanagan his grandfather, to whom he was become heir against the personal representative of his grandfather, and against the daughter of James Flanagan the son, who claimed a moiety as one of the next of kin of her grandfather. It was objected, that the second sale, after the death of the grandfather, was improper. The Court determined, that the second sale, actually made under the decree of the Court, before the Master, could not be considered as improperly made: that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather. * * * There was another case about the same time, which is in 1 Ves. 174, Cunningham v. Moody, where, by marriage articles, £500 was agreed to be laid out in purchase of lands, to be settled to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to the children of the marriage, as the husband and wife should appoint; and in default of a joint appointment, as the survivor should appoint; and in default of any appointment to the children, to be equally divided among them, if more than one, as tenants in common, in tail general, with cross remainders; and if but one, to that child in tail general, and no appointment was made. The father and mother being dead, and the daughter being married, the trustees paid the £500 to her and her husband, and they received it as money, and executed a release. The daughter had a child, which died, and she afterwards died without issue. A daughter of the settlor by a second marriage filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the £500 considering it as land; and it was observed that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest, during his life, as tenant by the curtesy. In the present case, William Fletcher, the son, had the whole beneficial title vested in him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money; the bill must therefore be dismissed without costs.[77]

[77] "The effect of a contract for purchase is very different at law and in equity. At law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be to be discussed between the representatives of the vendee. Therefore I do not take a full view of the sub-

## LECHMERE v. EARL OF CARLISLE.

(In Chancery, 1733. 3 P. Wms. 211, 24 E. R. 1033.)

The bill was brought by the nephew and heir of the late Lord Lechmere, to compel a specific performance of marriage articles.

Upon the marriage of Nicholas, late Lord Lechmere, with the Lady Elizabeth Howard, one of the daughters of the defendant the Earl of Carlisle, articles were entered into, dated 30th of April, 1719, whereby, reciting the said intended marriage, the Earl of Carlisle covenanted to pay the Lord Lechmere £6000 as the portion of his said daughter, and the Lord Lechmere covenanted for himself and his heirs, with certain trustees, within a year after his marriage, to lay out the said £6000 and £24,000 of his own money, in the purchase of freehold lands and tenants in fee simple, in possession in the south part of Great Britain, with the consent of the Earl of Carlisle and the Lord Morpeth, their executors and administrators; the lands when purchased to be settled to the use of the Lord Lechmere for life sans waste, remainder to trustees and their heirs during his life to support contingent remainders, and after the Lord Lechmere's death, in trust to pay £800 per annum, clear of all charges, (except parliamentary taxes) to the defendant the Lady Elizabeth Howard, his then intended wife, for her jointure, and after the determination of these respective estates, remainder to the first, &c. son of the marriage in tail male, remainder to trustees for 500 years, to raise portions for daughters of the marriage, remainder to the Lord Lechmere in fee. The 500 years term, to be void if no daughter, and until the purchase made, the interest to be paid to the several parties that would have been entitled to the rents and profits of the land when purchased, at the rate of £5 per cent.

The marriage took effect, and the Lord Carlisle paid £4000 part of the portion to the Lord Lechmere, and gave his bond for the remaining £2000 which had also been since paid to the defendant the Lady Lechmere.

The Lord Lechmere was seised of some lands in fee at the time of the marriage of about £300 per annum, and after his marriage purchased some estates in fee of about £500 per annum, and some estates for lives, and other reversionary estates in fee, expectant on lives, and contracted for the purchase of some estates in fee in possession, and on the 18th of June, 1727, died intestate, without issue, and without having made a settlement of any estate. None of the purhases or contracts were made by the Lord Lechmere with the consent of the trustees. Mr. Lechmere, his Lordship's nephew and heir, brought this

ject upon the question of time, unless that is taken into consideration; and many very nice and difficult cases may be put, in which the question to be discussed between the representatives, [would be] founded upon the conduct between the vendor and vendee. It is obvious, that a due consideration of the value of the objections will embrace that consideration also." Lord Eldon, in Seton v. Slade (1802) 7 Ves. *265, 274.

bill to have a specific performance of the articles, and the £30,000 laid out as therein is agreed, and to have interest at the rate of £5 per cent. in the mean time. * * *

Upon this case SIR JOSEPH JEKYLL, Master of the Rolls,[78] after deliberation, thus delivered his opinion:

The question upon these articles is, whether the heir at law be entitled to have this £30,000 taken out of the personal estate and invested, pursuant to the articles; or, in other words, whether the same be to be taken as land? And I hold that it must, for these reasons:

First. For that the Lord Lechmere was compellable in equity to lay out this £30,000 and to settle it agreeably to the articles. * * *

So that upon the whole matter; I decree that this £30,000 thus agreed to be laid out in land, shall be taken as land; that the land permitted to descend to the heir shall not be deemed to be in, or towards, satisfaction of the debt: consequently that the administratrix must invest this £30,000 in a purchase, and settle it pursuant to the articles. But though these have provided that £5 per cent. shall be paid until a purchase made; yet it appearing to me that the money has been placed in the government funds, which have yielded but £4 per cent. I think I may with reason and equity moderate the interest, and reduce it to £4 per cent. in regard the administratrix has made no more of it.

Note: On an appeal to the Lord Talbot, Paschæ, 1735, after long debate, his Honour's decree was so far affirmed, as that the £30,000 articled to be laid out in land, was by his Lordship held to be as land; who moreover agreed, that no difference had ever been made, between the cases where the money was deposited in the hands of a third person to be laid out, and where it was resting in the hands of the covenantor: but with respect to the freehold lands purchased in fee simple, in possession, after the covenant, though with but part of the £30,000 and left to descend, these were by the Lord Chancellor ordered to go as a satisfaction pro tanto; for that it could not be intended the Lord Lechmere was obliged to lay out all the money together; nay, it might be doubtful, whether one entire purchase could be met with for just that sum; and though his Lordship had covenanted to lay out the £30,000 in land, yet he had not covenanted to lay it out in one purchase, or at one time: but if it was invested at several times, it would satisfy the covenant, as much as if laid out all together.

[78] The statement of facts is abridged and part of the opinion is omitted.

## STAMPER v. MILLER.

(In Chancery before Lord Hardwicke, 1744. 3 Atk. 212, 26 E. R. 923.)

A question in this cause arose upon a settlement made upon a marriage, in which there was a proviso, that one thousand pounds therein mentioned shall and may be applied and laid out by the trustees in the purchase of lands and hereditaments, freehold or copyhold.

It has been insisted by the plaintiff, the heir at law of the covenantor in the settlement, that the thousand pounds was at all events to be laid out in land; and though the trustees have not done it, yet, that it is to be considered in this court as land, and consequently he is intitled to an account from the trustees' representatives.

LORD CHANCELLOR. Where there is a power to lay out money in land under some particular circumstances, but the original intention was that it should be considered as money, if it is not actually vested *in land*, it shall not be considered as land, and go to the heir.

The first clause under the deed is a clear trust of money, and a complete direction of the intents and purposes for which it was created.

All the words in the deed, while it is to continue money, are positive and imperative.

But the proviso relating to the laying it out in land is only the aforesaid £1000 shall or may be applied, &c.

It is different from the trusts of the money, for there is no covenant upon the trustees to do it, but begins with the principal sum of one thousand pounds: and though shall or may in acts of parliament have been construed absolutely, yet this case differs greatly from that.

All the three trustees are dead, and it is not possible to be done now.

The words shall or may were only inserted to leave the election to the trustees, whether they would, for securing the £1000 let it continue as it was already in mortgages or bonds, or call it in from these securities, and lay it out in land.

The heir at law is not at all in the consideration of the settlement, and therefore appears to me to be an extreme clear case against the plaintiff, that the thousand pounds settled by deed is to be considered as money.

His Lordship dismissed the plaintiff's bill, but without costs.

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## CHAMPION et al. v. BROWN and BROWN.

(Court of Chancery of New York, before James Kent, Chancellor, 1822. 6 Johns. Ch. 398, 10 Am. Dec. 343.)

The bill was filed, December 10, 1821, by Henry Champion, and William L. Storrs, and the administrators and heirs of John Paddock, deceased, against the defendants, John B. and Jacob B., for the specific performance of a contract, made the 29th of August, 1816, by which Henry C. and Lemuel Storrs, agreed to sell and convey to J. P. 952

acres of land, &c., for the sum of 8000 dollars; 500 dollars to be paid in cash, and the residue in six equal annual instalments, with interest annually. J. P. died intestate November 16, 1816, and his administrators and heirs, being unable to perform the contract, for want of personal assets, on the 1st of June, 1818, entered into an agreement with the defendants, by which the defendants covenanted and agreed, "that they would take up and cancel" the contract made between C. & S. and Paddock, &c., by the first day of August then next; or, in case Champion, the survivor, of Storrs, should refuse to give up and cancel the said contract, then the defendants covenanted to indemnify, and save harmless, the administrators of P., &c., from all damages, costs, charges, and expenses, which they might sustain, or be put to, on account of the claims, covenants, and agreements, in the said agreement contained, &c. The administrators of P. covenanted, in their individual capacities, to pay to the defendants all moneys owing to them from J. P. deceased, stating how the payments were to be made; and they were to allow, as part payment, the 500 dollars paid by P. to C. & S., and endorsed on the contract; "and, also, the amount of the improvements, appraised by Loomis and Lord." At the time of this agreement, the administrators of P. assigned the contract between him and C. & S. to the defendants.

L. Storrs died intestate, and, in the distribution and settlement of the estate, all his interest in the contract became vested in the plaintiff, William L. Storrs. Soon after the agreement between the defendants and the administrators of P., the former entered and took possession of the land, and have since continued in possession, exercising ownership, receiving rents, cutting timber, &c. But they have made no payments, nor taken up the contract between P. and C. & S., but the representatives of P. still remain liable to be sued upon it. The bill prayed for a discovery, and that the defendants may be decreed specifically to perform the contract between C. & S. and P., according to the true intent of the agreement between the defendants and P., and for their indemnity, the heirs offering to ratify and confirm the conveyance of the land to the defendants, in fee, &c., and for general relief.

The defendants demurred to the bill, as to a discovery, and as to the specific performance prayed, on the following grounds: Because, it does not appear that there is, or has been, any privity between the plaintiffs, or either of them, and the defendants, or between the defendants and Champion, and L. Storrs; and because, it does not appear that the administrator of P. had any power to sell or assign the contract, or the land described in it and because, the plaintiffs have not shown such a case as will entitle them to relief in this Court, &c., and because, it does not appear that the administrators of P. have or claim any interest in the contract or the land; nor that they have been, or can be, damnified by reason of the contract not being cancelled; and, as regards

the heirs of P., because, the plaintiffs have not shown a case entitling them to relief in this Court, as against those defendants, &c.

THE CHANCELLOR.[79] (1) The first and leading question is, whether the bill can be sustained by Champion and Storrs, as vendors, against the defendants, claiming by purchase under the vendee.

The title in law never passed out of the vendors, though in equity, by virtue of the agreement to sell, the estate was in the vendee, and was in him transmissable by descent, and devisable by will. * * *

I do not perceive the authority under which the administrators assigned the contract of P., and it may be doubted whether the defendants were entitled to fulfill the original contract, and could compel a deed from C. and S. without the valid assent of the heirs of P., to whom the benefit of his contract belonged. In equity, the land contracted for descended to them as real estate, and they were entitled to call upon the administrators to discharge the contract out of the proceeds of the personal estate, (if any there were,) so as to enable the heirs to demand and receive a deed. But, admitting the contract to have been duly assigned, the vendors could not have compelled the defendants to have paid the money. In this sense, they could not have exacted from them a specific performance of the contract of P. But I think they were entitled, by virtue of their lien, to call upon the defendants, as assignees of the contract of the vendee, to pay up the purchase money, or surrender up the land, or to have it sold for the benefit of the vendors, and perhaps to account for the intermediate rents and profits, and the waste committed. The remedy, by the vendor, against the assignee, may be said to be in rem rather than in personam. This is the case when the suit is by the vendee against a purchaser from the vendor.

It is well settled, that if A. enters into a contract to sell land to B., and afterwards refuses to perform his contract, and sells the land to C., for a valuable consideration, B. may, by bill, compel the purchaser to convey to him, provided he be chargeable with notice, at the time of his purchase, of B.'s equitable title under the agreement. (Lord Macclesfield, in Atcherly v. Vernon, 10 Mod. 518. Winged v. Lofebury, 2 Eq. Cas. Ab. 32, pl. 43. Taylor v. Stibbert, 2 Ves. jun. 437. Daniels v. Davison, 16 Ves. 249. 17 Ves. 433 S. C.) The rule that affects the purchaser is just as plain as that which would entitle the vendee to a specific performance against the vendor. If he be a purchaser, with notice, he is liable to the same equity, stands in his place, and is bound to do that, which the person he represents would be bound to do by the decree. The purchaser from the vendor takes the estate subject to the charge, and so, I apprehend, does a purchaser from the vendee, and he is equally responsible in respect to the estate. The vendor cannot make him personally liable for the purchase money, but the estate is liable, and if he be a purchaser with notice, it is the same thing whether the estate had or had not been actually conveyed by the vendor. * * *

[79] Parts of the opinion are omitted.

I shall, accordingly, declare, that upon the face of the bill, the plaintiffs, C. and S., have a lien upon the lands for the purchase money, and are entitled to call on the defendants, as assignees of P., to pay it, or that the lands, with the intermediate rents and profits thereof, in their hands, be made responsible for the same; and that the plaintiffs, who are administrators, are, upon the facts stated in the bill, entitled to a specific performance of the covenants on the part of the defendant, and to an assessment of damages for breach thereof; and that the plaintiffs, who are infants, have an interest in the lands as heirs of P., and are necessary parties for the purpose of having their interest disposed of, under the direction of the Court, as equity and their benefit shall dictate. It is, thereupon, ordered, that the demurrer be overruled, and the question of costs thereon reserved, and the defendants answer the bill in six weeks. Order accordingly.

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## COLES et al. v. FEENEY et al.

(Court of Chancery of New Jersey, 1894. 52 N. J. Eq. 493, 29 Atl. 172.)

Heard on bill and answer.

The bill is brought for the specific performance of a contract for the sale of land by the testatrix to the defendant Feeney on the 26th of December, 1891, by which the testatrix, in consideration of $3,000, agreed to convey to the defendant Feeney a tract of land in Jersey City, of which she was the owner, the conveyance to be completed on the 26th of January, 1892. The contract was signed by each of the parties. Three days after the date of this agreement, Mrs. Coles died testate of a will, by the first item of which she devised "so much of my real estate situate in Jersey City, in the state of New Jersey, derived by me from my son William F. Coles, lately deceased, as at my decease shall remain unsold, and shall not then be improved by dwelling houses or other buildings." This devise covers the land covered by the contract. She then made divers other bequests of money, and devises of land other than that in Jersey City. The eighth item provided that:

"In so far as may be needful or expedient for payment of the foregoing pecuniary legacies, my executors are authorized to use the proceeds of any real estate of which I may die seised, excepting such as is specifically devised under the provisions of the first, sixth, seventh, and eleventh items of my will."

By the twelfth item she disposes of the residue of her property to certain persons therein named. By the thirteenth item she appointed her executors, and used this language:

"And I authorize my said executors, or such of them as shall qualify and act, and the survivor and survivors of them, in their discretion, and as soon as by them deemed or found to be necessary or advisable for payment of legacies, for division or distribution, or for other purposes of this, my will, to sell and convey at public or private sale any and all real estate of which I may

die seised other than such as is specifically devised by the first, sixth, seventh, and eleventh items of this, my will."

The bill alleges that shortly after the will was proven the executors tendered a deed to Mr. Feeney for the tract of land in question, and demanded payment of the purchase money, and that he declined not on the ground that the deed was not tendered at the time fixed by the contract, but because the executors were unable to give a perfect title. The defendant Feeney answers, and bases his refusal to complete the purchase solely on the ground of the inability of the executors to make a complete title in the absence of the devisees of the lot in question, who, being numerous, were not made parties.

PITNEY, V. C. (after stating the facts). I do not think the rights of the parties turn upon the question, so much discussed in the briefs, whether or not the land in question "remained unsold" at the decease of the testatrix, and, because sold, was not devised by her under the first item of her will, or whether she "died seised" of it in such sense as to bring it within the scope of the power of sale contained in the thirteenth item. If this contract of sale was a valid contract, its effect was to work a conversion of the land from real to personal property. This it was in the power of the testatrix to do, notwithstanding her will, which was made before the date of the contract. Such conversion, if made, had the effect of taking the land out from under the operation of the first clause of her will, and giving the proceeds of it to her residuary legatees and devisees as a part of her personal estate; and, in the absence of any power of sale, it seems to me entirely clear that the executors would have the right, and it would be their duty, to take proper proceedings to perfect the conversion by compelling the transfer of the legal title to the purchaser, and obtaining from him the purchase money. Miller v. Miller, 25 N. J. Eq. 354.

In contemplation of equity the title to the property vested in the purchaser as soon as the contract was executed and delivered, subject, however, to a lien in favor of Mrs. Coles for the unpaid purchase money; and that lien is capable of being enforced by her executors against the specific devisees of the particular land, even in the absence of any power of sale, by compelling them to convey to the purchaser and compelling the purchaser to pay to the executors the purchase money. This right of the personal representatives depends entirely upon the validity of the contract; and, in order to enforce such right, they must establish its validity as against either the heir at law or devisee, as the case may be. Story, Eq. Pl. 177a; Fry, Spec. Perf. (2d Ed.) § 115; Id. (3d Ed.) § 190; Calv. Parties, 293; Barb. Parties, 397, 399; Roberts v. Marchant, 1 Hare, 547, 1 Phil. Ch. 371.

Again, if the contention of the executors be correct, that the effect of the contract was to take the land out from within the scope of the power of sale given them by the thirteenth clause of the will, still that effect depends upon the establishment of the existence and validity of the contract against the specific devisees of the contract. So that, in

any view to be taken, the executors' power depends upon the establishment of that contract as against the devisees under the first clause of the will, and they are not parties to the bill. This view of the case shows that the bill is defective in not making parties the several devisees under the first clause of the will. If they had been made parties, I should say the executors were entitled to relief. But it is manifestly unjust, and not in accordance with equity, to ask the purchaser to take a title the validity of which depends upon a nice question of construction, when it is within the power of the executors to eliminate all question and room for debate by making the specific devisees parties. The case may stand over, to enable the executors to bring in those devisees, if they shall be so advised; otherwise I will advise that the bill be dismissed.

## POTTER v. POTTER.

(In Chancery, 1750. 1 Ves. Sr. 437, 27 E. R. 1128.)

The plaintiffs were Thomas Potter, second son and devisee in the will of the late Archbishop of Canterbury, and the other younger children and grandchildren of the testator; the defendants were John Potter, eldest son and heir, the executors, some annuitants, under the will, and Isaac Hughes, with whom the testator had contracted for the purchase of a large real estate: on the circumstances attending which treaty carried on in the testator's life, and on his will and codicils, the questions arose. * * *

The testator, seised in fee of some manors and Lordships, and possessed of a large personal estate, 12 August 1745, duly made his last will in presence of three witnesses; devising, subject to an annuity, his three manors of A., B. and C. and all his messuages, lands, tenements, and hereditaments, in the county of Bedford or elsewhere in any part of England to the use of Thomas Potter for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail-male: remainder in same manner to his eldest son John Potter, &c., remainder to the daughters of the testator and grand-daughter as tenants in common, not as joint-tenants, then some specific and pecuniary legacies: and all the rest and residue in trust, that so much of the personal estate as at the time of his decease should not be placed out in any public fund, should be invested in South Sea or other public funds; and, as soon as a convenient purchase could be had, all the stock should be disposed of therein, and settled in the same way.

By a codicil on the back of the will he afterward gave additional legacies and annuities charged and payable in the same manner as the annuity in the will, and ratifying and confirming the will, dated 10th April 1747, and attested by three witnesses in these words,

"This will with the several additions and alterations above was signed, sealed, and republished, by the testator as his last will and testament in presence of us the subscribing witnesses." * * *

SIR JOHN STRANGE, Master of the Rolls,[80] having taken time to consider, now gave his decree: The question arises on the general words after enumeration of the particular estates, on which it seems to be admitted (and if not, I should have no doubt) that they will carry any other estate, he could be intituled to in law or equity at the time of the devise; for which, if it was necessary to cite authorities, there is 2 Ver. 679; P. C. 320; Eq. Ab. 211; which leads to the main question between the devisees and heir at law as to the contract. The vendor submits to the carrying it into execution; and both parties contend for it, but with different views. (Vide 1 Atk. 572; 2 Wms. 631.) On the best consideration, I am of opinion, that this estate, so contracted for in life of testator, must be considered in equity as his estate, and well devised to the uses in the will and codicils. As to the argument for defendant from being heir at law, &c., it is plain, that testator intended to die testate as to every part of his estate real and personal, and continued in that mind. What was his reason for so dealing with his son and heir this court has nothing to do with. Here is a clear intent and express words; and it is not pretended, that testator had any other lands, to which these general words could be applied, having particularised those estates of which he was seised. His not mentioning these lands may be accounted for: by the will he had disposed of all he had; what would be at his death, was uncertain; and therefore he used general words, that if completed it might pass by the will; and inserted the clause to lay it out in land, if not done before. To consider the instruments: though there is no occasion to rest this on the will itself, yet I strongly incline to think, that even were the codicils out of the case, the will itself would pass the estate. One circumstance indeed is wanting, the reducing this agreement into writing, according to the statute of frauds; which if done in June 1744, no doubt but this estate must be considered as his in equity from that time. But though an agreement is not reduced into writing and signed by the party, yet it is well known, that if confessed, or in part carried into execution, it will be binding on the parties, and carried into further execution as such in equity (1 Ves. Sen. 297); and here is the fullest admission thereof. It must therefore be decreed according to the case in Eq. Ab. 19, and the constant doctrine in this court: it will be the same, where vendor comes for specific performance, and the agreement admitted. No doubt, but on such admission it will be considered as an agreement from the time of transaction; so that on a bill by either party, the court must have decreed execution, the estate as testator's from June, 1744, and the money the vendor's. As to any partial execution before the will, it is so far carried into execution, as to supply the want of writing on that head. Plaintiff was agent to his

[80] The statement of facts is abridged and parts of the opinion are omitted.

father, who approved of the agreement: it would be such a carrying into execution on their parts as would have intitled vendor to have gone on with the purchase: but if that was doubtful, it is admitted for defendant, that the time of giving the note, when Huxley agreed to join with vendor in making a title was the effectual time from whence it was his estate in equity. * * * This last codicil was therefore a republication, and passed the estate under the general words of the will, if it had not passed before, as I think it had; and all three instruments must be taken together, and make but one will. * * *

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## BUCKMASTER v. HARROP.

**(In Chancery before Sir William Grant, 1802. 7 Ves. 341.)**

On the 23d of July, 1800, certain estates were sold in four lots by distinct particulars; and two agents for Peter Davenport Finney were declared the best bidders, at several sums, amounting in the whole to £3119 and they immediately after the sale declared, that they purchased for Finney; and Finney offered to pay the deposits, 10 per cent. and the auction duty, to Strethill Wright, the auctioneer; who was also the vendor: but he declined receiving either; alleging, that it was then late at night; and he had to go eight miles: but he told Finney, he would lay down the money, and would settle the same with him some other time; which Finney agreed to; and accordingly Wright paid the auction duty, amounting to £77 19s. 6d. By the conditions of sale the purchaser was to have possession of Lot 3 immediately, and of the other lots at Michaelmas next; paying the remainder of his purchase-money upon the execution of the conveyance on or before the 29th of September. Finney soon afterwards gave the amount of the auction duty to his attorneys, to be paid to Wright; directing them to take a proper receipt. He also sold the crops of hay, grass, and oats, then growing on the premises, comprised in Lot 3, for £50 to a person, who afterwards took possession of the premises in that lot. Finney died, before the £50 or any rent became due. An abstract of the title was sent to the attorneys of Finney about the 15th of September; who approved the title; but before any conveyance, on the 22d of September, Finney died.

The bill was filed by the heirs at law of Finney against the executors, the residuary legatee, and Wright; praying a specific performance of the contract; and that the purchase money may be paid out of the personal estate.

The answers admitted the agreement. The vendor submitted to perform the contract; and the executor did not object: but the residuary legatee resisted the performance. Wright demanded the money he had paid from the executor; but never received it.

THE MASTER OF THE ROLLS.[81] The object of this bill, filed by the coheirs of the purchaser, is to have the contract carried into execution. The vendor submits to perform the contract. The executors do not object to it. But the residuary legatee contends, that there is no contract this Court ought to execute; neither a contract in writing, nor part-performed. It is insisted by the plaintiff, that the residuary legatee has no right to object to the performance of a contract, to which the testator himself had no objection. I am of opinion the Court cannot speculate upon what the deceased would or would not have done: but the inquiry must be, whether at his death a contract existed by which he was bound, and which he could be compelled to perform. That alone can give the heir a right to call for the personal estate to be applied, or to the personal representative a right to call upon the heir. Whether the executor would or would not perform it, is of no moment. A mere executor has no right to give away the personal estate from the residuary legatee; who in this case is before the Court; and undertakes to show, the plaintiff has no right to call for a performance of the contract.

The principle, upon which the Court acts for or against the heir, is stated (1 Ves. 220) in The Attorney-General v. Day, and Lacon v. Mertins, 3 Atk. 1. The question must be the same, whether a purchase or a sale is insisted on. Was the ancestor himself bound? Was there such an agreement as converts the real estate into personal, or the personal estate into real? I am of opinion, every objection may be taken upon either, which it would have been competent to the deceased to take, if he had resisted the execution in his life. The plaintiffs say, if it is necessary, and, I am of opinion, it is, they can show, there was such an agreement. * * *

The plaintiffs then contend, that the agreement is part-performed as to all the lots; and, if not as to all, as to Lot No. 3. I am of opinion, this is no part-performance. * * *

The existence of the agreement may be put out of all doubt by the acts: but the objection upon the Statute, that the agreement is not in writing, remains where it did. The Court does not profess to execute a parol agreement, merely, because it is satisfactorily proved. In Whaley v. Bagenal, 6 Bro. P. C. 45, which being before the House of Lords must supersede the authority of every other case, various acts had been done, which implied, that the party had sold the estate, and did not consider himself any longer the owner of it. The question still remained, whether that agreement should be carried into execution; and it was held, that the acts done by the defendant did not entitle the plaintiff to have it specifically performed.

Upon the whole the plaintiffs are not entitled to this relief. The bill therefore must be dismissed, but without costs. The vendor must have his costs from the plaintiffs.

[81] Parts of the opinion are omitted.

## LAWES v. BENNETT.

(In Chancery, 1785. 1 Cox, 167, 29 E. R. 1111.)

Thomas Witterwronge, seized in fee of a farm called Bently, by indenture, dated 2d October 1758, demised the said farm to John St. Leger Douglas, Esquire, his executors, administrators and assigns, for seven years, under the yearly rent of £106. 14s. 6d., and upon the back of the said indenture was indorsed a memorandum or agreement signed by Witterwronge and Douglas, bearing even date with the said indenture, whereby it was agreed by and between the said Witterwronge and Douglas, that in case Douglas should at any time after the 29th of September 1761, and before the 29th of September 1765, be desirous of absolutely purchasing the fee simple and inheritance of the said premises, mentioned in the said indenture, for the sum of £3000, to be paid by him to the said Witterwronge at the execution of the conveyance thereof, and of such his mind and intention should give notice in writing to the said Witterwronge before the 29th September 1765, then Witterwronge agreed to sell to Douglas the fee simple and inheritance of the said premises for the said sum of £3000, and to execute proper conveyances thereof.

Thomas Witterwronge, by his will dated 1st September 1761, devised all his real estates of which he was seized or entitled to, unto his cousin John Bennett, and he thereby gave and bequeathed his personal estate to the said John Bennett, and to the plaintiff Mary, sister of the said John Bennett (after payment of his debts and legacies) to be divided equally share and share alike, and appointed John Bennett and plaintiff Mary joint executors.

Testator died in June 1763, and on 11th February 1764, John Bennett settled an account with plaintiff Mary, of all the testator's personal estate, and paid her £324. 6s. 3d., as her moiety thereof, and the account was signed and allowed by both of them.

By deed poll, dated 2d March 1762, made between the said John St. Leger Douglas of the one part, and William Waller Esquire of the other part, after reciting the said lease of 1758, and the memorandum or agreement thereon indorsed, the said John St. Leger Douglas, for the consideration therein mentioned, assigned the said premises and all his interest therein, and all benefit and advantage which should or might arise from the said agreement to the said William Waller, his executors, administrators, or assigns, for all the residue of the term then to come therein.

On the 2d February, 1765, William Waller called upon John Bennett to perform the contract entered into by the testator for sale of the premises for £3000, which Bennett complied with, and accordingly by indentures of lease and release, dated 1st and 2d February 1765, in pursuance and performance of the said agreement, so indorsed upon the said indenture of 1758, and in consideration of £3000, the said John

Bennett did bargain, sell, &c., the said premises to the said William Waller, his heirs and assigns for ever.

In 1779 John Bennett died, leaving defendant his widow and executrix; and the present bill was filed by Thomas Lawes and Mary his wife (sister of the said John Bennett), stating, that they had not until lately discovered the sale of the estate to Waller, and claiming one moiety of the purchase money received by Bennett, as being part of the personal estate of the testator Witterwronge, and which he had devised equally to Bennett and plaintiff Mary. And this was the single question in the cause, whether the premises being part of the testator's real estate at the time of his death, but sold afterwards under the circumstances aforesaid, the purchase money should be considered as part of the real or personal estate of the testator.

MASTER OF THE ROLLS [SIR LLOYD KENYON]. Although this case may be new in species yet the principles upon which it seems to me to depend are perfectly clear, and are so well established in this court, that if I am wrong it must be by misapplication of those principles. No stress can be laid upon the will of Witterwronge, for that is expressed in very general terms. He had two species of property, one of which gives to Bennett, the other to Bennett and his sister. Then which kind of property is the present? It is very clear that if a man seized of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no distinction at all. Suppose a man should bargain for the sale of timber, provided the buyer should give part of the personal estate, although it depends upon the buyer whether he gives security or not (as to what has been said about Douglas's being able to release his power of election, I think a court of equity would relieve against that, if it appeared to be done collusively to oust the legatee of his personal estate); when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period. The case of Bowes v. Lord Shrewsbury (5 Bro. Part Ca. 269) shows the nature of the property may be altered otherwise than by the act of the original owner, although that was altered by the act of the legislature and not of any third person; but it shows generally that there is no impossibility in the nature of the thing. As to the length of time, I think I can take no notice of it in this case for here there is no pretence to presume the demand satisfied. On the contrary, it has been withholden for another reason. I must therefore declare this £3000 to be part of the personal estate of the testator, and that the plaintiffs are entitled to one moiety thereof, and the Master must inquire whether the plaintiff Thomas has made any, and what settlement on the plaintiff Mary, &c. And as to interest, as it appears

that Bennett laid out this money in the funds, and consequently has made interest of it; he must be answerable for interest, from 1st February, at 4 per cent.

No costs on either side.

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## EDWARDS v. WEST.

(Chancery Division, 1876. 7 Ch. Div. 858.)

By an indenture dated September 29, 1870, the defendant demised to the plaintiffs a paper-mill and cottages on a lease for twenty-one years; the defendant to insure at his own expense the buildings demised for £14,000. The plaintiffs had the option of purchase, if exercised within five years; this time was extended by mutual agreement to September 29, 1876. On May 6, 1876, a fire occurred at the mills, and the defendant received nearly £12,000 insurance money.

On September 28, 1876, plaintiffs gave defendant notice they intended to purchase the property, and to claim the insurance money under the purchase.

The defendant refused to sell upon those terms, and the plaintiffs brought this action.

The action came on for trial, and his Lordship decided that the option to purchase continued, though the term had been ended by the fire (by virtue of a clause in the lease), but that the plaintiffs had no right to the insurance money.

FRY, J.[82] * * * There are therefore four dates material to consider; first, that of the contract creating the option; secondly, that of the injury to the premises; thirdly, that for the exercise of the option; and fourthly, that for the completion of the purchase according to that option.

Now the point which I am about to decide arises from the payment of a sum of between £11,000 and £12,000 by the insurance offices to the defendant consequent upon the injury to the property by fire on the 6th of May, 1876. The plaintiffs contend that that money so received by the defendant was received by him as part-payment of the £14,000, which the plaintiffs, under the option, were bound to pay; and that contention has been supported by three methods of argument.

In the first place, it has been said that by the law of England the exercise of the option causes it to relate back to the time of the creation of the option in such a manner as to render the property for this purpose property of the purchaser as from the date of the contract which gave the option; so that here, although the option was given by a contract made in April, and not exercised till the 28th of September, yet that when it was so exercised on the 28th of September, it operated retrospectively, and made the property the property of the

[82] The statement of facts is abridged and parts of the opinion are omitted.

purchaser as from the month of April preceding, and consequently made the vendor trustee of the fruits of the property for the purchaser. Now it appears to me that such a conclusion would be highly inconvenient, because it would place a person under the obligations which rest upon a trustee, or make him free from them, by reference to an act which was not performed until a future day; and the retrospective conversion of a person into a trustee of property is a result eminently inconvenient. In the next place, the argument appears to me to be opposed to the general course of authority and principle. According to the view which I conceive to be true, the conversion of property, which means the treating it as belonging to somebody else before it has been actually transferred to that other person, results from a contract which can be specifically enforced; so that where there is no specific performance of contract possible, there is no conversion. It flows in effect from the principle of equity which considers that done which ought to be done, and which the court can compel to be done, and it extends so far back as those circumstances exist, and no farther. In other words, where there is a contract capable of being specifically enforced as from the date of that contract, and neither earlier nor later, the property comprised in the contract is deemed to belong to the purchaser, and the money to be paid is deemed to belong to the vendor, because those two things ought to be done; but here there is no obligation to do them at any earlier date than that of the contract constituted by the exercise of the option. The conversion can not, according to the principle, relate back to an earlier date than the contract which gives rise to it. I refer to the case of Haynes v. Haynes, 1 Dr. & Sm. 426, as an authority for that general principle, and it appears to be important.

Upon that general principle, then, I should hold that the argument is untenable. But, then, I am told that the case is covered by authority, and for that purpose my attention is very properly drawn to the cases which begin with Lawes v. Bennett, 1 Cox, 167, and which show that where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, nevertheless the produce of the sale goes as part of his personal estate, and not as part of his real estate. Now, whether Lawes v. Bennett is or is not consistent with the general principle upon which conversion has been held to exist, it is not for me to say. It is enough for me to say that the case has been followed in numerous other cases, though it has been observed upon by more than one judge as somewhat difficult of explanation. I think that the language of Lord Eldon in Townley v. Bedwell, 14 Ves. 591, and of Vice-Chancellor Kindersley in Collingwood v. Rew, 3 Jur. (N. S.) 785, shows that they were not satisfied that that case was consistent with the general principles which were applicable to cases of conversion; and therefore, although I should implicitly follow Lawes v. Bennett in a case

between the real and personal representatives of the person who granted the option, I do not think that I am at liberty to extend it so as to imply that there is conversion from the date of the contract giving the option as between the vendor and the purchaser who claim under it. It is to be borne in mind that no authority can be produced which has extended the doctrine of Lawes v. Bennett in the slightest degree beyond what was decided in that case. The principle, whatever it be, has never been applied except as between the real and the personal representatives of the original creator of the option, and I for one shall not extend it, because I think that it is limited by the general principle to which I have adverted. Therefore, upon that ground, I hold that there is no conversion of the estate from an earlier date than the 28th of September, when the notice was given. The fire having taken place, and the insurance money having been received at an earlier date, the intended purchaser has no right, upon the general principles of conversion, to assert a title to that money. * * *[88]

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## COOPER v. JARMAN.

(In Chancery, 1866. L. R. 3 Eq. Cas. 98.)

This was the further consideration of a suit for the administration of the estate of John Boykett Jarman, who died intestate on the 23rd of February, 1864. On the 1st of April following, letters of administration of his estate and effects were granted to Joseph Charles Jarman and Ann Elizabeth Jarman, two of his children. Joseph Charles Jarman was also his heir-at-law.

On the 12th of October, 1863, the intestate had entered into a contract with Messrs. James and Robert Lawrence, for the erection, by them, of a house on a piece of freehold land belonging to him. The house was in course of erection, but not finished, at the time of his death; it had since been finished, and Joseph Charles Jarman had paid £799. 19s. out of the personal estate of the intestate to Messrs. Lawrence for the completion of the contract by them. The question now raised was, whether the payment of this sum ought to be allowed to Joseph Charles Jarman, as the legal personal representative of the intestate.

Dec. 4. LORD ROMILLY, M. R., after stating the facts, continued: The next of kin contend that this sum ought not to be allowed, and that the heir-at-law must personally bear the expense of completing the house. The ground on which this is insisted on by the next of kin is, that the contract was of such a character that the specific performance of it could not have been enforced against the intestate if he had thought fit to resist it, and that if he had done so, and had in the middle stopped the further building of the house, the only remedy which

[88] The bill was dismissed.

Messrs. Lawrence could have had against him would have been by an action for damages sustained by them by the breach of contract by the intestate. There can not, however, be any question but that the administrator would have been liable, in an action brought by the Messrs. Lawrence, if he had refused to allow them to complete the contract. The case of Wentworth v. Cock, 10 Ad. & E. 42, is distinct on this point; where, in an action against an executor for refusing to receive slate ordered by the testator, the Court of Queen's Bench held that the action would lie, and that the legal personal representative must receive and pay for goods ordered by the testator. Of course it would be the same in the case of an intestate. I think it can not be good law that an administrator is bound to do an injury and inflict damages upon a person with whom the intestate had entered into a contract, and to prevent that person from completing his contract because, by so doing, he would increase the personal estate of the intestate. There is, as it appears to me, a wide distinction between a case of this description and the case of a contract for the purchase of a piece of land. In that case the personal estate of the intestate, or testator, is bound to pay the purchase-money, provided a good title can be made; but if a good title can not be made, then there is no contract, and no action would lie against the representatives of the intestate, because the contract, in the absence of any express stipulation, necessarily is inferred to have been to buy land with a good title; and if the deceased person had contracted to buy land with any particular title, in a manner to bind him, this contract would bind the personal estate in the hands of the next of kin. But I have seen no case, and I am unable to believe that any case can be found, where a legal personal representative has been made answerable for performing a contract entered into by the deceased person, and at the time of his death intended to be performed by him, merely because, according to the peculiar rules of equity relating to the doctrine of specific performance, such a contract could not have been enforced by a suit in equity against the deceased person, or against his representative. Here, unquestionably, the intestate had bound himself, as far as possible, during his lifetime. The house had been begun; the building was in progress when he died. If the Messrs. Lawrence had, therefore, refused to go on with the building, an action would have lain against them at the suit of the administrator; and it can not, in my opinion, be law, that the next of kin should be entitled to call upon the heir-at-law to resist the Messrs. Lawrence, and hinder them from coming on the land, and prevent them from completing the contract because, in the opinion of the next of kin, the damage sustained by the contractor would possibly be less than the amount to be paid for the fulfilment of the contract. Besides which, if I am so to hold, no rule could be adopted which would be certain. The administrator could not safely pay the amount of damages claimed by the contractor for the loss sustained by the breach of the contract. If he did, the next of kin might successfully say that he paid more than

a jury would have allowed; and if he resisted, and went to trial at law, and thereupon the amount of damages found by the jury, together with the costs of the suit, should exceed the amount to be paid for the completion of the contract, could the legal personal representative be allowed to deduct this in taking the accounts? I apprehend clearly not. The administrator has, in my opinion, a clear duty to perform. The moral duty is distinct. It is to perform the contract entered into by his intestate. The legal duty, in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty. I am, therefore, of opinion that this sum has been properly allowed in the accounts of the administrator.

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## CURRE v. BOWYER.

**(In Chancery before Sir John Leach, Vice Chancellor, 1818. 5 Beav. 6, 49 E. R. 478.)**

This case was thus stated by Mr. Tinney, who had been counsel in the cause: A party entered into a contract for the sale of a real estate, and afterwards died before it had been completed. After the lapse of many years, the purchaser filed a bill for specific performance. This was resisted on the ground that the contract had been improvident, and had been obtained at an undervalue, and by undue influence.

SIR JOHN LEACH, however, held that the contract was binding at the death of the vendor, but that by the lapse of time, and by his laches, the purchaser had lost his right to have a specific performance, and that the estate belonged to the next of kin, and not to the heir at law.

The testatrix entered into a contract, by which she agreed to alienate her whole interest in the estate; but she did not, in any of the ways pointed out by the Act, revoke the will and codicils; and because she has not done so, the argument is, that the purchase-money, as representing the estate, passed by the devise; but revocation, in the manner directed by the Act, is not the only mode in which a will may be rendered inoperative.

If she had conveyed the estate, and thereby completed the alienation, the will would have had no operation upon it, or upon the purchase-money; and it was necessarily admitted, that the will could not, by the devise of the land, have any operation upon that part of the purchase-money, which was actually paid to the testatrix in her lifetime.

The question, whether the devisees can have any interest in that part of the purchase-money which was unpaid, depends on the rights and interests of the testatrix at the time of her death. She had contracted to sell her beneficial interest. In equity she had alienated the land, and instead of her beneficial interest in the land, she had acquired a title to the purchase-money. What was really hers in right and equity was, not the land but the money, of which alone she had a right to

dispose; and though she had a lien upon the land and might have refused to convey till the money was paid, yet that lien was a mere security, in or to which she had no right or interest, except for the purpose of enabling her to obtain the payment of the money. The beneficial interest in the land which she had devised was not at her disposition; but was, by her act, wholly vested in another, at the time of her death; and the case is clearly distinguishable from cases, in which testators, notwithstanding conveyances made after the dates of their wills, have retained estates or interests in the property which remain subject to their disposition.

Being of opinion, that by the contract, the testatrix must, in this Court, be deemed to have alienated the whole of her beneficial interest in the estate: that at the time of her death, she had no beneficial interest in the land at her disposition, and that the will only passes that which was at her disposition, I am of opinion, that the devises of the land have no interest in the purchase-money, and that the prayer of this petition must be granted.

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## WHITTAKER v. WHITTAKER.

**(In Chancery before Sir Richard Pepper Arden, 1792. 4 Bro. C. C. 31.)**

WILLIAM WHITTAKER, Esq., by will dated 5th January, 1782, after giving several specific and pecuniary legacies, gave to John Marlar and others, their heirs and assigns, certain premises situate at Sowerby, near Halifax, at New-Church, Lancashire, and at Totteridge, to the use of (the plaintiff) his nephew, Abraham Whittaker, for life, sans waste, remainder to trustees to preserve contingent remainders, with divers remainders over—and then (inter alia) reciting, that he had contracted with Robert Mackreth, Esq., for the purchase of an estate in the county of York, theretofore the estate of Sir George Metham, for £7950; he gave to the trustees all the residue of his goods, chattels, estates, &c., upon trusts, thereinafter expressed; one of which trusts was, "to collect and get in the same, and dispose of a sufficient part thereof, and therewith, in the first place, to pay the remainder of the purchase-money to said Robert Mackreth, Esq.; and to complete the contract with him in all respects whatever, and thereupon to take from said Robert Mackreth, or his heirs, and from all other necessary parties, a conveyance of said estate so contracted to be purchased of said Robert Mackreth, in such manner as counsel should direct, so as that the same estate might be legally conveyed to said trustees, their heirs and assigns, to such uses and estates, in favor of his said nephew, Abraham Whittaker, and with such remainders over, and subject to such and the like provisos, conditions, and limitations as were thereinbefore mentioned, with respect to his said estates at Sowerby, New-Church, and Totteridge, aforesaid."

In the same month of January, 1782, and before the contract was completed, and the remainder of the purchase-money paid (£1192 having been paid as a deposit), the testator died. * * *

The executors not being able to collect assets to carry the contract into execution, Mackreth, in Easter term, 1785, filed his bill against the executors of the testator, praying that the contract might be delivered up to him to be cancelled, on his paying £1192. 10s. the deposit; and upon the hearing of that cause 10th July, 1786, it was referred to the Master, to compute interest on that sum, and that upon payment of that sum (with interest, deducting the costs), the agreement should be cancelled; which decree was afterwards carried into execution.

In Hilary term, 1790, the present supplemental bill was filed, by the plaintiff, Abraham Whittaker, stating the above case, and praying that directions might be given for raising the said sum of £7950, and that the same might be laid out in lands, in the name of trustees, in trust, for such uses, in favor of the plaintiff, and with such remainders over, as in the will are limited; or if the Court should be of opinion, that the same should be considered as part of the residue of the testator's personal estate, then that the executors might be decreed to pay to the plaintiff one moiety, according to the said will, &c.

The cause came on at the Rolls, during the Sittings after Trinity term, when it was argued for the plaintiff, by Mr. Lloyd, and Mr. Hollist, that under the circumstances, and in the events which had happened, the money which was to have been paid for the lands contracted for, ought to be now laid out in the purchase of other lands, to be settled to the same uses. On the part of the defendants, it was contended, by Mr. Mitford and Mr. Sutton, that the money should sink into the residue of the testator's personal estate, but his Honor in giving judgment went so fully into the argument, and the cases cited, that it is unnecessary to premise a statement of either.

This day his Honor gave judgment.

MASTER OF THE ROLLS.[84] This is a bill praying to have £7950 laid out in the purchase of other lands, and settled to the same uses, to which the lands contracted to be purchased were to be settled, and it arises on this clause in the testator's will (stating the clause, as above stated).

The testator has, by his will, devised these premises to Abraham Whittaker, in strict settlement; and has ordered another estate to be purchased and settled to the same uses.

At the death of the testator, his contract with Mackreth, for the purchase of the estate, was incomplete, part of the purchase-money had been paid; there was no objection on the part of the vendor to completing the purchase, there was no want of title; but the testator's affairs were complicated, his will was not found for some time after his death, and the vendor filed his bill against the executors, either to

[84] The statement of facts is abridged and part of the opinion is omitted.

fulfill the contract or to abandon it. The testator died in 1782. In January, 1786, the cause came on—the executors declined completing the contract. The then Master of the Rolls [Sir L. Kenyon] decreed the contract to be at an end, and on payment of the deposit the contract was rescinded. In 1789, it appeared there were assets to enable the executors to pay the money.

The question is, whether under these circumstances the devisees of the land contracted to be purchased, are entitled to have the money laid out in the purchase of other lands, to be settled to the same uses?

And I am clearly of opinion they are so entitled. * * *

I am of opinion, wherever a legatee or devisee is disappointed by events after the death of testator, he is entitled to compensation. Suppose the estate had been conveyed, and he had been evicted, or, suppose there had turned out to be a bad title, could the devisee lose the money that came from the purchase? Suppose the estate had been conveyed to the testator, and had passed by his will to the devisee, and then the devisee was evicted, could not he recover the purchase-money?

Here the testator was bound to complete the purchase. Mackreth could have compelled him so to do. There was nothing to prevent the devisee from taking; but because the executors could not, or would not act, is he to be disappointed?

Therefore, I am of opinion the devisee is entitled to have the money laid out in lands, to be settled according to the uses in the will.

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## HAUGHWOUT and POMEROY v. MURPHY.

(Court of Errors and Appeals of New Jersey, 1871. 22 N. J. Eq. 531.)

One Amidee Boisaubin, on the 24th day of September, 1863, entered into a contract in writing, with Haughwout, one of the complainants, to sell to him a tract of land situate in the county of Morris, called the Spencer woods, containing twenty-two acres, for $200 per acre, and giving to Haughwout until the 1st day of March, 1864, to accept the proposition. In the latter part of February, 1864, Haughwout gave Boisaubin notice of his acceptance of the proposition. Boisaubin having refused to make conveyance of the property, Haughwout, on the 31st of August, 1865, filed a bill against Boisaubin to obtain specific performance of the contract, and on the 1st day of September, 1865, filed in the clerk's office of the county of Morris a notice of the pendency of the said suit, in compliance with the statute.

To the bill filed in that case Boisaubin filed his answer, and the cause coming on for hearing in the Court of Chancery on the pleadings and proofs, a decree was made on the 27th of March, 1867, in favor of Haughwout, that Boisaubin make conveyance to the complainant according to the terms of the said contract. Houghwout v. Boisaubin, 18 N. J. Eq. 315.

On the 10th day of August, 1867, Boisaubin, in fulfillment of the said decree, conveyed to Haughwout the entire tract called Spencer woods; and on the 14th of October, 1867, Haughwout conveyed the equal undivided one-half part of said tract to Pomeroy, the other complainant.

On the 7th of August, 1865, Boisaubin conveyed to Murphy, the defendant in this suit, three lots, which were parts of the Spencer woods, by a deed bearing date on that day, which was executed on the 7th or 8th of August, but not recorded until the 5th day of October, 1865. The consideration of the conveyance from Boisaubin to Murphy was $600, of which $400 were paid on the delivery of the deed, and the balance of $200 secured by a mortgage payable on the 7th of August, 1866; which mortgage was acknowledged on the 19th of August, 1865, and recorded on the 15th of May, 1866.

DEPUE, J.[85] The bill of complainant filed in this cause, after setting out the proceedings in the suit in chancery between Haughwout and Boisaubin, charges that the deed of conveyance from Boisaubin to Murphy, though bearing date on the 7th of August, 1865, was not actually delivered until the 5th day of October of that year, and after the filing of the bill of complaint by Haughwout against Boisaubin, and after the filing of notice of the pendency of that suit in the clerk's office of the county of Morris. It further charges that the said Murphy had actual knowledge of the contract of purchase made by Haughwout with Boisaubin, and of the intention of Haughwout to commence suit for specific performance, long before the delivery of his deed and the payment of any part of the consideration money therefor; and that the defendant accepted the said conveyance, and paid the purchase money therefor, with actual knowledge of the existence of the complainants' contract, and of the pendency of the suit for the specific performance thereof.

The prayer of the bill is that the title of the complainants to the said three lots may be ratified and established, and declared to be good and valid as against the claim of title made to the same by said Murphy, and be declared paramount thereto; and that the claim of title to the said lots by the said Murphy, under his deed of conveyance from Boisaubin, be declared invalid and of no effect against the title of the complainants, and that the defendant may be directed to release and convey to the complainants; and that the complainants may have such other and further relief, &c. * * *

The bill is to be taken to have been filed for the execution of the trust arising from the prior contract between Haughwout and Boisaubin for the purpose of the lands, by the conveyance to the complainant, by Murphy, of the legal title which he acquired by his deed. In this aspect of the case, the bill is a bill for specific performance.

In equity, upon an agreement for the sale of lands, the contract is

[85] Part of the opinion is omitted.

regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase money. After the contract, the vendor is the trustee of the legal estate for the vendee. Crawford v. Bertholf, 1 N. J. Eq. 460; Hoagland v. Latourette, 2 N. J. Eq. 254; Huffman v. Hummer, 17 N. J. Eq. 264; King v. Ruckman, 21 N. J. Eq. 599. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money. 1 Story's Eq. § 789; 2 Ibid. § 1213. If the vendor should again sell the estate of which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom, by the first contract, he became trustee, and therefore liable to account. 2 Spence's Eq. Jur. 310. Or the second purchaser, if he have notice at the time of the purchase of the previous contract, will be compelled to convey the property to the first purchaser. Hoagland v. Latourette, 2 N. J. Eq. 254; Downing v. Risley, 15 N. J. Eq. 94. A purchaser from a trustee, with notice of the trust, stands in the place of his vendor, and is as much a trustee as he was. 1 Eq. Cas. Abr. 384; Story v. Lord Windsor, 2 Atk. 631. The cestui que trust may follow the trust property in the hands of the purchaser, or may resort to the purchase money as a substituted fund. Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566, 581. It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of lands mainly depends.

The defendant insists that he holds the lands discharged of any trust in favor of Haughwout or the complainants, by reason of his being a bona fide purchaser for a valuable consideration without notice.

The proof is, that at the time of the delivery of the deed, $400 of the consideration money was paid, and the balance secured by mortgage. Conceding that the $400 was actually paid before Murphy had notice of Haughwout's claim, the defence of a bona fide purchase is not supported. Before the mortgage became due, Murphy had actual notice of the existence and nature of Haughwout's claim.

The defence of a bona fide purchase may be made by plea, in bar of discovery and relief, or by answer, in bar of relief only. If made by plea, the payment of the whole of the consideration money must be averred. An averment that part was paid and the balance secured by mortgage, will not be sufficient. Wood v. Mann, 1 Sumn. 506, Fed. Cas. No. 17,951. Proof of the payment of the whole purchase money is essential to the defence, whether it be made by plea or answer. Jewett v. Palmer, 7 Johns. Ch. (N. Y.) 65, 11 Am. Dec. 401; Malony v. Kernan, 2 Drury & Warren, 31; Losey v. Simpson, 11 N. J. Eq. 246. Notice before actual payment of all the purchase money, although it be secured and the conveyance executed, or before the execution of the conveyance, notwithstanding the money is paid, is equivalent to

notice before the contract. 2 Sug. V. & P. 533 (1037); Hill on Trustees, 165. If the defendant has paid part only, he will be protected pro tanto only. 1 Story's Eq. § 64c; Story's Eq. Pl. § 604a.

What the measure of relief shall be in cases where the deed has been executed and delivered and part of the purchase money paid before notice of the previous contract to sell to another, was elaborately discussed by the counsel of the appellants. The Chancellor held upon the authority of Flagg v. Mann, 2 Sumn. 487, Fed. Cas. No. 4,847, that a contract of purchase, executed by delivery of the deed and payment of part of the purchase money without notice of the previous contract, gave the purchaser a right to hold the land, and that the equity of the person with whom the previous contract was made, was merely to have the unpaid purchase money.

The law of the English courts is, that until the defence of a bona fide purchaser is perfected by the delivery of the deed of conveyance, and the payment of the entire consideration money such purchaser is without any protection as against the estate of the equitable owner under a prior contract, even though he contracted to purchase, and accepted his deed and paid part of the purchase money in good faith; his only remedy being against his vendor to recover back what he has paid on a consideration which has failed. In some of the American courts this doctrine has been qualified to the extent of enforcing specific performance of the prior contract, on condition that the purchaser shall be indemnified for the purchase money paid, and also for permanent improvements put upon the property before notice, on the principle that he who asks equity must do equity. The cases are collected in 2 Lead. Cas. in Eq. 1; notes to Basset v. Nosworthy.

The doctrine of the English courts is necessary to give effect to the principle that in equity, immediately on the contract to purchase, an equitable estate arises in the vendee, the legal estate remaining in the vendor for his benefit. Qualified by the obligation to make compensation to any subsequent bona fide purchaser, who has paid part only of the consideration money, for all disbursements made before notice, the rule is every way consonant with correct principles. Such indemnity is protection pro tanto.

But whatever the nature of the relief may be in cases where the naked question of the acceptance of a deed and payment of part of the consideration before notice is presented, the relief indicated by the Chancellor is the only relief the complainants are entitled to under the circumstances of this case. The rule of law which deprives a subsequent purchaser who has contracted for and accepted a conveyance, and paid part of the purchase money in good faith, of the fruits of his purchase without indemnity, is exceedingly harsh, and often oppressive in its application. Mitigated by the obligation to make indemnity for payments and expenditures before actual notice, its operation is nevertheless frequently inequitable. A party who asks the enforcement of a rule of this nature against another who is innocent of actual

fraud, must seek his remedy promptly. He may lose his right to specific relief against the lands by laches, and be remitted to the unpaid purchase money as the only relief which will be equitable. In cases where the prayer is for the specific performance of a contract between the immediate parties to the suit, delay in filing the bill is often of itself a bar to relief. Merritt v. Brown, 21 N. J. Eq. 401.

The agreement between Haughwout and Boisaubin was made on the 24th of September, 1863. In February, 1864, Haughwout gave Boisaubin notice of his election to take the property under the agreement. After this notice was given, Boisaubin laid the property out in lots and publicly offered them for sale. Murphy's deed for the three lots of which he became the purchaser, was executed and delivered in August, 1865. The bill in the suit of Haughwout v. Boisaubin, was filed the last day in the same month. The solicitor who appeared for Haughwout in that suit, had notice of the existence of Murphy's deed within a few days after his bill was filed. Boisaubin, in his answer, which was filed on the 3d of November, 1865, specifically sets out the fact of the conveyance to Murphy and the circumstances connected therewith. Murphy was himself examined as a witness on the 5th of April, 1866, and testified in relation to the conveyance to him. Haughwout must be charged with notice as early as April, 1866, that Murphy intended to assert his right to the land. The bill in this case was not filed until the 4th of April, 1868. After this long delay it would be inequitable to enforce specific performance against the defendant. The fact that there were delays in the prosecution of that suit to final decree, which were unavoidable, ought not to prejudice Murphy. He should have been made a party to that suit.

Besides that, the bond and mortgage which were given by Murphy to Boisaubin for the unpaid purchase money, were assigned by Boisaubin to one Geoffrey, on the 16th of April, 1866, and by Geoffrey further assigned to William Davidson, on the 2d of July of the same year, and notice of such assignment given to Murphy by the solicitor of Davidson. The money due on the mortgage was paid at its maturity by Murphy to Davidson's solicitor. That Davidson, in the transaction, was acting for Haughwout, and that the money wherewith this assignment was procured was paid by Haughwout and that the proceeds when collected were realized by him, are indisputable.

That the assignment was made by Geoffrey to Davidson, as collateral security, will not affect the case. When Murphy received notice of the prior equitable title of Haughwout, he was entitled to have the security he had given for the unpaid purchase money surrendered. Tourville v. Naish, 3 P. Wms. 307. The subsequent assignments were taken and the money received, with full notice of all the circumstances. The money received on the mortgage, Haughwout still retains. It is no answer to say that in decreeing specific performance Murphy may have the money refunded to him. Haughwout might have insisted upon having the land itself, or at his option, pursued the proceeds of

the sale. He cannot have both. By accepting a security given for the purchase money, he is deemed to have affirmed the sale so far as respects the purchaser. Murray v. Lylburn, 2 John. Ch. (N. Y.) 441; 2 Story's Eq., § 1262; Scott v. Gamble, 9 N. J. Eq. 218.

The complainants are not entitled to relief. The decree of the Chancellor is affirmed, with costs.

The whole court concurred.[86]

## BENSON v. BENSON.

(In Chancery before Sir John Trevor, Master of the Rolls, 1710. 1 P. Wms. 129, 24 E. R. 324.)

Two thousand pounds (whereof £1500 were the wife's portion, and £500 the husband's money), were agreed, by articles before marriage, to be invested in a purchase of lands, to be settled upon husband and wife for their lives, remainder to the heirs of the body of the wife by the husband, remainder to the heirs of the husband.

The husband receives the whole £2000 the wife dies leaving son and three daughters; after which the husband dying intestate, the eldest daughter takes out administration to the father.

The son brings a bill against his sister (the administratrix) to have the money paid to him, electing that it should not be laid out in land, and settled as had been agreed by the articles.

How cont': This may be a prejudice to the sisters, who if the lands were to be settled, and afterwards the son should die without issue, and without levying a fine, would be entitled to them under the contingency; and there can be no reason to deprive the sisters of any contingency; and this bill, tho' said to be brought to execute a trust, does, at the same time, seek to break it.

CUR'. A fine cannot be levied of money agreed to be laid out in a purchase of land to be settled in tail; but a decree can bind such money equally as a fine alone could have bound the land in this case, if bought and settled; and in regard the plaintiff the son would have the entire interest in the lands when purchased and settled, and the absolute power over them, and that a court of equity will not decree a vain thing:

Viz. Decree a purchase and settlement to be made, which the son, the next moment, by a fine, only, may cut off; therefore since the son elects to have the £2000 let him take it, and let the administratrix be indemnified.[87] * * *

[86] In Kimsey v. Posey (1912) 148 Ky. 54, 145 S. W. 1121, at 1122, the court said: "Neither was the chancellor in error in giving to each vendee the rents for 1911 of the property he acquired under the contract. The contract being enforced, the title to the respective tracts vested in the respective vendees as of January 1, 1911, the time originally contemplated by the contract for its performance. From that date, Posey and Reichert were the owners of the 250 acres, and as such were entitled to the rents thereof, and liable for the charges against it, including taxes."

[87] Part of the opinion is omitted.

## STATE ex rel. DILLMAN v. WEIDE et al.

(Supreme Court of South Dakota, 1912. 29 S. D. 109, 135 N. W. 696.)

Appeal from Circuit Court, Grant County; C. X. Seward, Judge.

Action by the State, on the relation of J. A. Dillman, to prohibit B. Weide and others, trustees of town of Revillo, from submitting the question of granting permits for the sale of intoxicating liquors to the voters at the general election. From an order granting a peremptory writ prohibiting further proceedings, entered upon the sustaining of a demurrer to the defendants' answer, defendants appeal.

SMITH, J.[88] Appeal from the circuit court of Grant county. A petition was filed in the office of the clerk of the incorporated town of Revillo, purporting to be signed by 28 qualified voters, requesting the submission at the next general municipal election of the question of granting permits for the sale of intoxicating liquors within the municipality for the then ensuing year. This proceeding was instituted to prohibit the trustees and clerk from submitting said question to the voters as demanded in the petition, and alleging that said officers were without jurisdiction for the reason that the petition was not signed by 25 legal freeholder voters of the town, and that seven of the persons who signed said petition were not freeholders and therefore not qualified to sign said petition. An alternative writ of prohibition was issued, to which defendants made return and answer, admitting that 3 of the persons who had signed the petition were not freeholders, but denying the allegations of plaintiff as to the other 4 persons named, and alleging that the petition was signed by 25 legal freeholder voters.

It is further alleged in the answer that 24 of the signers of said petition were owners of the absolute fee to lands within said town, and that one Hans Helgeson was a legal freeholder voter, and had a legal freehold estate and interest in lot 5, block 3, of said town by virtue of a contract of sale thereof, entered into between said Hans Helgeson and one Chloe Dillman on the 26th day of October, 1910, whereby the said Chloe Dillman, in consideration of the sum of $80, agreed to convey by warranty deed the fee-simple title to said lot to said Hans Helgeson on the 1st day of November, 1911, and that Helgeson under and by virtue of said contract had paid $40 of the consideration for said lot, and had made all payments and done all things required under and by virtue of said contract, and had been put in quiet and peaceable possession thereof since the date of said contract, had paid all taxes and assessments thereon since said contract was made, was holding the same in good faith, and was financially able to pay, and would pay, the balance of the purchase price for said lot and secure a warranty deed therefor on the 1st of November, 1911; that the said Chloe Dillman at the time said contract was made was the owner in fee of said lot; that said contract was acknowledged so as to entitle it to record,

[88] Parts of the opinions of Smith, Whiting, and Corson, JJ., are omitted.

and on the 1st day of November, 1910, was duly recorded in the register of deeds office of said county.

To this answer plaintiff demurred on the ground that it did not state a defense. An order was made by the trial court sustaining the demurrer upon the specific ground that Helgeson was not a legal freeholder voter.

Defendants elected to stand upon the answer, and appeal from a judgment granting a peremptory writ prohibiting further proceedings on the submission at said election of the question of selling intoxicating liquors. The sole question presented is whether Helgeson was a legal freeholder voter, and qualified to sign the petition. It is conceded that, if Helgeson was not a freeholder, the village trustees had no jurisdiction in the premises, and were not authorized to submit the question to a vote.

Section 1, c. 166, of the Session Laws of 1903, provides as follows:

"At the annual municipal election held in any township, town or city in this state for general municipal purposes, the question of granting permits to sell intoxicating liquors within the corporate limits of such township, town or city shall be submitted to the legal voters thereof upon petition signed by twenty-five (25) legal freeholder voters of such township, town or city, to be filed with the clerk or auditor of such township, town or city thirty days before election, which petition shall state that a vote is desired upon such question."

It is conceded that Helgeson was a qualified legal voter of the village of Revillo, but respondent's contention is that upon the facts above set forth he was not a freeholder. If the contract above referred to vested in Helgeson a freehold estate, he was qualified as a signer of the petition. * * *

Respondent's argument appears to ignore the fact that an "equitable estate" in real property is as truly an inheritable estate as is a legal estate or an estate held in fee simple absolute, and that the true test as to whether the estate is inheritable and hence a freehold does not depend upon the class of persons who may inherit, but upon the question whether the estate itself is capable of passing by inheritance. That a life estate whether for the life of the owner or of another person may pass by inheritance to the heirs of the grantee of the holder of the life estate is so well settled that a citation of authorities is unnecessary. * * *

We reach the conclusion, therefore, in accordance with the practically unanimous decisions of all the courts of highest authority, that under this contract Helgeson, the vendee in possession, became vested with the entire equitable estate in the real property which is the subject of the contract, and that the vendor only held and retained the legal title to the same as security for the payment of the unpaid portion of the purchase price.

The only question remaining is whether the equitable estate thus vested in Helgeson under the contract is an inheritable estate or interest in real property. If inheritable, it is a freehold estate under the

express language of section 245 of the Civil Code, and Helgeson is a freeholder and competent signer of the petition. The doctrine that the equitable estate vested in the vendee is inheritable as real property is so well settled that an extended discussion or citation of authorities is unnecessary. It is likewise immaterial under the authorities whether an equitable estate be created by contract or by operation of law. Its inheritable quality remains. * * *

It is conceded on this appeal that Helgeson was put in possession upon the execution of the contract of sale, has remained in possession ever since, has made improvements and paid taxes, and is able and willing, and intends to fulfill all the conditions of the contract and to pay the remaining portion of the purchase price when due, and obtain a deed from the vendor. His entire good faith in the purchase of the property or in the signing of the petition is not questioned on this appeal. We are clearly of opinion he became vested under the contract with a present inheritable freehold estate in the purchased property, and that he was a freehold voter qualified to sign the petition.

The order of the trial court sustaining the demurrer is reversed, and the cause remanded for further proceedings according to law.

WHITING, J. (dissenting). * * * I had supposed all would agree that there was not within this state a thing—real, personal, or mixed—the subject of property in and to which there was not at all times vested somewhere a title known as "legal," carrying with it an interest in such property known as the "legal estate." * * * My colleague seems to be of the view that there may exist what is known as an "equitable estate" of such magnitude and importance that it, for the time at least, absolutely wipes out of existence the so-called legal estate. To such proposition I must dissent, as I believe it to have no support in reason, and surely none in authority. * * *

My colleague discussed, to considerable extent, the rule of equitable conversion, and I fully agree with what he says in relation thereto, except as to its bearing upon the question before us. With this part of his opinion I am unable to agree, as it seems to me the question of equitable conversion has absolutely no bearing thereon. The necessary result of the majority opinion herein is to render the vendee under a purely executory contract a competent signer of one of these petitions, though, under our statute, his contract is not a conveyance and is not protected by our recording acts. Applying it to case at bar, it would result in holding Helgeson a qualified signer if his contract had been purely executory in all its terms and no possession given thereunder. I cannot subscribe to any holding that must bring such a result, where there is nothing in the wording of the statute to warrant it. Let us recognize the legal estate as the one which qualifies its holder to do whatever the statute may empower the holder of an estate to do, and not resort to the doctrine of equitable conversion in order to qualify a party to perform an act pertaining to citizenship. * * * It is for this court merely to determine whether the Legisla-

ture intended the owner of the legal estate to be the signer of a petition or the owner of the equitable estate. * * * It would seem that there is no escape from the conclusion that the person who holds or is fully entitled to be vested with the legal freehold estate is the proper signer of a petition, and that nothing short thereof is sufficient to qualify him as such signer. * * *

CORSON, J. (dissenting). * * * In my judgment, there is no ambiguity in the section of the law above quoted, and the only proper construction to be given to it is that the "legal freeholder voters" are such as have the legal title to freehold property, and does not include equitable freeholders.

In my opinion, therefore, the order of the circuit court sustaining the demurrer to the return should be affirmed.[89]

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## PERKINS v. LYONS et al.

**(Supreme Court of Washington, 1912. 68 Wash. 498, 123 Pac. 793.)**

Department 2. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Action by P. C. Perkins against Matt Lyons and others. From a judgment for defendants, plaintiff appeals.

PER CURIAM. The respondent Lyons owned certain farm lands situated in Columbia county, in this state, and the respondents Todd and De Ruwe owned certain lands situated in Waitsburg, in Walla Walla county. In August, 1910, the respective parties had their lands listed for sale with a real estate firm doing business at Waitsburg. This firm induced the parties to execute an agreement in writing for an exchange of the properties; the owners of the Waitsburg property agreeing therein to pay the owner of the Columbia county property as boot money the sum of $12,000 on or before 10 years from the

[89] In Weidenbaum et al. v. Raphael et al. (N. J. Ch. 1914) 90 Atl. 684, the court said: "The general rule is that heirs of a vendee are entitled to specific performance, and to have the administrator pay the purchase price out of the personal estate. Fry, Sp. Perf. (4th Ed.) §§ 211, 217. The married woman as vendee can be compelled to perform specifically (though not as vendor), and as to her the remedy is therefore mutual, as between her heirs and the vendor. Moore v. Baker (1903) 65 N. J. Eq. 104, 55 Atl. 106. The fact that the heirs of the vendee are infants does not of itself prevent the specific performance of the contract in their favor as vendees, if either they or some one in their behalf are able to carry out the conditions of the contract on the purchaser's part. It is not a case of disability of the infants in the making of a contract of sale which could not be enforced because of such disability. But the vendee's right to specific performance is dependent on the fulfillment of the conditions to be performed on his part, and the assignee of a vendee, even when under no disability, is not permitted to substitute his personal liability on the unperformed conditions against the consent of the vendor. 26 A. & E. Ency. (2d Ed.) 126; Pom. Sp. Perf. § 320. Where the assignees of the vendee are trustees, and the execution of the contract requires covenants, specific performance in their favor cannot be compelled, unless they personally enter into the covenants. Id. §§ 331, 332."

date of the sale with interest at 6 per cent. per annum, the payment to be secured by mortgage on the Columbia county lands. Subsequently abstracts of the lands were made out and examined, and deeds to the respective properties were executed and left with an attorney. After the execution of the first-named agreement, the respondent Lyons entered into an agreement with F. S. Boyles, a member of the firm of the brokers with whom the properties were listed for sale, by the terms of which the respondents agreed to convey the Waitsburg land to Boyles. Boyles subsequently assigned the contract to the appellant Perkins. Subsequently the parties to the original contract mutually agreed to rescind it, whereupon the appellant brought the present action to enforce a specific performance in so far as it is necessary in order for him to obtain the benefit of the contract between Lyons and Boyles of which he is the assignee. The trial court made no formal findings, but in the judgment entered it is recited that the several contracts are fraudulent and inoperative and should be delivered up for cancellation.

In this court the appellant makes the point that fraud was never an issue in the cause, not having been alleged in any of the several answers filed by the respondents, but whether this is true or not we have not been able to verify, as the answer of the Todds has not been included in the transcript.

The record, however, shows that fraud was an issue at the trial. The respondents Todd and De Ruwe offered evidence which was admitted without objection and which tended to show that they had been induced to sign the first contract of sale through misrepresentation and false statements made to them by the representative of the agency having the properties for sale, and, inasmuch as the parties and the trial court treated the evidence as within the issues, this court will do so also, treating the pleadings as amended to correspond therewith.

On the questions of fact presented, we think the evidence supports the conclusion of the trial judge. De Ruwe and the Todds owned unequal interests in the Waitsburg land, and the Todds were unwilling to make the exchange if they had to take a greater interest in the Columbia county lands than one-fifth thereof, while De Ruwe insisted that they should take a half interest therein. Boyles procured their signature to the contract by treating with them apart from each other and representing to the one that the other had agreed to his terms. When the parties consulted together and discovered the true condition, they repudiated the contract. This, it seems to us, is such a fraud as would prevent Boyles from enforcing a specific performance of the contract or recovering damages in lieu of such specific performance, and, as Boyles cannot recover, his assignee, who has no better right, likewise cannot recover.

The judgment appealed from is right and will stand affirmed.

## SECTION 4.—EQUITABLE INTERESTS AND BURDENS OF THIRD PERSONS UNDER THE CONTRACT

### FRAZIER v. BROADNAX.

(Court of Appeals of Kentucky, 1822. 12 Ky. [2 Litt.] 249.)

THE COURT. At the January term, 1802, of the Logan county court, there was granted to Robert Bryan a certificate for two hundred acres of land, containing therein a location describing the land as lying in Logan county, on Red river, beginning at a hickory in the barrens; thence running westward, southward, eastward and northward, so as to include the complement and improvement, according to law. A survey was afterwards, in April, 1805, executed upon this certificate, in the name of Bryan; and the certificate of survey afterwards, on the 4th of January, 1808, assigned by Bryan to Isaac Reynolds. Prior, however, to the assignment of the certificate of survey, and on the 19th of March, 1807, Bryan assigned to Reynolds the certificate obtained from the county court of Logan.

On the 22d of October, 1807, Reynolds for a valuable consideration sold the land described in the survey made under the certificate, to William Kirkland, and gave to Kirkland an obligation for a general warranty deed, to be made so soon as the patent could be obtained from the commonwealth, Kirkland paying the state price.

After this, Kirkland sold the land to two of the Campbells; but, the price being unpaid, he consented that John Campbell, one of those to whom he had sold, and who is alleged to have become the proprietor of the interest of the other, might sell the land, and that, upon receiving the consideration for which he had sold to the Campbells, he would assign Reynolds' obligation. Campbell accordingly contracted with Samuel Caldwell and George McWhorter for the sale of the land, at the price of $800; about $307 thereof Caldwell and McWhorter were to pay Kirkland; being the amount of the consideration due Kirkland for the land, from the Campbells; and the balance to be paid, and was, in fact, paid Campbell. This contract between Campbell, Caldwell and McWhorter, seems to have been made early in the spring, 1811, and, on the 25th of March in that year, Caldwell and McWhorter executed two notes for the payment of the consideration due Kirkland, one of which was for $107 and the other for $200; and Kirkland, on the same day, executed, under his hand and seal, an instrument of writing, though inartificially expressed, in substance nothing more than an obligation binding him to assign to Caldwell and McWhorter the obligation of Reynolds for a title to the land, whenever the $307, which they had undertaken to pay, should be discharged. The note for $107 was afterwards discharged, in a horse paid by Cald-

well to Kirkland; but the other note still remains unpaid; and, owing to the insolvency of both Caldwell and McWhorter, Kirkland has been unable to coerce payment thereof by the most vigilant prosecution of a suit against them on the note.

Subsequent to this Caldwell purchased from McWhorter his interest in the land; and after Caldwell had become insolvent and taken the oath administered to that class of debtors, he, on the 10th of March, 1814, assigned to Frazier, for a valuable consideration, the obligation which had been given by Kirkland to him and McWhorter.

Kirkland, after having prosecuted his suit on the $200 note, finding that he was unable to coerce payment from Caldwell and McWhorter, determined to sell the land for which he held Reynolds' obligation; and, on the 11th of May, 1814, actually sold and assigned the obligation of Reynolds to Henry P. Broadnax, for the sum of $248, at the same time making known to Broadnax the circumstances in relation to the obligation which he had previously given to Caldwell and McWhorter. At the time of making the purchase from Kirkland, Broadnax appears, however, to have held two other claims to part of the land, under patents which had previously issued from the commonwealth; and he alleges that he was induced to make the purchase from Kirkland, to avoid litigation, although he insists that the claims which he then held are of paramount validity to that purchased of Kirkland. Subsequent to this, Broadnax proceeded to pay $35.75, the amount which remained unpaid of the state price, and obtained a patent in his own name for the land purchased of Kirkland.

2. The foregoing are the prominent facts presented in the record, and upon which the present contest must be decided; and the question presented for the consideration of this court is, whether or not the circuit court was correct in dismissing the bill of Frazier, asserting claim to the land through the assignment of Kirkland's obligation to Caldwell and McWhorter and offering to pay the amount of the principal, interest and costs of the judgment recovered by Kirkland against Caldwell and McWhorter, and the amount paid by Broadnax to the state on obtaining the patent, and praying that Broadnax may be compelled to convey the land by a deed with general warranty, and for general relief.

In the consideration of this case, it must be conceded that Broadnax, in consequence of his purchase from Kirkland, cannot assume a more favorable attitude than Kirkland would, were the legal title in him, and the suit had been brought by Frazier to compel him to surrender it; for, having purchased from Kirkland, with a knowledge of the obligation which Kirkland had previously given to Caldwell and McWhorter, Broadnax must be considered as holding the title subject to any equity which that obligation may have imposed on Kirkland. It is, also, equally clear that Frazier cannot have acquired any additional equity to that which Caldwell and McWhorter derived from the obligation of Kirkland by his subsequent purchase of Kirkland's obli-

gation. By that purchase, Frazier has become the assignee of Kirkland's obligation to Caldwell and McWhorter; but he was not induced by any act of Kirkland to make the purchase; and holding the obligation merely in the character of an assignee, in seeking a specific execution of that obligation, his claim must be subject to any defence which might have been urged against it in the hands of Caldwell and McWhorter.

3. Throwing out of view, therefore, any peculiar merit which either Broadnax or Frazier can have derived under their respective purchases, the present contest must mainly turn on the question, whether or not under the circumstances displayed in evidence, Caldwell and McWhorter, before the sale to Frazier, would have been entitled to the aid of a court of equity, to enforce, specifically, the execution of the stipulations contained in the obligation given to them by Kirkland. And if any thing like promptness and good faith is required in the fulfilment of stipulations entered into by a complainant seeking the aid of a court of equity, we apprehend they would not; for they have not only failed to discharge the amount which they undertook to pay Kirkland, upon his executing the obligation to them, but they have evinced a most inflexible and stubborn backwardness in payment, by baffling all the energies of the process of law sued out by Kirkland for the purpose of enforcing payment. They have, it is true, paid Campbell the balance of the purchase money above that which was to be paid Kirkland, and have paid Kirkland $107, part of $300 which was stipulated to be paid him; but, as the amount paid Campbell formed no part of the consideration for which the land was sold by Kirkland that payment can have produced no obligation on Kirkland to convey; and the amount paid Kirkland not being more than a little above one third of the consideration for which he sold the land, should not, after such a backwardness in paying the residue, induce the court to enforce a specific execution of the contract. It is not enough, that a complainant has performed part of the stipulations on his part, to entitle him to the assistance of a court of equity. Justice demands an entire fulfilment of the contract; and that rule which requires of complainants the exercise of good faith in performing their undertakings, forbids the aid of the court in their favor, where, as in this case, after there has been a partial performance of their stipulations, they have evinced a marked design not to perform the residue. In fact, there are other circumstances displayed in this cause, which mark the peculiar propriety of leaving the complainant to his remedy at law. At the time Kirkland gave his obligation to Caldwell and McWhorter, there appears to have been an adverse claim conflicting with that owned by Kirkland, and neither of the claims was then patented; and, from any thing apparent in the record, neither could succeed against the elder patent of the other. It was important, therefore, to the validity of Kirkland's claim, that a patent should be obtained with all practicable dispatch. By the terms of Reynolds' obligation, the state price was to

be paid by Kirkland; and after Caldwell and McWhorter made their purchase the duty devolved on them, of making that payment. A delay of that payment was, therefore, imminently calculated, not only to place in hazard the claim sold by Kirkland; but as Caldwell and McWhorter had both become insolvent, the prospect of Kirkland obtaining indemnity out of the land for the consideration unpaid, was thereby greatly diminished. After being involved in such a dilemma, by the backwardness and delay of Caldwell and McWhorter, the only safe alternative which could have been pursued by Kirkland, was that adopted by him to sell the land to Broadnax, the proprietor of the other claim; and having done so, Frazier, claiming under those who by their delay had produced that necessity, ought not to receive the assistance of a court of conscience; and, consequently, his bill was properly dismissed by the circuit court.

The decree must, therefore, be affirmed with costs.

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## KIMBROUGH v. CURTIS et al.

(Supreme Court of Mississippi, 1874. 50 Miss. 117.)

Error to the Chancery Court of Leflore County. Hon. J. J. Hooker, Chancellor.

The opinion of the court contains a sufficient statement of the case.

SIMRALL, J.[90] A. L. McCaskill, the complainant's intestate, agreed in writing to sell and convey to Curtis, a certain tract of land; the conveyance to be made upon payment of the purchase money. By a separate instrument, either a bond or a promissory note, Curtis obligated himself to pay, "when the first steam car shall run on the Mississippi Central Railroad, through any part of Carroll county," which event, the complainant alleges, occurred on or about the first of February, A. D. 1860.

In 1862, Curtis sold and conveyed the land to defendant, Thomas Walton, who had notice of the contract with Curtis. The bill was filed by O. L. Kimbrough, administrator of the estate of A. L. McCaskill, deceased, for relief in the nature of specific performance, that is to say, that unless Walton shall pay by a short day the purchase money, then that the land shall be sold. The complainants tendered with their bill, a deed purporting to be executed by the heirs of McCaskill to Curtis.

To this bill, Walton filed an answer disclaiming all interest in the subject matter of the suit alleging that before the suit was brought, he had conveyed the land to Mary Ann Walton and to Shields.

The complainant then filed an amended and supplemental bill, making Mary Ann Walton and Shields defendants, and asking against them the relief sought in the original bill against Thomas Walton.

[90] Part of the opinion is omitted.

It appears that the court permitted Walton to withdraw his answer, and disclaimer to the original bill; and to file a demurrer thereto. * * *

The relations and rights of the several parties are these: the complainant is a creditor, with the benefit of the security attending the debt. The vendee, the debtor, is entitled to a proper assurance of title on parting with his money, or his assignee is subjected to the same responsibility. The law esteems the title as retained by the vendor as security for the purchase money. The assignee of the purchaser takes the equitable title incumbered with a quasi lien for the debt to the original vendor.

When the administrator of the vendor is the complainant, asserting against the assignee of the vendee the security held by him for the debt, the heirs of the vendor are necessary parties, so that their title may be divested. That must be so, unless the administrator tenders a proper deed from the heirs. But the complainant alleges in his original bill, that Curtis sold and conveyed the land in 1862 or 1863, to Thomas Walton, and offers, with his bill, a deed executed by the heirs, in 1870, to Curtis. The conveyance to Walton operated a transfer from Curtis of his equity, and substituted Walton to all of his rights under the title bond. Under the allegations of the original bill, Walton could not have been required to accept that deed as fulfilling the measure of his rights as assignee of Curtis.

But the supplemental and amended bill alleges that Walton had sold and conveyed to Mary Ann Walton and Shields. To entitle the complainant to relief against them, he should have tendered a deed from the heirs to them; or he should have made the heirs parties, and prayed a specific performance of the original contract with Curtis, and on a failure of these assignees to pay, then the lands be sold.

We have held in a case, analogous to this, that the assignee of the note for the purchase money could sustain a bill against the vendor and vendee, or their respective representatives, to enforce the lien and for a specific performance of the contract of sale; and that it was no objection to the bill, that a deed was not tendered; for the title did not reside in the complainant, and he could only reap the benefit of his equity by demanding that the parties to the contract of sale shall be held to the performance of their respective covenants.

In this case the complainant may resort to the security of his intestate for the debt. But his equity upon the land should not be meted out to him, at the expense of the respective rights of parties arising out of the contract of sale. That can be conserved to them by making them parties to the suit, and adjusting the decree according to their respective equities.

Under neither of the bills could this sort of relief have been administered. It was proper, therefore, to have sustained the demurrer.

We think enough appears in the complainant's bills to show, upon a proper statement of his case, he may have relief. We do not think

that it is necessary that the complainant should aver in his bill a tender of a deed from the heirs, before suit brought, nor is he bound to offer such a deed with his bill. It may be impossible for him to induce the heirs to execute a conveyance. The reason of the authorities cited does not apply.

We do not think the bill amenable to the objection, that the contingency stated for the payment of the purchase money, is a wagering or gambling contract. At the date of the obligation, The Mississippi Central Railroad was being constructed. When the contingency would happen was uncertain; but it was reasonably certain, according to appearances, that the event would take place at some time in the not remote future. We waive the point made in the demurrer on the statute of limitations, and leave that open if the litigation shall be continued. It does not distinctly appear whether the debt was evidenced by bond or promissory note, nor are dates stated with sufficient precision.

The decree sustaining the demurrer is affirmed; so much as dismisses the bill is reversed, and cause is remanded, with leave to complainant to amend his bill; if not amended, then the chancellor shall dismiss it.

Appellant to pay the costs in this court.

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## SECTION 5.—EQUITABLE INTERESTS AND BURDENS ARISING FROM RESTRICTIVE AGREEMENTS

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### MANN v. STEPHENS.

**(In Chancery before Sir Lancelot Shadwell, 1846. 15 Sim. 377.)**

In 1838, T. Smith, being seized in fee of a piece of land near Gravesend, in Kent, on which he had built three houses, sold and conveyed one of the houses to J. T. Scott, and covenanted, for himself, his heirs and assigns, with Scott, his heirs and assigns, that an adjoining piece of land, of which also he was seized in fee, should, forever thereafter, remain and be used as a shrubbery or garden, and that no house or other building should be erected on any part of it, except a private house or ornamental cottage, and that only on a certain part of it called The Dell, and so as to be an ornament, rather than otherwise, to the surrounding property. In October, 1845, the house, after several mesne conveyances, became vested in the plaintiff in fee. In 1843, T. Smith sold and conveyed the piece of land, to which the covenant related, to H. W. Smith in fee; and H. W. Smith entered into a covenant with T. Smith, similar to that which T. Smith had entered into with Scott. H. W. Smith afterwards sold the piece of land to F. Chinnock, of

whom the defendant purchased it in November, 1845; and, in January following, H. W. Smith conveyed it to him. The defendant, at the time of his purchase, had actual notice of the covenant entered into by H. W. Smith with T. Smith, and constructive notice of the original covenant; but nevertheless, he began to build a beer-shop and brewery on part of the land not in The Dell. Whereupon the bill was filed for an injunction to restrain him from proceeding with those buildings, and from erecting any other building on the land, except a private house or ornamental cottage, to be erected in The Dell, and so as to be an ornament, rather than otherwise, to the surrounding property.

Mr. Bethell and Mr. J. T. Humphry now moved for the injunction, on the ground that the defendant purchased the piece of land with notice of the covenant. They referred to The Duke of Bedford v. The Trustees of the British Museum, 2 Myl. & K. 552, Whatman v. Gibson, 9 Sim. 196, and Rankin v. Huskisson, 4 Sim. 13.

Mr. Stuart and Mr. Mee Matthew, contra, said that there was no privity between the plaintiff and the defendant; and that the burden of the covenant did not run with the land. They cited Spencer's Case, 5 Rep. 31b, Hemingway v. Fernandes, 13 Sim. 228, and Keppell v. Bailey, 2 Myl. & K. 517.

Mr. Bethell, in reply, said that he did not ask for the injunction upon a legal, but upon an equitable ground; namely, that the defendant purchased the piece of land with notice of the covenant.

THE VICE-CHANCELLOR was clearly of opinion that the erecting of the beer-shop and brewery was a gross violation of the covenant. And, accordingly, he granted an injunction to restrain the defendant from erecting, on the piece of land, any brewery or other building except one private house or ornamental cottage, to be erected in The Dell, and so as to be an ornament, rather than otherwise, to the surrounding property.

The plaintiff, afterwards, obtained an order for the commitment of the defendant, on the ground that he had committed a breach of the injunction. The defendant appealed to the Lord Chancellor, from that order, and also from the order for the injunction.

His lordship considered that the injunction was properly granted, but directed the order for it to be varied, by omitting the words, "and which shall be ornamental, rather than otherwise, to the surrounding property," as being too indefinite. His lordship directed also that the order for the commitment of the defendant should be discharged, because the evidence of the breach of the injunction was not sufficient to justify it; and that the motion should stand over, with liberty, to the plaintiff, to bring an action on the covenant.

## TULK v. MOXHAY.

(In Chancery before Lord Cottenham, 1848. 2 Phil. Ch. 774.)

In the year 1808 the plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the square, sold the piece of ground by the description of "Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same," to one Elms in fee: and the deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors, and administrators:

"That Elms, his heirs, and assigns, should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure Ground."

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with the vendor: but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed this bill for an injunction; and an injunction was granted by the Master of the Rolls, to restrain the defendant from converting or using the piece of ground and Square Garden, and the iron railing round the same, to or for any other purpose than as a Square Garden and Pleasure Ground in an open state, and uncovered with buildings.

On a motion, now made, to discharge that order,

THE LORD CHANCELLOR (without calling upon the other side). That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract; the owner of certain houses in the Square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the cove-

nant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. There are not only cases before the Vice-Chancellor of England, in which he considered that doctrine as not in dispute; but looking at the ground on which Lord Eldon disposed of the case of the Duke of Bedford v. The Trustees of the British Museum, 2 My. & K. 552, it is impossible to suppose that he entertained any doubt of it. In the case of Mann v. Stephens before me, I never intended to make the injunction depend upon the result of the action; nor does the order imply it. The motion was, to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also to dissolve the injunction. I upheld the injunction, but discharged the order of commitment, on the ground that it was not clearly proved that any breach had been committed; but there being a doubt whether part of the premises on which the defendant was proceeding to build, was locally situated within what was called the Dell, on which alone he had under the covenant a right to build at all, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to prejudice the plaintiff in his right to bring an action if he thought he had such right, and, therefore, I gave him liberty to do so.

With respect to the observations of Lord Brougham in Keppell v. Bailey [2 M. & K. 547] he never could have meant to lay down, that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.

I think the cases cited before the Vice-Chancellor and this decision of the Master of the Rolls perfectly right, and, therefore, that this injunction must be refused with costs.

## LORD MANNERS v. JOHNSON.

(In Chancery before Sir Charles Hall, 1875. 1 Ch. Div. 673.)

HALL, V. C.[91] * * * This suit embraces two distinct objects: the one to restrain the defendant from encroaching and bringing forward the general front of the two houses in question; and the other to restrain him from allowing the bay windows in these houses to remain. I shall deal first with the latter object. * * *

The covenant is a covenant by the defendant that he will not "erect any building on the said premises Nos. 1 and 2, Palace Road" (that is, upon the two sites), "nearer to the said Palace Road than the line of frontage of the present houses in Palace Road." And then it goes on, "but shall observe a straight line of frontage with the line of houses Nos. 3 to 8, Palace Road, aforesaid." As I read that, there is a positive obligation on the defendant not to erect any buildings on the two sites nearer to Palace Road than the line of frontage of the houses in Palace Road, which is not in any way qualified or detracted from by the following words, "but shall observe a straight line of frontage with the line of the existing houses." I consider it is an independent covenant in its first part, not in any way restricted or cut down to mean merely that he will observe in his buildings "a straight line of frontage with the line of houses." But if it be not a separate obligation, reading the whole of the obligation, and treating it for this purpose as if it were all to be taken together, then it appears to me there is a plain obligation in that clause that there shall be no buildings on those two sites "nearer to the said Palace Road than the line of frontage of the present houses in Palace Road." * * *

Then it is said it is not a case for a mandatory injunction, because, although the covenant may be such as I have held it to be, not only is the amount of damage and injury nil, but more than that, what has been done is actually an improvement to the plaintiff's property. Of course the plaintiff is the best judge of what will be an improvement to his own property; but I take it now to be the law that if a covenant of this character is entered into with reference to the position of buildings upon a particular plot of ground as part of a scheme for building upon property, then the party who stipulates for and obtains that covenant does so free from being embarrassed by the question whether any, and if any, what injury or damage is consequent on the breach of the covenant, and that an assign of the benefit of the covenant is in as good a position as the original covenantee. * * *

I see no reason why the court should not exercise its jurisdiction by a mandatory injunction as to the bow windows. I can not listen to suggestions of hardships and loss of value, and so forth. The defendant, by cutting off the bow windows, will have to make every one of

[91] The statement of facts is found in the report of this case printed at page 160, supra, as is also the part of the opinion here omitted.

his rooms that has a bow window smaller, but he must take the consequences of that.

The next and only remaining question is that as to the advance of the main building, which I could not determine, in the present state of the evidence, without sending a surveyor to examine and report and take the measurements. That part of the case the plaintiffs very reasonably and properly have not desired to press, and it therefore becomes only material with reference to the costs of the litigation. Instead, therefore, of incurring the expense of a surveyor's report, I shall not give the plaintiffs any costs of their cross-examination of witnesses, a considerable portion of which was directed to that part of the case; but, with that exception, while granting them a mandatory injunction, I shall give them the costs of the suit.[92]

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## RENALS v. COWLISHAW.

(Chancery Division, 1878. L. R. 9 Ch. Div. 125. Court of Appeal, 1879. 11 Ch. Div. 866.)

By an indenture dated the 29th of September, 1845, Messrs. Hoby, Winterbotham and Russell, as the devisees in trust for sale of a mansion-house and residential property known as the Mill Hill estate, and of certain pieces of land adjoining thereto, sold and conveyed two of

[92] In Equitable Life Assurance Society v. Brennan (1896) 148 N. Y. 661, 671, 43 N. E. 173, 175, the court thus speaks of the law of restrictive covenants: "While it may not be possible to harmonize all the authorities in this country and England on the subject of equitable negative easements, yet a few general rules may be regarded as settled by the cases. It is not necessary, in order to sustain the action, that there should be privity either of estate or of contract, nor is it essential that an action at law should be maintainable on the covenant; but there must be found somewhere the clear intent to establish the restriction for the benefit of the party suing or his grantor, of which right the defendant must have either actual or constructive notice. If the covenant is silent, if there is no mutual agreement or understanding between the various owners creating an easement, if there is nothing in the surrounding circumstances from which mutual rights can be fairly inferred, then no action can be maintained. There is a class of cases where the covenant, by a fair interpretation of its language, is not exclusively for the benefit of the grantor, but of other property owners in the immediate vicinity. Barrow v. Richard (1840) 8 Paige, 351, 35 Am. Dec. 713; Brouwer v. Jones (1856) 23 Barb. 153; Seymour v. McDonald (1847) 4 Sandf. Ch. 502; Lattimer v. Livermore (1878) 72 N. Y. 174. There is still another line of cases where the covenant was for the benefit of specific owners of lots, and reciprocal covenants were entered into. Trustees v. Lynch (1877) 70 N. Y. 440, 26 Am. Rep. 615. There are many cases in this country and England which uphold the doctrine laid down in Tallmadge v. Bank (1862) 26 N. Y. 105, to the effect that, although the legal title be absolute and unrestricted, yet the owner may, by parol contract with the purchasers of successive parcels in respect to the manner of its improvement and occupation, affect the remaining parcels with an equity requiring them also to be occupied in conformity to the general plan, which is binding upon a subsequent purchaser with notice. In the case at bar the covenant running to the grantor only does not, standing by itself, tend in any way to prove the plaintiff's case, while the surrounding circumstances fail to establish any uniform plan of restriction on the eastern half of the block."

these adjoining pieces of land to one Francis Shaw, in fee, and Shaw thereby, for himself, his heirs, executors, and administrators, covenanted with Hoby, Winterbotham and Russell, their heirs, executors, administrators, and assigns, not to build upon the lands thereby conveyed within a certain distance from a particular road leading "to the Mill Hill house and property belonging to the said trustees"; that the garden walls or palisades to be set up along the side of the said road should stand back a certain distance from the centre of the road; that any house to be built on the land adjoining the road should be of a certain value, and of an elevation at least equal to that of the houses on a particular road; and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling houses only. The conveyance did not state that this covenant was for the protection of the residential property, or in reference to the other adjoining pieces of land, or make any statement or reference thereto.

The same trustees also sold about this time other pieces of lands adjoining the Mill Hill estate; and the conveyance to the purchaser in each case contained restrictive covenants similar to those above mentioned. It was alleged by the plaintiffs in their statement of claim that the intention of all the restrictive covenants was to protect and maintain the value of the Mill Hill estate, and to secure the continuance of the surrounding neighbourhood as purely residential in character.

The trustees, in December, 1854, sold and conveyed the Mill Hill estate to T. P. Bainbrigge in fee, and, Bainbrigge having died, his devisees in trust, in September, 1870, sold and conveyed the same estate to the plaintiffs as tenants in common in fee.

In neither of these two conveyances were there covenants similar to those in the conveyance to Shaw, but there was in the conveyance to the plaintiffs a covenant by them with their vendors not to build a public-house or carry on offensive trades upon a particular portion of the property conveyed to them. Neither of the two conveyances recited or mentioned in any way the conveyance or sale to Shaw, or the existence of any restrictive covenant entered into by Shaw or by Gadsby, nor did either of them recite or mention the sales or conveyances of the other pieces of land sold as above mentioned.

There had also been a devolution title with regard to the lands sold to Shaw, for after his death Mary Shaw, the person entitled under his will, in August, 1867, sold and conveyed part of the lands comprised in the indenture of September, 1845, to John Gadsby in fee, who, in his conveyance, entered into covenants with Mary Shaw, her heirs, executors, and administrators, substantially identical mutatis mutandis with the restrictive covenants contained in the indenture of the 29th of September, 1845. And subsequently the lands so conveyed to Gadsby were sold and conveyed (with certain buildings erected thereon) by Gadsby or persons deriving title through him, to the defendants as tenants in common in fee.

The plaintiffs alleged that the defendants were carrying on upon their lands and in contravention of the restrictive covenants first above mentioned, the trade of wheelwrights, smiths, and bent timber manufacturers, and had erected a high chimney which emitted thick black smoke, and that those acts were destructive of the residential character of the neighbourhood, and had deteriorated the value and amenity of the Mill Hill estate. By their action they claimed an injunction to restrain the defendants from carrying on any trade or business upon their lands, and from permitting the buildings erected thereon to be used otherwise than as private houses, and from contravening in any manner the restrictive covenants contained in the indenture of September, 1845.

The principal question argued, and that on which the decision turned, was as to the right of the plaintiffs to sue upon these covenants.

It appeared that no contract had been entered into or representations made, either upon the occasion of the purchase by Bainbrigge from the trustees, or upon the purchase from Bainbrigge by the plaintiffs, that the purchaser should have the benefit of the covenants entered into by Shaw with the trustees.

HALL, V. C. I think this case is governed by Keates v. Lyon, L. R. 4 Ch. 218, by Child v. Douglas, Kay, 560, 5 D., M. & G. 739, as ultimately decided by Vice-Chancellor Wood, 2 Jur. (N. S.) 950, who, after granting an interlocutory injunction in the first instance, refused to grant the plaintiff an injunction at the hearing, and by the case of Master v. Hansard, 4 Ch. D. 718.

The law as to the burden of and the persons entitled to the benefit of covenants in conveyances in fee, was certainly not in a satisfactory state; but it is now well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs, and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, having notice thereof. Who, then (other than the original covenantee), is entitled to the benefit of the covenant? From the cases of Mann v. Stephens, 15 Sim. 377, Western v. MacDermott, L. R. 2 Ch. 72, and Coles v. Sims, Kay, 56, 5 D., M. & G. 1, it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others

where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant: whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important.

The plaintiffs in this case, in their statement of claim, rest their case upon their being "assigns" of the Mill Hill estate, and they say that as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill estate, which they retained; and, therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length, viz., that in such a case a purchaser becomes entitled to the covenant even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by the vendor upon the occasion of the conveyance containing the covenants. It appears to me that the three cases to which I have referred shew that this is not the law of this court; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not shewing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase. Lord Justice Bramwell, in Master v. Hansard, 4 Ch. D. 724, said:

"I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors to enable them to make the most of the property which they retained."

In the present case I think that the covenants were put in with a like object. If it had appeared in the conveyance to Bainbrigge that there were such restrictive covenants in conveyances already executed, and expressly or otherwise that Bainbrigge was to have the benefit of them, he and the plaintiffs, as claiming through him, would have been entitled to the benefit of them. But there being in the conveyance to Bainbrigge no reference to the existence of such covenants by recital of the conveyances containing them or otherwise, the plaintiffs cannot be treated as entitled to the benefit of them. This action must be dismissed with costs.

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*In the Court of Appeal*

This was an appeal by the plaintiffs from a decision of Vice-Chancellor Hall, 9 Ch. D. 125.

Hastings, Q. C., and Renshaw, for the appellants:

We contend that a covenant must be treated in equity as running with the land to assigns of the covenantees if three requisites are satisfied—1, that the covenant must extend to assigns; 2, that the person claiming the benefit of the covenant must be assign of the same estate as the covenantee; and, 3, that there is not anything in the nature of the transaction to shew that it was not the intention of the parties that the covenant should run with the land.

[JAMES, L. J. With what land do you say that the covenant runs? If the vendors had also had property in Yorkshire, a purchaser of that would have been an assign. Could he enforce the covenant?]

We say it runs with the Mill Hill estate, which is mentioned in the covenant as belonging to the trustees. The covenant cannot have been intended for their personal benefit, but must have been intended to enure for the benefit of the neighbouring unsold lands. We are equitable assignees of the covenant. Western v. MacDermott, Law Rep. 1 Eq. 499; Id. 2 Ch. 72.

[JAMES, L. J. There a particular field was clearly referred to, and it was a case of reciprocal rights.

BAGGALLAY, L. J. Both parties derived title under a deed embodying a general building scheme.]

The Master of the Rolls puts it on this, that the covenant was a covenant entered into for the benefit of the unsold property, and that the plaintiff, as assign of part of that property, was entitled to the benefit of the covenant. The Vice-Chancellor holds that it is not enough for the subsequent purchaser to be an assign of the land, but that he must shew an intention to give him the benefit of the restrictive covenants. This is a novel doctrine, and inconsistent with what was said by Lord Hatherley in Child v. Douglas, 2 Jur. (N. S.) 950.

[BAGGALLAY, L. J. Was not the land there laid out according to a building scheme?]

Yes; but we say it is not necessary that there should be any express

notice or mention of the restrictive covenant. The purchaser takes the land with the advantages appurtenant to it.

[JAMES, L. J. Is there any case to shew that if the owner of 100 acres sells an acre, taking a restrictive covenant, and sells the remainder in lots of an acre each, every one of the ninety-nine purchasers can enforce the covenant against the purchaser of the first acre?]

The case does not seem to have occurred at law, but in equity there are Mann v. Stephens, 15 Sim. 377, and Eastwood v. Lever, 4 D., J. & S. 114, where the law is laid down in our favour, though the plaintiff there was held to have lost his right by acquiescence.

[JAMES, L. J. There was a building scheme, and the covenants were entered into for maintaining the general character of the neighbourhood. If the general character of the neighbourhood changes the obligation ceases: Duke of Bedford v. Trustees of British Museum, 2 My. & K. 552.]

Child v. Douglas, 2 Jur. (N. S.) 950, is an authority that express words are not wanted. Here we have all the elements of that case. In Eastwood v. Lever no doubt stress is laid on the particular ground mentioned in the judgment, but there is nothing laying down that in the absence of that ground the plaintiff could not have sued. The Vice-Chancellor thought that this case was governed by Keates v. Lyon, Law Rep. 4 Ch. 218, but there the covenant did not mention assigns.

[JAMES, L. J. That is immaterial in equity, though it is important on the question whether a covenant runs with the land at law.]

In Master v. Hansard, 4 Ch. D. 718, the plaintiff was not assign of the same estate as the covenantee; he was only another lessee under the covenantee.

W. Pearson, Q. C., and Bury, for the respondents, were not called upon.

JAMES, L. J. I am of opinion that the decision of Vice-Chancellor Hall is correct. It is impossible, as it seems to me, to distinguish this case from the cases to which he has referred. To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into. Supposing I were now framing the deed afresh, I should not have the remotest idea how the covenant ought to be framed, as I can not tell what the property was which the parties intended to be protected, and within what limits.

I do not think it necessary to add anything more, except that I entirely concur with every word of the judgment of Vice-Chancellor Hall.

BAGGALLAY, L. J. I am of the same opinion with the Lord Justice, and I adopt entirely the language of the Vice-Chancellor in his judgment, as reported, 9 Ch. D. 125.

THESIGER, L. J. I am of the same opinion.

## SHARP v. ROPES.

(Supreme Judicial Court of Massachusetts, 1872. 110 Mass. 381.)

Bill in Equity. * * *

AMES, J.[93] The case finds that Stephen Heath, being the owner of the entire tract of land, caused it to be laid out in eleven separate building lots. A plan, showing the streets that were to be opened, and the different lots, with their respective dimensions, areas and numbers, was duly recorded in the registry of deeds; but this plan furnishes no intimation of an intention on the part of the grantor to impose any restriction whatever upon purchasers, in regard to the manner in which they were to occupy or build upon the lots which they should purchase. Of the five lots upon the northerly side of Gordon street, lot 10 was built upon by the grantor himself, he having erected a dwelling-house thereon, which has been occupied by his family since his decease. Lot 8 and a portion of lot 7 were sold and conveyed by him to George G. Drew, and have since been conveyed to the plaintiff. The remainder of lot 7 and the whole of lot 6 were conveyed to the defendant. Thus, of the five lots lying on the northerly side of that street, three were conveyed by said Heath to two separate purchasers, subject to the conditions and restrictions recited in the plaintiff's bill. There is no suggestion that the other two lots were subjected to any restriction of the kind.

It is not claimed that, in regard to any of the lots, there was any written covenant by the grantor, and it does not appear that there was any express stipulation or direct assurance on his part, that any person who should purchase a lot on the north side of that street should have the benefit of a restriction binding all the other purchasers to leave an open space between their dwelling-houses and the street. The only ground upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building, by which each one would acquire a right in the nature of an easement in the land purchased by the others, is to be found in the fact, that in his transactions with two separate and independent purchasers, the grantor conveyed a portion of the land in each case, subject to the terms and conditions set forth in the bill of complaint. It is true, that of these conditions, the one prohibiting the prosecution of any offensive trade or manufacture upon the premises, or the using of them for the keeping of swine, or of a livery stable, would in practice be beneficial to the neighborhood generally. But it is to be remembered that the grantor had himself built a dwelling-house in that immediate neighborhood, and the provision which he made for the prevention of nuisances may have been intended for the benefit of that particular house.

It is undoubtedly true, and has often been decided, that where a tract

[93] The statement of facts is omitted.

of land is subdivided into lots, and those lots are conveyed to separate purchasers, subject to conditions that are of a nature to operate as inducements to the purchase, and to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other grantee. Whitney v. Union Railway Co., 11 Gray, 359, 71 Am. Dec. 715; Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632; Linzee v. Mixer, 101 Mass. 512; Tulk v. Moxhay, 2 Phil. Ch. 774. But in the case at bar there is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed points out the mode in which he, his heirs or devisees may enforce it. Neither of the deeds, under which these parties respectively claim, purports to give to the grantee any such right against any other grantee. For aught that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continued to own the dwelling-house. The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained.

The cases cited and relied upon by the plaintiff's counsel do not appear to us to meet this difficulty. In Tallmadge v. East River Bank, 26 N. Y. 105, a landowner in New York City had laid out a street sixty feet in width, and had sold the building lots on each side, making use in the sales of a plan which showed that an open space was to be reserved in front of each lot. The purchasers bought under this plan, and with the express assurance that it should be adhered to, and their right to enjoy the promised advantages was sustained by the court. In Hills v. Miller, 3 Paige (N. Y.) 254, 24 Am. Dec. 218, the owner had sold a tract of land, giving at the same time a bond that a smaller triangular lot belonging to him, in front of the lot sold, should not be occupied with buildings. The court held that the deed and the bond constituted one contract, and created an easement which could be enforced against any purchaser of the triangular lot, with notice. In Barrow v. Richard, 8 Paige (N. Y.) 351, 35 Am. Dec. 713, an estate had been subdivided into a large number of building lots, which the owner had conveyed by deeds to various purchasers, with express covenants against all trades, &c., offensive to "the neighboring inhabitants." The English cases also cited, Child v. Douglas, Kay, 560, Coles v. Sims, 5 De G., M. & G. 1, and Western v. MacDermott, L. R. 2 Ch. 72, are all of them cases in which a general building plan, or uniform system and mode of occupation, had been distinctly established and made a part of the title conveyed, in express terms, either by the

deed itself, or by some covenant or obligation connected with it by reference. But we find nothing in the terms of the conveyance, or in any reference to a plan or covenant, or in the circumstances of the transaction, or the situation of the property, that will justify us in saying that any such general plan or system was intended by the grantor to be established for the benefit of grantees, or to make a part of their respective titles. The case in our judgment is closely analogous to Badger v. Boardman, 16 Gray, 559, Jewell v. Lee, 14 Allen, 145, 92 Am. Dec. 744, Hubbell v. Warren, 8 Allen, 173, 178, and is disposed of according to the law decided in these cases, by an order that the

Bill be dismissed, with costs.

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## MANDER v. FALCKE.

(Court of Appeal. [1891] 2 Ch. 554.)

LINDLEY, L. J.[94] This is an appeal by George Edward Hinde from an injunction restraining him and his son, George William Hinde, from using, or permitting certain premises to be used, as a brothel or disorderly house, or from doing, causing, permitting, or suffering therein anything which may grow to the annoyance, damage, injury, prejudice, or inconvenience of the premises or of the adjoining property of the plaintiffs. The plaintiffs are the freehold reversioners of the house in question. A lease of it was granted by their predecessor in title, and the defendant Falcke is entitled to the benefit of this lease, subject to an underlease, which, in 1889, was assigned to George William Hinde, who has not appealed. The father appeals on the ground that he has nothing to do with the property. Now, what the business relations between the father and son are is very obscure. Whether the father acquired the underlease in the son's name is uncertain, but that the father has much more to do with the business carried on in the house than he wishes us to believe appears to me quite clear. After perusing the affidavits, I have not the slightest doubt that the father is substantially the person interested in the business, and that the son is put forward as a screen. I have no doubt that the father is managing the house; and that he does so with full notice of the terms on which the son holds the property. I feel certain that he has a pecuniary interest in the concern. I do not proceed on the hypothesis that he is cestui que trust of the underlease, for that is uncertain. I treat him simply as an occupier managing the business. He may be neither an assignee nor purchaser, but he is in occupation, and that is enough to affect him, he having notice of the covenants in the lease. I have not followed all the cases from Tulk v. Moxhay, 2 Ph. 774, but in Wilson v. Hart, Law Rep. 1 Ch. 463, it was held that a tenant from year to

[94] The statement of facts and the concurring opinions of Bowen and Fry, L. JJ., are omitted.

year was bound in equity by a restrictive covenant of which he had express notice, and though I cannot say that it has been decided that a mere occupier is in the same position, I am satisfied on principle that a simple occupier comes within the decision of Lord Cottenham in Tulk v. Moxhay. The appeal will be dismissed.

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## BARNEY v. EVERARD.

(Supreme Court of New York, Special Term, New York County, 1900. 32 Misc. Rep. 648, 67 N. Y. Supp. 535.)

Action by Charles T. Barney against James Everard for an injunction restraining the erection of an apartment house.

BEEKMAN, J. Prior to the date hereinafter mentioned one Thomas J. Robinson was the owner of a plot of ground on the southerly side of 120th street, distant 300 feet westerly from Fifth avenue, and having a frontage on said street of 160 feet. On the 23d day of June, 1892, he sold and conveyed to Malvina Hammerstein the extreme westerly portion of said property, beginning 410 feet from Fifth avenue, and extending westerly 50 feet. This deed of conveyance contained a covenant on the part of the grantee in the following words:

"And the party of the second part, by the acceptance of these presents, hereby covenants that she will not erect, or permit to be erected, on any part of the aforesaid premises fronting on One Hundred and Twentieth street, any building other than a private dwelling house or houses; it being understood, however, that a private stable may be erected at a distance not less than sixty feet from the curb line, and on the rear of the westerly twenty-five feet of the lots hereby conveyed."

The balance of the property owned by Robinson was subsequently sold by him in parcels from time to time, but without any restriction of any kind whatsoever with respect to their improvement or use. On February 8, 1897, Mrs. Hammerstein conveyed to one McGrann the easterly portion of the premises which she had acquired under the above-mentioned deed, having a frontage of 20 feet. On February 15, 1898, the latter conveyed the same property to one Kellar, who on July 28, 1898, in turn conveyed the same to the plaintiff in this action. In none of these deeds was any reference made to the restrictive covenant above mentioned, nor did any of them contain any covenant or agreement on the part of the grantee or the grantor respecting any such restriction. On March 3, 1898, the defendant acquired title to the remaining 30 feet of the Hammerstein parcel. Upon this parcel the defendant purposes to erect a first-class, fireproof apartment house, which is to be eight stories in height, and so constructed as to accommodate one family on each floor, and the family of a janitor in the basement. The plans provide for an electric passenger elevator opening on each floor, there being on three sides of the interior of the elevator shaft a passageway, and a doorway opening into the respective apartments is to be through the wall on

each story which faces the doorway of the elevator. The object of this action is to secure injunctive relief, prohibiting the defendant from erecting such building, on the ground that it is not a private dwelling house, within the meaning of the covenant above referred to. The defendant resists the action on two grounds: First, that the proposed building is a private dwelling house, and that consequently no violation of the restriction is contemplated; and, second, that, in any event, the plaintiff is not entitled to maintain this action, because the restrictive covenant in question, which he seeks to have specifically performed, was not made or executed by Robinson for the benefit of the plaintiff or his lot, and that he has therefore no easement in, or right over, the defendant's land arising out of the existence of said covenant.

Logically, the ground last above mentioned should be first considered and disposed of; for, if it should be sustained, it finally disposes of the action, and the plaintiff would have no interest in the determination of the question as to whether what the defendant proposes to do is or is not contrary to the covenant. In support of his right to maintain the action, the learned counsel for the plaintiff cites the case of Brouwer v. Jones, 23 Barb. 153. The facts of this case, briefly stated, are as follows: Brouwer & Mason were the owners of a certain tract of land in the city of Brooklyn, which was divided up into city lots, two of which they sold to one Sands, who in turn conveyed the same to one Arents, by whom they were demised to the defendant Jones for a term of five years. Previous to the said conveyance so made to Sands, Brouwer & Mason had sold and conveyed other lots in the vicinity of the said two lots, and embraced in the same tract of land, to the plaintiffs or to the grantors of the plaintiffs. In all of said conveyances made by Brouwer & Mason to Sands, as well as to the plaintiffs and their grantors, there was contained an express covenant on the part of the respective grantees to the effect that at no time should there be erected, established, or carried on in any manner, on the premises so granted, any slaughter house, tallow chandlery, etc., or any manufactory, trade, business, or calling whatever, which might be in any way dangerous or noxious or offensive to the neighboring inhabitants. The action was brought to restrain the defendant from carrying on a sawmill which he had erected upon the premises that had been demised to him, which was alleged to be noxious and offensive, and therefore against the covenant in question. Although not referred to in the statement of facts contained in the report, it appears from the opinion of the court that the objection was raised by the defendant that one of the plaintiffs, Philbrick by name, deduced his title through Sands, the defendant's grantor, and the original covenantor in the covenant in question, and that for that reason the action could not be maintained, so far as that plaintiff was concerned. As this objection was disposed of adversely to the defendant's claim, this case is relied upon by the learned counsel for the plaintiff as disposing of the contention of the defendant in this case which is now under discus-

sion. The principal question which was decided in the case will appear from the following quotation from Judge Emott's opinion (page 162):

"The object of the covenants inserted in the deeds of all the lots included in the tract of which the lots both of the plaintiffs and defendants are a part was to protect the whole tract, and every lot belonging to it, whether in the hands of the original owners or of any subsequent grantees, from nuisances or offensive and injurious erections or occupations. Every conveyance from Brouwer & Mason contained such a covenant, and every lot conveyed by them had an easement in every other lot to forbid or restrain its use or occupation in any offensive way. And therefore I am unable to see in what respect the relative dates of the conveyances to the grantees of Brouwer & Mason can make any difference. Every such covenant, in every deed given by them, was intended, not only for their benefit, but also for that of their prior as well as subsequent grantees, and created this easement in behalf of the whole property. This court may therefore very properly be asked to interpose in behalf of any of the owners of the lots, as being parties for whose benefit the covenants were made."

With respect to the plaintiff Philbrick and his right to unite with the other plaintiffs in seeking equitable relief for the enforcement of the covenant, the court says (page 162):

"One of the plaintiffs deduces his title through Sands, the defendant's grantor, and the original covenantor in the covenant in question. I think this is wholly immaterial. Title to lands within the tract, for the common benefit of which this easement was created, is the only requisite, as I view this case, to support such an action as this to restrain any violation of this covenant by any proprietor."

No further reference to this feature of the case is made. In my opinion, the case at bar is so radically different from that of Brouwer v. Jones that the latter cannot be regarded as an authority controlling its disposition. There all of the conveyances affecting each lot in the entire tract contained similar covenants, which were intended for the benefit of every other lot in the tract. Out of this condition there was associated with the burden which each lot was under a benefit arising out of the covenants contained in the deeds affecting each and all of the other lots. Thus, there existed in favor of each lot an easement, as it has been called, in each of the other lots intended to be benefited by the system of restriction which was adopted by the original owners of the tract. But no such condition exists in the case at bar. Obviously the only intention that Robinson had in imposing the restriction in question only upon the parcel conveyed to Mrs. Hammerstein was to protect and benefit himself and his grantees in his and their enjoyment of the balance of the tract of which the Hammerstein lots formed a part. Certainly, the restriction in question was not a benefit to Mrs. Hammerstein, and it is impossible to see how, under this covenant, it can be said that in her hands there could be any easement arising out of the restriction in favor of any one portion of her property over any other portion of the same, the relation of dominant and servient tenement being impossible where both pieces of property are under the same ownership. Had she, in conveying the parcel now owned by the plaintiff, inserted any provision which gave to her grantee the benefit of the restriction with respect to the remain-

der of the property (of which the defendant is now the owner), a different case would have been presented; but nothing of this kind was done, for, as we have seen, such deed made no reference in any way whatsoever to the restriction in question or to any other. Having reached the conclusion that the covenant in question was not one for the benefit of the plaintiff or his grantors, and that he has acquired no right to the enforcement of the same, it follows that there must be judgment for the defendant dismissing the complaint. In view of this conclusion, it becomes a matter of no importance whether the building which the defendant proposes to erect is within the covenant or not, and a discussion of that point is therefore unnecessary. Judgment for the defendant, dismissing the complaint, with costs.

Judgment for defendant, with costs.

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## VANSANT et al. v. ROSE.

**(Appellate Court of Illinois, 1912. 170 Ill. App. 572.)**

Appeal from the Circuit Court of Cook County, the Hon. Adelor J. Petit, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1912.

MR. JUSTICE F. A. SMITH [95] delivered the opinion of the court.

This is an appeal from an interlocutory order granting an injunction to restrain an appellant upon a bill supported by affidavits from a breach of covenants or restrictions in a deed through which she acquired title.

John C. Vansant, Marcellus E. McDowell and the Guaranty Trust & Savings Deposit Company as executors and trustees under the last will and testament of Marcellus E. McDowell, deceased, filed a bill in the Circuit Court of Cook County against Alvida A. Rose, appellant, to enjoin the defendant from erecting a flat building at the southwest corner of Kenmore and Glen Lake Avenues in Edgewater, and from placing the flat building on the lot lines of the premises, in alleged violation of a covenant in the deed of conveyance from appellees, the complainants in the bill, to defendant's grantor. The court granted an injunction pendente lite on the giving of a bond by appellees in the sum of $5,000.

From the averments of the bill it appears that December 16, 1904, appellees were the owners of the two lots, now owned by appellant, at the southwest corner of Kenmore and Glen avenues. On that day appellees conveyed to appellant's husband Frank A. Rose, the two lots by a deed containing the following restrictive covenants:

"It is hereby expressly covenanted and agreed that neither said party of the second part nor his heirs, executors and administrators, or assigns shall erect any fence, enclosure or obstruction to view on said lots within thirty (30) feet of the front or side street line of said lots for a period of ten years

[95] Parts of the opinion are omitted.

from the date hereof, and shall not build any wall of any building erected on said lots within said thirty feet of the front or side street line of said lots for a period of twenty years from the date hereof without the written consent of said parties of the first part. * * * It is hereby expressly covenanted and agreed that neither said party of the second part nor his heirs, executors, administrators or assigns shall build or cause to be built on said lots any building known as a flat or a tenement building, hereby covenanting to erect thereon only a single private dwelling house (excepting the stable as aforesaid), for a period of twenty years from this date."

This deed was duly recorded and subsequently the title of Frank A. Rose passed to his wife, the appellant, by conveyances. It is the breach of the above covenants in the deed from appellees to Frank A. Rose that appellees seek to enjoin.

The bill nowhere alleges that the complainants own any land in the vicinity of the land conveyed to Frank A. Rose with the restrictions above set forth, nor is there any averment in the bill that appellees now own any land in Edgewater or the city of Chicago or elsewhere which would be affected in the slightest degree by the enforcement or breach of the covenant in question. Appellees rely simply and solely upon the fact that they are the promisees in the covenants of the grantee Frank A. Rose in the above deed, and in legal effect say that they are entitled to enforce that contract specifically in equity solely on the ground that they are parties to it, and that it makes no difference whatever that they own no real estate in the vicinity which will be affected in any way by the enforcement or the violation of the covenants.

Appellant contends that the bill is fatally defective because it does not show that complainants have any right to the beneficial interest in the land affected by the covenants, or in adjoining lands, which will confer upon complainants a property interest in the enforcement of the covenants, and cite in support of her contention High on Injunctions (4th Ed.) vol. 11, p. 1137; Los Angeles University v. Swarth, 46 C. C. A. 647, 107 Fed. 798, 54 L. R. A. 262; Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655; Rector v. Rector, 130 App. Div. 166, 114 N. Y. Supp. 623; and Dana v. Wentworth, 111 Mass. 291.

In support of this contention and under the above authorities it is urged by appellant that the law is that a complainant has no standing to file a bill to enforce a restrictive covenant as to the use of land, unless he has a right or beneficial interest in the land affected by the covenant, or in adjoining land which will confer upon the complainant a property interest in the enforcement of the covenant.

On the other hand, it is contended by appellees that the covenants above set forth in the deed constitute a valid, legal contract, and that its obligatory force is co-extensive with its terms and stipulations; and the theories upon which they predicate the right to the injunction granted by the court are as follows:

First, the theory of a mere negative covenant sustained by adequate consideration, just and reasonable in itself, and without ambiguity, its nature being such that it can be enforced only by injunction;

Second, the theory of a reserved right or interest in the property conveyed, that is to say, the grantors owning the property in fee conveyed it subject to restrictions which are in the nature of encumbrances pro tanto, the purchaser acquiring only a part of the property and the vendor remaining the owner of the rest. The interest thus reserved may be large or small, but, if it is a right in or over the premises in question it is property; the covenant is a property right which the grantor reserves. This theory admits the application of a rule, which seems to embarrass some courts, that such a covenant is in the nature of an easement and must inhere in reserved property to be enforced; and,

The third theory is that the purchaser, having acquired the property at a low price by reason of the restrictions, has received, if the restrictions are not binding, property of the vendor which he ought not to retain, except on terms of the conveyance; so the denial of a remedy is taking a vendor's property without compensation.

In support of this bill appellees cite Hayes v. St. Paul M. E. Church, 196 Ill. 633, 63 N. E. 1040. At page 635 of 196 Ill., and at page 1041 of 63 N. E., it is said:

"* * * An owner has a right to sell his property upon such terms and conditions as he may see proper, and if the terms are accepted by the grantee, and are not objectionable in law, they will be enforced at the suit of the one in whom the right is vested. (Frye v. Partridge, 82 Ill. 267.) If a subsequent owner has taken title with notice, either actual or constructive, of a binding agreement between his grantor and the original owner establishing a building restriction, he will be bound to abide by it and equity will enforce it. The question is whether by the agreement between King and his grantee, this lot was burdened with the restriction for the benefit of the complainant's lot, so that she can enforce the agreement. The restriction was imposed by John A. King and the agreement was with him. Complainant was a stranger to that transaction and there is no covenant or agreement between her and the defendant or its grantor. Her right to enforce the agreement must depend upon her making it appear that it was entered into for the benefit of her lot. In making his conveyance John A. King had a legal right to impose the condition from any motive, and it is immaterial what the motive was, and he could impose it in favor of property which he did not own and which belonged to complainant if he saw fit to do so. When he executed his deed he did not own any other property in the block or in that vicinity. He did not own the lot or house south of the premises which he conveyed, and had no interest in either. * * * The defendant took the premises bound by the agreement, and can be restrained from violating it at the suit of any one having the interest."

* * * * * * * * * *

By accepting the deed containing the restrictions a valid contract is consummated which is enforceable against the grantee and his successors in title and equity will enjoin the breach. Frye v. Partridge, supra; McDougall v. Burrows, 154 Ill. App. 375; Wakefield v. Van Tassell, supra [202 Ill. 41, 66 N. E. 830, 65 L. R. A. 511, 95 Am. St. Rep. 207].

It is not necessary that the right preserved or the restriction imposed be an easement appurtenant to other land, though that situation frequently occurs, and such easements are protected, but in Illinois the right to enforce the contract made by the covenants of the deed

does not depend upon whether there is a dominant estate. Rights in gross will be protected in equity. Frye v. Partridge, supra; Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; Wakefield v. Van Tassell, supra; Eckhart v. Irons, 128 Ill. 568, 20 N. E. 687.

In our opinion the negative covenants in the deed to Rose subjected the loss in question to a lien in the nature of an easement in gross or a personal servitude. When the property was transferred to his wife appellant, she had notice of the servitude, knew that complainants had not conveyed the entire estate to her husband, and that complainants had restricted the use of the lots and reserved in themselves certain rights or interests therein. She therefore took the lots bound by the covenants, and in our opinion may be restrained from violating the covenants. When Rose accepted the deed from complainants she did not acquire absolute and unqualified dominion over the lots. On the contrary it was part of the title which he accepted that he should be limited and restricted in the use of the lots, in important particulars, and such restrictions partake of the nature of an encumbrance upon the lots. * * *

We must be governed by the authorities of this state, and we think they uphold clearly that the contract contained in the deed by which appellees conveyed the property was a valid binding contract, not only upon the grantee in the deed, but upon his heirs and assigns, and that the remedy for a violation of the restrictive covenants is by injunction even though a recovery at law might be sustained. But where, as in this case, there can be no adequate recovery at law, the remedy is clearly by injunction. In our opinion, the authorities further sustain the proposition that an injunction will be granted without reference to any injury to the complainants, and that it will be granted although there is no easement in favor of adjacent property to protect and no injury proved, and whether complainants own property in the immediate neighborhood or not which would be injuriously affected by a violation of the restrictive conditions contained in the deed.

We are of the opinion, therefore, that the order granting the injunction upon the bill and affidavits was proper, and it is affirmed.

Affirmed.

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## In re NISBET AND POTTS' CONTRACT.

**(Court of Appeal. [1906] 1 Ch. 386.)**

A covenant restricting the use of the land had been entered into between the owner and an adjoining owner. Subsequently a squatter on the restricted land held it by adverse possession for twelve years and acquired a statutory title. The covenantee sought to hold the squatter's adverse possession subject to the restrictive covenant.

Held by Farwell, J., that it was so bound. Affirmed on appeal.

ROMER, L. J.[96] * * * In the first place, with regard to the general doctrine concerning a negative covenant, such as we are dealing with in this case, I think that whatever reasons may have been given for the doctrine in the earlier cases, and notwithstanding the way in which the doctrine has been referred to in some judgments in early cases, yet, at the present day, the doctrine ought to be regarded as well settled. I think the law is that such a covenant, when validly created, binds the land in equity, and can be enforced as against subsequent owners of the land, subject only to the limitation that, being equitable, it can not be enforced as against a bona fide purchaser of the land—that is to say, of the legal estate—without notice. This was clearly pointed out by Sir George Jessel, M. R., in the case of London and South Western Ry. Co. v. Gomm, 20 Ch. D. 562, where, referring to Tulk v. Moxhay, 2 Ph. 774, he says this (20 Ch. D. 583):

"The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's Case, 5 Rep. 16a, to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevented the owner of the servient tenement from building so as to obstruct the light."

Then, speaking of a negative covenant, such as not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, he says:

"This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not."

And, as pointed out by my Lord, in subsequent cases that view of the law has been adopted by this court. Indeed, to hold otherwise would lead to a result which, in my opinion, would be lamentable; for, according to the contention of the appellant, the result would be that while any person in occupation of the land claiming through the covenantor, even though only a tenant from year to year or a mere occupant by permission, would be bound by the covenant, yet a squatter going into occupation, without any right or any permission of the true owner, could say that, as between him and the covenantee, the land was freed from the covenant. In other words, the squatter could, as against the covenantee, successfully plead his own trespass as putting him in a better position than if he had gone upon the land by right. I cannot think that the law necessitates any such result. On the contrary, as I have said, in my opinion the negative covenant does

[96] The statement of facts is abridged and part of the opinion of Romer, L. J., and all of the concurring opinions of Collins, M. R., and Cozens-Hardy, L. J., are omitted.

bind the land in equity; and I think that with regard to a subsequent squatter, dealing in the first place with the time before that squatter has acquired any statutory right by lapse of time, inasmuch as he could not say he was a purchaser of a legal estate without notice, he would be bound by the covenant during his squatting, and accordingly the covenant, if he sought to break it, could be enforced against him at the instance and on behalf of the covenantee.

Now that being, in my opinion, the position of the squatter before he has acquired a statutory right under the statute of limitations, let me consider what would be the position of a squatter after a twelve years' occupation under the statute. By that occupation he has no doubt acquired a statutory title as against the covenantor or the heirs or assigns of the land of the covenantor who during those twelve years has, or have been, so remiss as not to eject him; but he does not thereby of necessity become entitled to hold the land free from the obligation of the negative covenant. That obligation is one existing against the title of the true owner of the land. The right of the true owner to the land has, no doubt, gone as against the successful squatter, who has acquired a title against him under the statute, but the original equitable right of the covenantee still exists. It was not a right that could be barred by the operation of the statute of limitations in favour of the statutory squatting owner. The covenantee was not an assign of the land, or of any part of the land, or of any estate in the land, which was capable of being barred by the operation of the statute of limitations; nor was the covenantor a trustee, in any sense, of the land for the covenantee, or of any part of it, or of any estate in it. The covenantee could not, directly or indirectly, by any person representing him and his right, in respect of that right under the restrictive covenant, take proceedings to recover possession against the squatter during the twelve years; and, in the case I am considering, the covenantee would, in my opinion, be no more barred by the operation of the statute of limitations by not taking proceedings against the squatter during the twelve years than he would have been barred by not taking proceedings against the true owner, had that true owner remained in possession during that period.

There is a fallacy, as it appears to me, in the argument of the appellant, and I think it is this: The argument seems to assume that the statutory owner becomes, at the end of the statutory period of limitation, in the same position as if he had ousted by statutory title all the prior owners of the estate so as to destroy all negative covenants validly created by them. That is not so. If A., being really entitled to land, ousts by his superior good title one B. who has created restrictive covenants, or purported to create them, at a time when B.'s title was bad as against A., then, of course, when A. recovers possession, he is not bound by the restrictive covenants, for they were not originally validly created as against him, A.; but if A. is admittedly the true owner in fee in possession of the land at the time when he enters into

valid restrictive covenants binding the land in equity, then a subsequent squatter, even when he ultimately by twelve years' occupation becomes entitled to the land as against A. or his heirs or assigns, cannot be heard to say that A. had no right to enter into the covenants originally, or that those covenants never had any validity as against him, the squatter, or ceased to have validity directly the twelve years elapsed. And certainly that squatter who, if he did not know of the restrictive covenants validly entered into by the true owner, at best could only say that he did not know of them because he made no inquiry as to the title before he squatted, cannot say that he is in the position of a purchaser, as it were, of the land for value without notice. So to hold would, in my opinion, be most unjust towards the covenantee, and would lead to most undesirable consequences affecting many estates in this country now usefully regulated by such restrictive covenants as I am now considering.

Now, that being so, it remains to be considered whether in the present case, the vendor, or the vendor to him, was a purchaser for value without notice. In my opinion, if a purchaser chooses, either by agreement with his vendor or otherwise, to take less than a forty years' title, he cannot by so restricting his investigation, and by not inquiring into the title for the full period of forty years, say that he is not affected with notice of such equities affecting the land as he would have ascertained by reasonable inquiries into the title for the earlier part of the forty years.

The appellant seems to contend that where a vendor has acquired a title merely by possession under the statute of limitations, such a case is to be treated as an exception to the rule I have indicated, and that a trespasser who has acquired a good title by successful trespass for twelve years or more is not bound, or should be treated as not being bound, to make any inquiries whatever as to the earlier title, and should be treated as if he were in the position of a person purchasing and taking a proper title. I cannot agree with that contention of the appellant. I cannot see why a successful trespasser for twelve years, or a purchaser from him, should be placed in a better position than an ordinary owner or vendor, or a purchaser from such ordinary vendor. I do not see that he is entitled to be regarded as being in any peculiarly favoured position. That being so, in the present case neither the present vendor, nor the vendor to him, can say he was a purchaser without notice. If the present vendor, or his vendor, had insisted on a proper title in regard to length being given to him, or had made proper inquiries into that title, it is clear that he must have ascertained the existence of the negative covenants in question. It certainly is, in my opinion, for the vendor in this case to prove the plea of purchaser for value without notice on his behalf, or on behalf of the vendor to him; but he has not discharged the onus so cast upon him. For these reasons I think the appeal fails. * * *

## HAYWOOD v. BRUNSWICK PERMANENT BEN. BLDG. SOCIETY.

(Court of Appeal, 1881. 8 Q. B. Div. 403.)

Appeal from the judgment of Stephen, J., on further consideration. This was an action against a building society, the mortgagees of certain land, upon a covenant to build and keep in repair houses erected upon the land. The facts were these:

By an indenture dated the 17th of May, 1866, made between Charles Jackson and Edward Jackson, Charles Jackson granted a plot of land to Edward to the use that Edward should pay Charles an annual chief rent of £11, and Edward for himself, his heirs, executors, administrators, and assigns, covenanted with Charles, his executors and assigns, that he Edward, his heirs and assigns, would pay Charles, his heirs and assigns, this rent half-yearly, and would erect and keep in good repair, and, when necessary, rebuild, messuages on the land of the value of double the rent. On the 2d of March, 1867, Charles Jackson conveyed to Haywood to the use of Haywood, his heirs and assigns, the said chief rent and all powers and remedies in respect thereof, together with the benefit of the said covenant. Edward Jackson assigned his interest to MacAndrew. MacAndrew by a deed of the 8th of September, 1871, mortgaged the premises in question to certain persons described as the trustees of the Brunswick Building Society in fee subject to the rent-charge and covenants above mentioned. The building society was afterwards incorporated under the Act of 1874, and under the mortgage deed took possession of the land and the buildings on it. It was conceded on the one hand that buildings of the stipulated value had been erected upon the land, and on the other that they had not been kept in repair, and the question was whether, under the circumstances stated, the building society was liable upon the covenant to keep them in repair. No question arose as to their liability to pay the chief rent, as the arrears were paid into court in the action.

The case was tried before Stephen, J., without a jury, at the Manchester Winter Assizes, 1881, who reserved it for further consideration, and after stating the facts as above, gave judgment as follows: * * *

The result is that there must be judgment for the plaintiff, with costs. There will be no damages, the parties having agreed that if it is formally decided that the defendants are to put the buildings in repair, they must be repaired to the satisfaction of a gentleman agreed upon.

The defendants appealed.

Dec. 3. BRETT, L. J.[97] This appeal must be allowed. I am clearly of opinion, both on principle and on the authority of Milnes v.

[97] The statement of facts is abridged, part of the opinion of Brett, L. J., and the concurring opinions of Cotton, L. J., and Lindley, L. J., are omitted.

Branch, 5 M. & S. 411, that this action could not be maintained at common law. Milnes v. Branch, 5 M. & S. 411, must be understood, as it always has been understood, and as Lord St. Leonard's, Sug. V. & P. (14th Ed.) p. 590, understood it, and it will be seen, on a reference to his book, that he considers the effect of it to be that a covenant to build does not run with the rent in the hands of an assignee.

This being so, the question is reduced to an equitable one. Now the equitable doctrine was brought to a focus in Tulk v. Moxhay, 2 Ph. 774, which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necessary to decide here, that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced. Be that as it may, a covenant to repair is not restrictive and could not be enforced against the land; therefore such a covenant is within neither rule. It is admitted that there has been no case in which any court has gone farther than this, and yet if the court would have been prepared to go farther, such a case would have arisen. The strongest argument to the contrary is, that the reason for no court having gone farther is that a mandatory injunction was not in former times grantable, whereas it is now; but I cannot help thinking, in spite of this, that if we enlarged the rule as it is contended, we should be making a new equity, which we cannot do.

I think also that Cox v. Bishop, 8 De G., M. & G. 815, 26 L. J. (Ch.) 389, shews that a court of equity has refused to extend the rule of Tulk v. Moxhay, 2 Ph. 774, in the direction contended for, and that if we decided for the plaintiff we should have to overrule that case. But it is said that if we decide for the defendants we shall have to overrule Cooke v. Chilcott, 3 Ch. D. 694. If that case was decided on the equitable doctrine of notice, I think we ought to overrule it. But I think there is much to shew that the ground of the decision was that Malins, V. C., was of the opinion—wrongly as it now turns out—that the covenant ran with the land, and the decision of the Court of Appeal appears to have proceeded on an admission. * * *

Appeal allowed.[98]

[98] In Cooke v. Chilcott (1876) L. R. 3 Ch. Div. 694, the vendee of land containing a spring covenanted for himself, his heirs and assigns with the vendor to erect and maintain a pumping plant to furnish the land held by vendor with water. Vice-Chancellor Malins held that this covenant, though affirmative, could be enforced (by an indirect decree) under the doctrine of Tulk v. Moxhay, saying:

"That this is a covenant which the court ought to support, if possible, is evident. The defence is rested partly on the ground of the expense which the performance of the covenant would involve. But I cannot listen to a defence of that kind, because the defendant bought the property with express notice of the covenant by which he is bound to supply water to these houses,

and it was for him to consider, when he bought it, whether the covenant did or not involve too great a burden. But the plaintiffs' right is resisted principally on two grounds. First, it is said that the covenant does not run with the land. Now, there is no dispute as to what acts the performance of the covenant requires. The well has been sunk, and the defendant is bound to maintain and keep in repair a steam-engine to be used for supplying the houses with water from it. The defendant also bought with notice of the obligation, and cannot take the property without performing the obligation attached to it. It is, therefore, immaterial whether the covenant runs with the land, but I think it does run with the land. This is the case of two persons claiming title under grants from the same vendor by which one piece of land became bound for the benefit of the other, and the question is whether the covenant can be enforced against the person who contracted to bear the burden. That as between the original parties, it could have been enforced, I cannot entertain a doubt; and I think that it is a covenant which runs with the land for all time. I entertain no doubt that as between contiguous owners, both being sub-purchasers under the same vendor, they take subject to the burden. * * * If the covenant is not binding on the ground that it does not run with the land, the consequence would be that, though these contiguous owners have relied on having it performed, the defendant might from this hour refuse to supply a single gallon of water, and thus every house which has been erected in the expectation that this covenant would be performed might be at once deprived of water. It would be perfectly monstrous that such a defence should be allowed. In my opinion, therefore, the covenant runs with the land, but it is immaterial whether it does or not, because the defendant took with notice of the obligation. * * * I do not think it necessary to go into all the cases which were cited. But I think that when a contract is entered into for the benefit of contiguous landowners, and one is bound by it, and the other entitled to the benefit of it, the covenant binds him forever, and also runs with the land. But it is equally clear that he is bound by taking the land with notice of the covenant. * * *

"Aug. 2. The defendant having appealed against the order overruling the demurrer, the appeal now came on to be heard before the court of appeal. The attention of their Lordships having been drawn to the fact that by the statement of claim it was alleged that the defendant had admitted his liability on the covenant, the court of appeal affirmed the decision of the Vice-Chancellor without going into the points argued before him on the motion."

But this case was overruled. See Austerberry v. Corporation of Oldham, 29 Ch. Div. 750 (1885), where COTTON, L. J., holds: "Here the covenant which is attempted to be insisted upon on this appeal is a covenant to lay out money in doing certain work upon this land; and, that being so, in my opinion—and the court of appeal has already expressed a similar opinion in a case which was before it—that is not a covenant which a court of equity will enforce: it will not enforce a covenant not running at law when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor, to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted: but in my opinion a court of equity does not and ought not to enforce a covenant binding only in equity in such a way as to require the successors of the covenantor himself, they having entered into no covenant, to expend sums of money in accordance with what the original covenantor bound himself to do. The case principally relied upon by the appellant was one before Vice-Chancellor Malins. That was the case of Cooke v. Chilcott (1876) 3 Ch. D. 694. Now undoubtedly the Vice-Chancellor did decide that case on the equitable doctrine, and said that he would enforce the covenant; but that is an authority which in my opinion was not right on that point. In the subsequent case of Haywood v. Brunswick Permanent Benefit Building Society (1881) 8 Q. B. D. 403,—both Lord Justice Lindley and myself were members of the court which decided that case,—we expressed our opinion against Cooke v. Chilcott being a correct development of the doctrine established by Tulk v. Moxhay (1848) 2 Ph. 774, or for which Tulk v. Moxhay was an authority."

In London & South Western Ry. Co. v. Gomm, (1882) 20 Ch. Div. 562–

587, the Court of Appeal set aside the decree of Kay, J., who had held that a subsequent alienee with notice was bound by a covenant to reconvey for a stipulated sum as a restrictive covenant capable of specific performance. The view of the Court of Appeal was thus set forth by Jessel, M. R., and Lindley, L. J.:

"JESSEL, M. R. With regard to the argument founded on Tulk v. Moxhay (1848) 2 Ph. 774, that case was very much considered by the court of appeal at Westminster in Haywood v. The Brunswick Permanent Benefit Building Society (1881) 8 Q. B. D. 403, and the court there decided that they would not extend the doctrine of Tulk v. Moxhay (1848) 2 Ph. 774, to affirmative covenants, compelling a man to lay out money or do any other act of what I may call an active character, but that it was to be confined to restrictive covenants. Of course that authority would be binding upon us if we did not agree to it, but I most cordially accede to it. I think that we ought not to extend the doctrine of Tulk v. Moxhay in the way suggested here. The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's Case (1585) 5 Co. Rep. 16a, to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in Tulk v. Moxhay was affirmative in its terms, but was held by the court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not. It appears to me that, rightly considered, that doctrine is not an authority for the proposition that an equitable estate or interest may be raised at any time, notwithstanding the rule against remoteness. * * *

"LINDLEY, L. J. * * * This is an action for specific performance of a contract entered into not by the defendant but by somebody else. The first thing, therefore, the plaintiffs must shew is, upon what legal principle the defendant is bound by a contract into which he did not enter. It is not contended that he is bound by it on the ground that the covenant entered into by Powell runs with the land and binds him at law, but it is said that though it does not bind him at law it binds him in equity. Then upon what principle is it that he is bound in equity? It is said that he is bound in equity because he bought the land knowing of the covenant into which his predecessor in title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants. That is precisely the proposition which had to be considered in Haywood v. Brunswick Permanent Benefit Building Society (1881) 8 Q. B. D. 403, and because it was sought there to extend the doctrine of Tulk v. Moxhay (1848) 2 Ph. 774, to a degree which was thought dangerous, considerable pains were taken by the court to point out the limits of that doctrine. * * * The conclusion arrived at by the court was that Tulk v. Moxhay, when properly understood, did not apply to any but restrictive covenants. The case of Cooke v. Chilcott (1876) 3 Ch. D. 694, before Vice-Chancellor Malins was very much considered, but it was not followed by the Court of Appeal. Here we are asked to extend the doctrine of Tulk v. Moxhay, and to apply it to a covenant to sell land at any time for a specified sum of money. That this is an extension of the doctrine cannot, I think, be denied; and for the reasons which were given by the court of appeal in the case to which I have referred I think we ought to decline to extend that doctrine. If so, how is Gomm to be held to be bound

## ATLANTA, K. & N. RY. CO. v. McKINNEY.

(Supreme Court of Georgia, 1906. 124 Ga. 929, 53 S. E. 701, 6 L. R. A. [N. S.] 436, 110 Am. St. Rep. 215.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Action by M. McKinney against the Atlanta, Knoxville & Northern Railway Company. A general demurrer to the petition was overruled, and defendant brings error.

McKinney brought suit against the Atlanta, Knoxville & Northern Railway Company, and alleged: On September 13, 1886, Andrew W. Green conveyed to petitioner the exclusive right to the use and control of all the springs and branches upon a described lot of land in Fannin county, for the purpose of being used on an adjacent lot of land. On November 12, 1888, petitioner conveyed to the Marietta & North Georgia Railroad Company the right to the use of water from the branches and springs on the said lot of land, for the purpose of supplying its water tank at Blue Ridge, Ga., "in consideration of the fact that said Marietta & North Georgia Railroad Company shall carry and convey sufficient water to the residence of said McKinney for the ample use and accommodation of said residence and its occupants." It is further alleged that the Atlanta, Knoxville & Northern Railway Company purchased all the property, rights, and franchises of the Marietta & North Georgia Railroad Company at a receiver's sale, and became thereby bound by all the conditions of the above-described deed, and that for more than four years and ever since the purchase of the Marietta & North Georgia Railroad the defendant has been continuously using the water conveyed in the above-described deed, and that neither the defendant nor its assignor ever carried water to the residence of petitioner. Petitioner claimed, as damages for the breach of the covenant, $500 as the cost of conveying the water to his residence as contemplated in the deed, and the value of the use of the water at the rate of $25 per year since November 12, 1888, the date of the covenant. The defendant demurred generally to the petition, and specially to that portion seeking damages for the cost of conveying the water to the petitioner's residence. The special demurrer was sustained, and the general demurrer overruled. To the judgment overruling the general demurrer the defendant excepted.

Clay & Blair and Wm. Butt, for plaintiff in error. J. Z. Foster, O. R. Dupree, and Thos. A. Brown, for defendant in error.

COBB, P. J.[**] (after stating the foregoing facts). The right of action of the petitioner depends upon whether or not the covenant to convey water to his residence is a covenant running with the land.

by this covenant? He did not enter into it, he is not bound at law, and Tulk v. Mox hay is no authority for saying that he is bound in equity. That appears to me to dispose of this case."

[**] Parts of the opinion are omitted.

If it is a real covenant, he may recover for its breach against the assignee of the covenantor. If it is only a collateral or personal covenant, he has no cause of action. The determination of a question of this character is usually one of some difficulty. "All covenants are either real or personal. Those so closely connected with the realty that their benefit or burden passes with the realty are construed to be covenants real; all others are personal." * * *

Spencer's Case, 5 Coke, 16, 1 Smith's Leading Cases (9th Ed.) 174. * * * The rule as there laid down is as follows:

"When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land and shall bind the assignee although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time the demise is made, it cannot be appurtenant or annexed to the thing which hath no being."

In the case of Atlanta Con. St. Ry. v. Jackson, 108 Ga. 638, 34 S. E. 184, Mr. Chief Justice Simmons said:

"To constitute a covenant running with the land, the covenant 'must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.' * * *"

Under the rules above laid down, we think it is clear that this is a covenant running with the land. It measures up to every test suggested. It not only relates to the interest or estate conveyed; it is inseparably annexed to and a part of it, a charge upon it. It affects the nature, quality, and value of the thing demised. It qualifies its mode of enjoyment; it restricts its use. It is inextricably woven into the manner in which the grantee shall enjoy the thing demised. "A covenant by a lessor to supply houses with water at a rate therein mentioned for each house also runs with the land, and for a breach of it the assignee of the lessee may maintain an action against the reversioner." * * *

The second rule in Spencer's Case is stated:

"But when the covenant extends to a thing which is not in being at the time the demise is made, it cannot be appurtenant or annexed to the thing which hath no being."

And this rule was urged as a sufficient reason for holding that the covenant in the present case was not one running with the land. This rule has been severely criticised by various courts of this country and of England. See American notes to Spencer's Case, 1 Smith's Leading Cases (9th Ed.) 186 et seq.; Aikin v. Albany, Vermont & Canada R. Co., 26 Barb. (N. Y.) 294; Masury v. Southworth, 9 Ohio St. 350. And see, also, Willcox v. Kehoe, 124 Ga. 484, 52 S. E. 896, 4 L. R. A. (N. S.) 466, 4 Ann. Cas. 437. But in the present case the facts do not make out a covenant extending to a thing not in esse. The demise is of the right to convey water from certain springs and branches to a water tank. The covenant is to convey a part of such water to the plaintiff's residence. The covenant extends to the water to be conveyed to the plaintiff's residence. The water is the subject-matter

of the covenant. The manner of conveying it is not even specified. The fact that the machinery for so conveying the water was not in existence does not bring the covenant within the second rule of Spencer's Case. There is an element of futurity in every covenant; a covenant is a promise to do. The manner of its performance is, of course, contemporaneous with its performance, and it is immaterial whether the means upon which the manner of its performance is dependent be or be not in existence at the time the covenant is made. Another objection urged against the alleged covenant was that the deed of conveyance was a unilateral contract, and that no undertaking of the grantee in the deed, the covenantor in the present case, could be construed to be more than a simple contract, as he neither signed nor sealed the instrument. Unquestionably, in some jurisdictions, this would be a good objection. It has been held that the mere acceptance of a deed poll will not bind the grantee therein as a covenantor. See 8 Am. & Eng. Enc. Law, 65, and cit.; contra, 11 Cyc. 1045, and cit. But this question is not open in this state; this court having adopted the rule stated in Taylor on Landlord and Tenant, § 245. "It [a covenant] can only be created by a deed, but may be by a deed poll (the party named in the deed) as well as by indenture, but where lands are conveyed by indenture to a person who does not seal the deed, yet if he entered upon the land, and accepts the deed in other matters, he will be bound by the covenants contained in it." Georgia Southern Railroad v. Reeves, 64 Ga. 494.

Judgment affirmed. All the Justices concur.

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## HALL v. EWIN.

**(Court of Appeal, 1887. 37 Ch. Div. 74.)**

The plaintiff, W. H. Hall, was the owner of a house in Edgware Road, in the parish of Paddington. By an indenture dated the 3d of November, 1849, the plaintiff granted a lease of the house to G. Tarlington for eighty years. The lease contained a covenant by the lessee for himself, his heirs, executors, administrators, and assigns, in the following terms:

"That he, his executors, administrators, and assigns, shall not at any time during the said term use, exercise, or carry on in or upon the said hereby demised premises, or permit or suffer any part thereof to be occupied by any person or persons who shall use, occupy, or carry on therein any noisome or offensive trade, business, or employment whatsoever without the like consent in writing of the said W. H. Hall, his heirs or assigns, first obtained."

By an indenture dated the 11th of January, 1851, G. Tarlington demised the premises to R. S. Ruddach, for the residue of the term of eighty years, except the last three days thereof, by way of mortgage for securing the repayment of a principal sum and interest.

By an indenture dated the 19th of September, 1865, the executors of

R. S. Ruddach, under the power of sale contained in the mortgage deed, assigned the premises for the residue of the term of eighty years, except the last three days thereof, to the defendant John Ewin.

By an indenture dated the 29th of October, 1885, the defendant John Ewin demised the premises to the defendant George McNeff for twenty-one years. This lease contained the following covenant by McNeff:

"And also shall not at any time during the said term use, exercise, or carry on in or upon the said demised premises any noisome or offensive trade, business, or employment whatsoever without the like consent in writing of the said John Ewin, his executors, administrators, or assigns, first obtained."

In the month of February, 1886, the defendant McNeff purchased some lions, and opened an exhibition of wild beasts on the premises. He exhibited pictures outside the house, and employed black men to parade in front of it with a gong and trumpet, so that the neighbours complained of the nuisance.

The present action was brought by W. H. Hall and C. Breitbart, who was a carver and gilder, keeping a shop two doors from the premises in question, asking for an injunction to restrain Ewin and McNeff from using the premises as an exhibition of wild animals, or otherwise, so as to cause a nuisance to the plaintiffs, and also from carrying on upon the premises, or permitting or suffering any part thereof to be occupied by any person carrying on, any noisome or offensive trade or business without the consent in writing of the plaintiff W. H. Hall.

In his defense the defendant Ewin pleaded that if the allegations in the statement of claim were correct they created no cause of action against him, that none of the acts complained of had been committed by him, and that he had given no consent in writing to the acts complained of; but, on the contrary, he had done all in his power, save by bringing an action, to induce McNeff to desist from any acts which might cause annoyance to the neighbourhood, and that he was not liable for the alleged acts of McNeff.

The existence of the nuisance was sufficiently proved by the evidence. There was no evidence of Ewin having in any way encouraged or consented to the exhibition complained of. Three letters were put in evidence from the plaintiffs' solicitors to Ewin, dated the 9th and 15th of February, and the 13th of March, 1886, complaining of the nuisance, to which Ewin made no reply. It also appeared that on the 12th of March the clerk of the plaintiffs' solicitors called on Ewin. The latter was ill and did not see him, but sent a message down to him that he would speak to McNeff at once upon the subject. On the 15th of March McNeff wrote to the solicitors stating that he had closed the exhibition out of respect to the wishes of his landlord. It was not, however, really closed for two or three days afterwards.

On the 18th of March the plaintiffs issued the writ in the action, asking for an injunction and damages; and on the following day gave notice of motion for an interim injunction, which was granted.

The case was heard on the 3d of May, 1887, before Mr. Justice Kekewich. His Lordship was of opinion that although Ewin was not an assignee of the lease, he was equitably bound by the covenant, and that as he had the power to enforce his own covenants against McNeff and to stop the nuisance, he had broken the covenant against suffering the premises to be used for the purpose of carrying on a noisome occupation. He therefore granted the injunction against both of the defendants, with costs. From this judgment the defendant Ewin appealed.

COTTON, L. J.[1] This is an appeal by the defendant Ewin against a judgment of Mr. Justice Kekewich, granting an injunction restraining him from the breach of a certain covenant in a lease. Is this right? Ewin is in this position: The plaintiff Hall granted a lease containing the covenant in question, and the lessee made a mortgage of the lease by underlease, and the mortgagee sold his interest under the power of sale to Ewin; therefore Ewin was merely an underlessee and was not bound at law by the covenants in the original lease. He would have been bound if he had taken an assignment of the estate of the lessee under the lease, but he took no such assignment. It is useless to consider whether if Ewin had been bound at law the plaintiff could have maintained an action against him and got damages. If the plaintiff is entitled to relief in this case it must be not on the ground of breach of covenant, but on the ground that he is equitably bound, on the principle laid down in Tulk v. Moxhay, 2 Ph. 774, to use the house in conformity with the covenants in the lease. I am of opinion that it would be an extension of the principle of Tulk v. Moxhay to hold him liable to an injunction in such a case as this. The words of the covenant in the original lease are these. [His Lordship read the covenant.] Then what are the facts? The defendant Ewin, who was himself an underlessee, granted an underlease to McNeff, in which there was a covenant that he could not exercise any noisome or offensive trade or business without the consent in writing of Ewin. If the plaintiffs had shewn that Ewin had granted this underlease for the purpose of its being used for an offensive trade or had granted a written license to McNeff so to use it, he would have acted in a way inconsistent with the covenants in the original lease, and I should have had no hesitation in granting an injunction against him; but he has done nothing of the kind, and the case made against him is that by standing by and allowing the house to be used for the exhibition of wild beasts, he has acted in violation of the covenant. I give no opinion whether the plaintiff would have had a right of action against him if he had been bound in law by the covenant. There is no doubt that under the principle of Tulk v. Moxhay, 2 Ph. 774, if a man had actually done anything in contravention of the covenants of which he had notice, the court would grant an injunction. As I understand Tulk v. Moxhay,

[1] The concurring opinions of Lindley and Lopes, L. JJ., are omitted.

the principle there laid down was that if a man bought an underlease, although he was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants the court of chancery could not allow him to use the land in contravention of the covenants. That is a sound principle. If a man buys land subject to a restrictive covenant, he regulates the price accordingly, and it would be contrary to equity to allow him to use the land in contravention of the restriction. But here the plaintiff does not seek to restrain Ewin from using the house in a particular way, or from doing something which will enable the tenant so to use it, but to compel him to bring an action against his tenant who is in possession of the house. The principle of Tulk v. Moxhay has never been carried so far except in a case before Vice-Chancellor Malins. Cooke v. Chilcott, 3 Ch. D. 694. The question came practically before the court of appeal in Haywood v. Brunswick Permanent Benefit Building Society, 8 Q. B. D. 403, and the court there laid down that the principle in Tulk v. Moxhay was not to be applied so as to compel a man to do that which will involve him in expense. The covenant in Haywood v. Brunswick Permanent Benefit Building Society was to repair buildings on the land, and was therefore as much with reference to the land as the covenant in this case, but the court would not compel the defendant, who was the assignee of the original grantee, to repair the buildings. There is no evidence in this case that the defendant Ewin has given any license to his tenant to do the act complained of. I think it would be wrong to make an order that would have the effect of compelling him to bring an action, or of making him liable to damages if he did not bring an action. It is said that he did nothing to prevent the use of the house in the way complained of. But before the action was brought it appears from the evidence that the clerk of the plaintiffs' solicitor called at the house of the defendant Ewin, and that Ewin informed him that he would see McNeff about the matter, and then the plaintiff himself puts in evidence a letter from McNeff saying that out of respect to Ewin's wishes he had stopped the exhibition. It is true that the statement of McNeff, that the exhibition was closed, was false, but the plaintiff has not proved that it was false that Ewin had requested him to stop it. So that on the evidence it stands that there is no proof that the defendant gave permission to his tenant to open the exhibition, but it does appear that he spoke to him and requested him to discontinue it. I think it would be wrong to grant an injunction against Ewin under these circumstances. The injunction against him must therefore be discharged.

With respect to the costs, I was at first of opinion that, having regard to the fact that Ewin did not answer the letters sent to him by the plaintiffs' solicitor, the action ought to be dismissed against him without costs; but considering the fact that before the action was brought the clerk of the solicitor was told that the defendant was

doing something to induce his tenant to stop the exhibition, I think we can not do otherwise than dismiss the action against him, with costs, in the usual way.[2]

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## ABBEY v. GUTTERES.

(Chancery Division, 1911. 55 Solicitors' Journal, 364.)

In this action the plaintiff sought an injunction to enforce the keeping closed of certain windows in a flat occupied by the defendant. In 1898 Mrs. Bethell, the plaintiff's predecessor in title, was the owner of a house called Chelsea Lodge, which adjoined property belonging to Sir Chas. Oppenheim. In 1897 the latter had entered into an agreement with a builder, Lovat, under which Lovat was to erect a block of flats on the said property, on the completion of which a lease for ninety-nine years was to be granted him. On the 13th of May, 1898, before the flats were erected, Lovat entered into an agreement with Mrs. Bethell, whereby he agreed that the lower sashes of the windows of the proposed flats facing Chelsea Lodge should be glazed with opaque glass, and permanently fixed. In 1899 the flats were completed and the lease granted to Lovat, who mortgaged it in 1902, subsequently releasing the equity of redemption. In 1909 the defendant became tenant of one of the flats on a twenty-one years' lease, and opened one of the windows which had been fixed, whereupon the plaintiff instituted proceedings.

WARRINGTON, J., after reviewing the facts, continued: There are three points of defence raised in this action: First, that the covenant is not one which comes within the equitable doctrine in accordance with which covenants may be made to run with land, because it is not restrictive. Second, that the obligation was created by a person who had no power to bind the land. Third, that the defendant is in the position of a bona fide purchaser for value without notice. As to the first, it is said the covenant is not restrictive because not negative. Now a restrictive covenant is one that restricts the enjoyment of land. When a person in possession of land binds himself to maintain a building, or part thereof, in a certain condition he enters into an obligation restrictive of his full enjoyment of the land. It is not necessary that there should be an express negative covenant; a negative may be implied. I think, therefore, that this covenant is restrictive. Secondly, it is said that at the date of the covenant Lovat was a mere licensee, with no estate or interest in the land, and therefore could not bind it. The building agreement is one in ordinary form—that when certain things have been done a lease will be granted. Under such an agreement, as stated by Collins, M. R., in Quick v. Chapman (1903) 1 Ch.

[2] "It is not at all necessary that the person enjoined should be standing in the legal shoes of the covenantor." Maitland, Lectures on Equity, 168, citing Mander v. Falcke (C. A. 1891) 2 Ch. 554.

659, the builder "has at the most a kind of licence, coupled with an interest in the land." He has an interest because, on the fulfiling of certain conditions, he may require a lease to be granted him. I cannot see why he cannot create a charge on the land, limited to his interest therein. He has in equity a right to call for a lease, subject to the fulfilment of certain conditions; he has an equitable interest which will ripen into a legal interest. Why should he not create an obligation to be coincident with his interest? If he mortgaged his expectant right to obtain a lease, he could not say that the mortgage was invalid after he had obtained it. I think, therefore, that the second defence fails. Lastly, as to notice. The onus is on the defendant to prove that she had none. She made no investigation of title at all, and the result of that is well expressed by Romer, L. J., in Nisbet & Potts' Contract (1906) 1 Ch. 408, the effect of which is that a purchaser accepts a less than forty years' title at his own risk. In this case if the defendant had wanted to investigate the title she would not have been entitled to do so; but for the purposes of this case she must be treated as if she was entitled to a forty years' title. Now this agreement secures certain benefits of light over the garden of Chelsea Lodge to the premises in question, and is therefore the title part of what the purchaser was going to acquire, and would therefore have been disclosed by the vendor to the purchaser in the ordinary course of business, if a full forty years' title had been furnished. The defendant, therefore, must be considered to have had full notice of the covenant. As all the defences fail, the plaintiff is entitled to an injunction to restrain the defendant from opening the windows in question; or from keeping the lower sashes otherwise than permanently fixed; but the plaintiff will find himself in difficulties if he asks for an injunction that the said windows be kept glazed with opaque glass.

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## SANFORD v. KEER.

**(Court of Errors and Appeals of New Jersey, 1912. 80 N. J. Eq. 240, 83 Atl. 225, 40 L. R. A. [N. S.] 1090.)**

Appeal from Court of Chancery.

Bill in equity by Margaret J. Sanford against Ernest F. Keer. From a decree for defendant, complainant appeals.

The complainant and her husband (who is now deceased, and whose share has passed to her) were the owners, by the entirety, of a tract of land on the north side of Clinton avenue, in the city of Newark, which they laid out into building lots, opening up streets (Shanley, formerly Sanford, avenue, South Tenth street, and South Eleventh street, running north and south, and Madison avenue, running east and west) through it, and of which they prepared a plan, showing the streets and the building lots thereon. They sold a very large portion of these lots,

and conveyed them to the respective purchasers under and subject to express restrictive covenants against their use for other than residential purposes, and providing for improvements of a character indicated by the terms of the covenants, which terms varied somewhat in the different sections of the tract, apparently in accordance with the class of improvements intended to be promoted in each section. All the lots sold, however, were restricted for residential purposes and dwelling house improvements of one class or another. The original mansion house portion of the tract, where complainant and her husband lived when the sales took place, and where she still resides, and which she now owns, occupies nearly the entire block on the west side of South Tenth street from Clinton avenue to Madison avenue, and the lots, nine in number, on the opposite, or easterly, side of South Tenth street in this block, including the lot in question now owned by defendant, have all been sold, except one, which complainant still owns, and conveyed, subject to the express restrictive covenants that the grantee, his heirs and assigns, will not erect, suffer or permit to be erected, thereon, within a period of 50 years, any building whatsoever other than a private dwelling house, such private dwelling house to be used only as and for a private residence and for one family only; that it should set back from the street line 30 feet to the piazza line, or 39 feet to the main building (except the one on the corner of Madison avenue, which had to set back 42 feet), and that it should cost at least $5,000. * * *

The defendant owns a lot fronting on South Tenth street and directly opposite the mansion house owned and occupied by complainant, as aforesaid, and about the middle of the block in question, which lot he bought from one Weston, a grantee from complainant and her husband. * * *

Defendant has constructed a garage, not upon the rear of his lot, but in substantially the exact location (40 feet from the curb line) thereon specified by the restrictive covenant for a dwelling house. He has not constructed any dwelling house on this lot, but resides in a dwelling house on another lot which he owns, fronting on Shanley avenue and abutting up to the lot in question in the rear; and he uses the garage in connection with his dwelling house on said other lot.

The bill was filed promptly upon the commencement of the building of the garage, a restraining order was applied for and refused, and the defendant proceeded with and completed the garage at his peril. Upon final hearing, a decree was entered, refusing the injunction prayed for and dismissing the bill, and the present appeal is from that decree.

WHITE, J.[3] * * * The complainant in her bill expressly repudiates any general or neighborhood scheme of restrictive covenants, and bases her prayer for relief upon the individual and particular cov-

[3] The statement of facts is abridged and parts of the opinion are omitted.

enant (above recited in full) entered into with her by defendant's vendor and appearing in his chain of title. It is beyond question, and is admitted, that what defendant has done is a clear violation of the terms of this covenant, and that he purchased with complete notice of these terms. Under these circumstances, standing alone, it is too well settled to require discussion that complainant, whose remaining property, still owned by her, is clearly injured by the breach, is entitled in equity to enforce performance of the covenant against the defendant. Tulk v. Moxhay, 2 Phil. 744; Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190; Hayes v. Waverly & Passaic R. R. Co., 51 N. J. Eq. 345, 27 Atl. 648; and other cases too numerous to mention. The defendant, on the other hand, invokes in defense two principles, which, if substantiated by the facts, are almost, if not quite, equally well settled.

The first is that the covenant in question formed part of a general or neighborhood scheme, and that this scheme, in so far as it is involved in this violation, has been abandoned by mutual consent and acquiescence of all parties in interest, including the complainant, not only by permitted violations of its requirement in several cases where it did appear in the covenants, but by its entire omission from the covenants upon some of the lots, and the substitution in place of it of express consent to such violation. This point, if applicable to the facts, is fatal to the relief asked by complainant. In a neighborhood scheme, the burden follows the benefit. It is the mutual benefit accruing to all and to each which makes it inequitable for any one so benefited to repudiate the burden to the injury of the others. If, therefore, the parties in interest, by express act or passive acquiescence, permit such violations of the plan or scheme as destroy, wholly or partially, the benefit therefrom, they have to a corresponding extent absolved each other from its burdens. * * * In Peek v. Matthews, L. R. 3 Eq. Cas. 515, it was said:

**"The vendor in such cases, stipulating for the benefit of himself and others, as a quasi trustee for them, is bound to enforce the covenant as much against one as against the other."**

See, also, Ocean City Ass'n v. Headley, 62 N. J. Eq. 322, 50 Atl. 78. * * *

Turning, now, to the present case, the Vice Chancellor found as a fact that the restrictive covenants contained in the deeds from complainant and her husband for the various lots of this tract which were sold constituted a general or neighborhood scheme; and an examination of the evidence completely confirms this view. There was a plan of the lots, with the streets and avenues laid out thereon, exhibited to the purchasers, who were induced to buy by representations that the value of their proposed improvements would be protected by the fact that restrictions were placed on all lots as sold; and the nature and provisions of these restrictions were explained to them according to the particular section in which they proposed to purchase. * * *

As incidental to this general purpose, there was also a start made

to restrict against outbuildings of any character, but this part of the restriction, where it was imposed, has been modified by mutual acquiescence by the insertion, in place of it, in some of the conveyances, in connection with the dwelling house covenants, of the phrase, "with necessary or desirable outbuildings," and by its violation, in one or more instances, by the erection of a garage on the rear of a lot upon which a dwelling house was constructed in conformity with the dwelling house restriction. We do not think, however, that this modification of this incidental feature is of such a nature as to destroy or impair the mutual benefit to the lot owners of the essential general dwelling house scheme upon the protection of which they relied. So far as the modification of what may be called the incidental "no outhouse scheme" is concerned, of course, defendant's covenant is likewise modified, so that his burden will correspond with his benefit; but, as to the main essential purpose of the neighborhood dwelling house scheme, we think defendant's lot continues to participate in its benefit, and consequently remains subject to its burden.

This being the case, the question arises: Does the construction of the defendant's garage, not on the rear of his lot behind a dwelling house constructed thereon in conformity with the covenant, but, instead of that, constructed without any dwelling house on the lot at all, and in the very place fixed by the covenant for the dwelling house to go, fall within the modification of the incidental outhouse covenant, so as to be protected by such modification? We not only think that it does not, but, on the contrary, that it is a violation of the essential and beneficial purpose and effect of the neighborhood dwelling house scheme. This scheme gave each lot owner, who paid a higher price for his lot with that in view and constructed his dwelling house in accordance with the covenant, the right to expect that the improvement upon his neighbor's lot, in close proximity to his own dwelling house and fronting upon an uniform building line, would be a similar dwelling, or one at least of the designated cost. The advantages to him of such an arrangement are too obvious to require discussion. Instead of this, he finds as the neighboring improvement a sheet iron garage building of probably comparatively trifling expense as compared with the cost of the improvement which he had a right to expect, and doubtless of such displeasing appearance as to quite justify the taste of the owner in placing it beside some one else's dwelling house, instead of beside his own.

While we entirely agree, therefore, with the view of the Vice Chancellor that there was in this instance a neighborhood scheme, we think he erred in his conclusion that it had been abandoned in such essential features as to justify its violation in the manner in which defendant has violated it.

The other principle invoked by the defendant to justify his violation of this covenant is that, by reason of other similar constructions (garages) in alleged similar locations with reference to complainant's re-

maining property, the violated covenant, in so far as it is violated, has ceased to have any beneficial value to complainant's property, and consequently can form no ground for equitable relief. This principle, if applicable, would also be decisive. * * *

The facts in this case, however, fall very far short of bringing it within the operation of this doctrine. * * *

For the reasons above stated, the decree of the Court of Chancery is reversed, and the case is remanded to that court, in order that a decree may be entered in accordance with the opinion herein expressed.

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## SECTION 6.—PERFORMANCE IN PART WITH COMPENSATION FOR DEFICIENCY

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### ROFFEY v. SHALLCROSS.

(In Chancery before Sir John Leach, 1819. 4 Madd. 227, 56 E. R. 690.)

A person purchased, under a decree, two-sevenths of an estate, in one lot. There was a good title to one-seventh, but not to the other one-seventh; and, upon this, THE VICE CHANCELLOR held that the purchaser was at liberty to be discharged from the whole of his purchase.[4]

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### HILL v. BUCKLEY.

(In Chancery before Sir William Grant, M. R., 1811. 17 Ves. 394, 34 E. R. 153.)

The bill prayed the specific performance of a contract for the sale of an estate by the Defendants, devisees in trust, to the Plaintiff; with an abatement out of the purchase money, in respect of a deficiency in quantity.

The particular represented Kestle Woods, part of the premises included in the contract, as containing two hundred and seventeen acres

[4] The cases are conflicting on this subject; but it is unnecessary to enumerate them, as they are all stated in Sugd. Vend. & Purch. (5th Ed.) 246 et seq. Lord Eldon is there represented to have been of opinion that where there is a purchase of two lots, and no title can be made to one lot, the purchaser is bound to take the lot to which a good title can be made, unless there was an understanding that the purchaser was not to take any of the lots unless he could obtain them all; but, in an analogous case, Ex parte Tilsley, Jan. 22, 1819, where there was a purchase of two lots, under a sale in lunacy, and the biddings were sought to be opened as to one lot, his Lordship would not suffer the sale of that one lot to be opened, unless the other was, except the purchaser chose to keep the lot as to which the bidding was not sought to be opened, because he might not have bought that lot unless he was to have both.

and ten perches of Statute measure; in which was included a marsh, called Gulberry Marsh.

The draft of the agreement, sent by the Defendant's agent to the agent for the Plaintiff, by whom it was engrossed, described the woods as containing, together with the hedges and fences thereof, two hundred and seventeen acres and ten perches, and the meadow adjoining the said woods, called Gulberry Marsh, as containing two acres and twenty-four perches.

The bill stated, that, upon perusing the draft of the contract, previous to the engrossment, the Plaintiff objected to the words, "be the same more or less," being added to the specification of the quantity of acres; as the woods were stated in the particular to contain two hundred and seventeen acres and ten perches; and the Plaintiff and his agent had no opportunity of ascertaining the correctness of the statement: but the Plaintiff formed his judgment of the value from the particular, and therefore insisted that such words should be omitted in the engrossment. The Plaintiff's agent, having engrossed the contract accordingly, with that alteration, transmitted it to the Defendant's agent for his signature; with a letter, stating, that he had made some alterations, of no material consequence. After the contract had been returned, executed by the Defendant's agent, the Plaintiff, in the course of a treaty to sell the woods to another person, had the first intimation, from an estimate and measurement shown to him, of a deficiency in the quantity; and by a measurement which was furnished upon application to the Defendant's agent, it plainly appears that the statement upon which he purchased is erroneous; and, instead of the woods, including Gulberry Marsh, containing two hundred and seventeen acres and ten perches, they do not contain more than one hundred and ninety-one acres.

The Defendants, by their answer, stated, that in a Map Book, in the possession of their agent, containing a copy of two valuations, formerly made, the said woods, exclusive of Gulberry Marsh, are stated to contain 188 acres, 1 rood, 4 perches, Statute measure, and 158 acres, 25 perches, customary measure; and immediately under these numbers are the following words and figures: "Hedges, &c. 28 3 6— 24 0 25; which numbers 188 1 4 & 28 3 6 together amount to 217 0 10;" that in the said Map Book, Gulberry Marsh is mentioned in a different page; stated to contain 2 acres, 24 perches; amounting, together with 188 acres, 1 rood, 4 perches, to 190 acres, 1 rood, 38 perches; that the agent, by mistake, added the quantity of 28 acres, 3 roods, 6 perches, which is meant (though not so stated) in the said Book to express the quantity of land occupied in hedges, ditches, and other wastes, throughout the whole Barton of Newhouse, and not merely in Kestle Woods, to the quantity of 188 acres, 1 rood, 4 perches; suggesting that the Defendant's agent did not know the exact quantity of acres contained in the said woods; and therefore added the words "be the same more or less;" and would not have signed the contract, if he had been aware

that it differed from the draft by omitting those words; of which he was not aware, when he signed the contract; and therefore signed by surprise.

The Defendants submitted, that, as they were trustees for infants, and their agent was not expressly authorized to sign the contract, and signed without knowing the real quantity, they ought not to be prejudiced by his mistake; but the contract ought either to be specifically performed without abatement, or wholly abandoned.

The Defendant's agent proved the circumstances under which he signed the contract: being ill at Bath, he did not particularly compare it with the draft; and was not aware that they differed, excepting in a few trifling circumstances. He was not authorized by the Defendants to sign the said agreement, otherwise than from his general authority, and his particular authority to accept the sum of £5250 for the woods and marsh.

THE MASTER OF THE ROLLS. The facts of this case are very few; and there is very little controversy upon them. In the particular, which was sent by the Defendants' agent to the Plaintiff's, which is the basis of the subsequent negotiation, the woods, called the Kestle Woods, including the Gulberry Marsh, were represented as containing two hundred and seventeen acres and ten perches. In fact there was not that quantity by about twenty-six acres. No deception was intended. The Defendants' agent fell into a mistake; the nature and cause of which now distinctly appear: but I do not think myself warranted, by any evidence in the cause, to infer, that the Plaintiff knew the real quantity. A very intimate acquaintance with the premises would not necessarily imply knowledge of their exact contents; while the particularity of the statement, descending to perches, would naturally convey the notion of actual admeasurement. Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price, regard was had on both sides, to the quantity which both suppose the estate to consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain: therefore, a rateable abatement of price will probably leave both in nearly the same relative situation in which they would have stood, if the true quantity had been originally known; and I do not think I could, upon any principle in the case of Mortlock v. Buller, to which this bears no resemblance, exempt these the Defendants from this equity, upon the ground of their being trustees, and not owners.

But there is a difficulty in this case from the nature of the mistake, which must have influenced the vendors in their estimate of the price,

in a manner, that, if a rateable abatement were now to be decreed, would be extremely disadvantageous to them; for, though they believed they had two hundred and seventeen acres to give to the purchaser, and must be supposed to have asked a price in proportion, yet they did not believe that it was all wood land. They imagined that twenty-eight acres consisted only of hedges and fences, and other waste. They could not certainly set the same value upon that, though perhaps it was considered of some value, as upon land covered with wood of mature growth: therefore, by a rateable abatement from the purchase money, it is clear they must allow to the purchaser much more than they would have received from him; and consequently they would be compelled to accept less than it was ever in their contemplation to take. That is not all. The purchaser also would obtain a better bargain than he ever had in his contemplation. He was, in the course of the negotiation, furnished with the value of the woods, quâ wood, as ascertained in the year 1805. The value being given, it was immaterial, in that respect, whether the woods were spread over a greater or less number of acres. The valuation had no reference to the quantity of ground. All the wood upon the estate was comprehended; and it was represented to the purchaser, that what he was to get was wood, which, in 1805, was of the value of £3500. He has got all the wood upon which that value was set. Is he entitled also, to the value of twenty-six additional acres of wood; which he would have, in effect, by an abatement made to him out of the purchase money, upon the proportion merely of quantity and price. The wood would have been no more valuable to him, if in fact it had occupied two hundred and seventeen acres, instead of one hundred and eighty-eight: nor would he have paid a shilling more for it; as the price of the wood was not fixed with reference to the ground which it covered. Therefore it is only in the price of the soil, and not in the price of the wood, that the purchaser could be injured by the mistake of the vendor: the particular representing the wood as occupying two hundred and seventeen acres: the purchaser has the right quantity of wood, but not of soil. He is therefore entitled to some abatement, as they gave him reason to believe that he was to obtain two hundred and seventeen acres of soil; but the abatement is to be only so much as soil, covered with wood, would be worth, after deducting the value of the wood; and with an abatement, to be ascertained upon that principle, the agreement ought to be carried into execution.

## SIR GEORGE HANGER v. EYLES.

(In Chancery, 1722. 2 Eq. Cas. Abr. 689, placitum 7, 22 E. R. 579.)

Bill for a specific Performance of Articles for the Purchase of Lands. The Case was, the Plaintiff agreed to sell the Manor and Lands in A. in Kent to the Defendant by a Particular, wherein the Manor and Royalties are mentioned, but no Value set upon them therein. It happened that the Plaintiff had no Title to the Manor, but had been in Possession of the Royalties several Years. The Defendant objected against going on with the Purchase. And this was a Contract at a South-Sea Price, viz. forty-six Years Purchase; and secondly, that tho' no Value was set upon the Manor and Royalties by the Particular, yet they are valuable in themselves, and was a great Inducement to him to purchase the Estate; and, therefore, since the Plaintiff cannot strictly perform his Part of the Agreement by conveying the Manor, he ought not to have the Aid of a Court of Equity to compel the Defendant to pay the Money, since he cannot have the full Benefit of the Agreement; and for this last Reason the Bill was dismissed, but without Costs, if the Plaintiff would deliver up the Articles. Per LORD CHAN. MACCLESFIELD.

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## BURNELL v. BROWN.

(In Chancery, 1820. 1 Jac. & W. 168, 37 E. R. 339.)

This was a suit to compel the completion of the purchase of an estate, sold to the Defendant by auction on the 14th September, 1812. The Defendant admitted the agreement, but insisted on having a deduction made from the stipulated price, as a compensation for a right of shooting, hunting, and hawking, which had been reserved over a part of the premises. The reservation was not mentioned in the particulars or conditions of sale, and the Defendant stated in his answer that he was induced to purchase the estate, which was contiguous to one of his own, chiefly for the sake of the game. A deposit of ten per cent. was paid soon after the sale; the remainder of the purchase money, according to one of the conditions was to be paid on the 25th April following, at which time possession was to be given.

It appeared that in January, 1813, the abstract was delivered, which stated the reservation in question. In the month of April following the Defendant, upon his own request, was let in possession. Several letters passed between the Plaintiff and Defendant and their solicitors, and the greater part of the purchase money was paid, without any objection being made to the completion of the purchase, on the ground of the reservation till October in the same year, when the Defendant's solicitor claimed to have some compensation made for it. A clerk of the Plaintiff's solicitor, in answer to the letter containing this claim,

said that a reasonable compensation would be allowed: this, however, was done without the concurrence of the Plaintiff, who, upon its coming to his knowledge, refused his assent. The clerk being examined in the cause, admitted that he had no express authority from the Plaintiff or his solicitor, to accede to the Defendant's demand.

The conveyance had been delayed for some time by a difficulty about the description of the parcels, and afterwards by the necessity of levying a fine of part of the premises. The Plaintiff's solicitor had, after the Defendant was in possession, furnished him with additional papers, which were required to give some information not contained in the abstract. The Plaintiff, on receiving from the Defendant the portion of the purchase money which was paid to him, gave a receipt undertaking to be accountable for it.

That part of the purchase money, which had not been paid to the Plaintiff, had been ordered into Court. * * *

THE LORD CHIEF BARON [SIR RICHARD RICHARDS].[5] This is a Bill for the specific performance of an agreement. There is no doubt as to the agreement in general; the only question is, whether the Defendant is entitled to have a deduction made from the purchase money. This depends on a consideration of the circumstances of the case, which are not many, and which lead, I hope, to a very clear conclusion.

The Defendant, became the purchaser at the auction on the 14th September, 1812. By the conditions, he was to make a deposit at the time, and to pay the residue of the purchase money on the 25th April next, at which time he was to enter into possession. It is observable, that in the contemplation of the parties, the payment and the taking possession were to be at the same time.

By the particulars and conditions of sale, it does not appear that there was any reservation of a right of sporting over the premises; of course, therefore, the Defendant agreed to purchase them free from any such right. On the 16th January, 1813, the Plaintiff's solicitor delivered the abstract; by that the reservation appeared. It must necessarily have happened that the Defendant's solicitor knew of it soon after the delivery of the abstract; and making all allowances for his other engagements I must presume that the Defendant himself was soon apprised of it. When he saw this, he saw what was a palpable objection. I might say a permanent one, for it was one that the Plaintiff could not remove. If he had then stated any objection on that ground, attention must have been paid to it. I will not stay to enquire, whether the objection is one for which a compensation would have been decreed, but it certainly must have been attended to. It would be very difficult for the Court to decide, what difference in value such a reservation made, no doubt however, the purchaser might waive the objection, and the question here is whether he has not done so. * * *

[5] Parts of the opinion of the Lord Chief Baron (who heard the case for the Master of the Rolls) are omitted.

I think that on his being let into possession, the contract was completed, except the execution of the conveyance and the payment of the purchase money; and the objection having been waived, could not be set up again, without some act of the Plaintiff's, or of some person authorized by him.

Then, let us see what happened afterwards. In December, the clerk of the Plaintiff's solicitor writes, that no objection will be made to a reasonable compensation. In a subsequent letter he repeats this. Now, in his evidence he states, that he had no authority for writing as he did. It is clear that he had none; and Burnell, as soon as he heard of the claim that was made for compensation, immediately refused to acquiesce in it. It appears to me, that if the contract was previously completed, it was impossible to set up any new contract between them without an authority given by Burnell.

If so, it follows that Brown having taken possession, his solicitor at the time clearly knowing the objection that is now made, but neither of them giving any information of it, has waived the objection, which he certainly might have made before, and he is not, from what has since taken place, enabled now to make it. The Plaintiff is therefore entitled to the relief he prays; and the Defendant must pay him interest on the remainder of the purchase money, from the time of his taking possession till the time of its being paid into Court. * * *

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## LORD BOLINGBROKE'S CASE.

(In Chancery. 1 Schoales & L. 19, note.)

The incumbent of a living had contracted with the present Lord B. for the purchase of the advowson, and on the faith of the contract had built a much better house in the glebe than he would otherwise have done. The late Lord B. was then living, and the present Lord only tenant in tail in remainder, and the contract was made with a perfect understanding how the parties were situated. The late Lord B. was not in a state of mind to do any act himself, but the legal estate was vested in a Mr. Cator during his Lordship's life, and therefore he was competent to make a tenant to the precipe. Cator refused to do so, consequently the present Lord B. could make no sufficient conveyance.

LORD THURLOW thought that the gentleman who had made the contract, and who, upon the faith of it, had built a good house on the glebe, should get the utmost Lord B. could give him, and directed that his Lordship should convey a base fee by levying a fine with a covenant to suffer a recovery whenever he should be enabled so to do by the death of the tenant for life.

## DREWE v. HANSON.

(In Chancery before Lord Eldon, 1802. 6 Ves. 675, 31 E. R. 1253.)

An injunction having been obtained, restraining the defendant from proceeding at law to recover his deposit, the usual order was made for dissolving the injunction, unless cause, upon the answer coming in; by which the following circumstances appeared.

In August the defendant purchased from the plaintiff by private contract an estate, consisting of some farms and the tithes of the parish of Bishop's Lincomb in Devonshire, for the sum of £11,000 the purchase to be completed on the 25th of December. The description in the particular as to the tithes was this: "Also the valuable corn and hay tithes of the whole parish of Bishop's Lincomb." An abstract was soon afterwards delivered; and a rental: containing the general description of the garb, otherwise the tithe, of hay and corn: the latter expressing nothing relative to tithe of hay; but containing these entries:

"Custom hay about £2."
"Farms out of tillage this year and not in composition 5."
"Estates occasionally in tillage but not in composition 20."

In September the defendant went into Devonshire to see the estate; and employed a surveyor to look over it. Upon the 14th of December he wrote to the plaintiff, refusing to complete his purchase; and calling for his deposit.

The corn tithes arose from about 8000 acres; and were paid by annual composition. The tithe of hay was from so much of about 2000 additional acres, as was meadow, (how much did not appear:) one-half of the tithe of hay contained in the allotment belonging to the Vicar: the other half commuted for by a payment of £2 per annum; the nature of which did not appear: the conversations upon the subject not carrying it further than belief that it was a modus. The answer also stated, that the tenants had converted arable to meadow, and threatened to convert more.

LORD CHANCELLOR. Without meaning to say, what may be the final decision, I am of opinion, attending to all the circumstances, it is too hazardous to say, there is not a fair and reasonable question, whether this contract may not be specifically executed. It is certainly to be observed, that under the head of specific performance contracts, substantially different from those entered into have been enforced. In the case of a contract for a house and a wharf, the object of a purchaser being to carry on his business at the wharf, it was considered, that this Court was specifically performing that man's contract by giving him the house without the wharf. So in Shirley v. Davis, in the Court of Exchequer, the subject of the contract was a house on the north side of the river Thames, supposed to be in the county of Essex;

but which turned out to be in Kent; a small part of which county happens to be on the other side of the river. The purchaser was told, he would be made a church-warden of Greenwich; and though his object was to be a freeholder of Essex, he was compelled to take it. So in Lord Stanhope's case the object was to get an estate tithe-free; and yet Lord Thurlow obliged him to take it subject to tithes.

In this case, the hay-tithes were represented to be of so much of about 2000 acres as happened to be employed in meadow: how much is not at all distinctly in proof. There is something like a distinct representation as to the arable land, but not amounting to a warranty. It appears also, that the corn-tithe was really the principal part of the estate; that the farms were purchased for the purpose of enjoying the corn-tithe estate. The aspect of the particular is a farm in hand, rendered beneficial by the circumstance, that the purchaser would have the whole tithes of the parish of corn and hay; which is also some representation, that the tithes are to be taken in kind; and I take it so as to the corn-tithe; being paid for by annual composition. As to the nature of the payment for the moiety of the tithe of hay, it is not understood, whether it is a modus or a payment capable of being shaken in Law. It is impossible to deny, that the purchaser under such a particular is put in a situation of great hardship. The abstract does not correct the representation; as the rental in a degree does. If this case stands simply upon the representation in the particular, the abstract, and the rental, it would be within the authorities. That they are extremely strong cannot be denied; and upon a motion for an injunction a precedent cannot be established, to affect the vast class of authorities upon a point of such importance, turning upon all their particularities. In the case of an estate sold tithe-free it is a prodigiously strong measure in a Court of Equity to say, as a discreet exercise of its jurisdiction, that the contract shall be performed; the defendant swearing positively, and proving, that he would have nothing to do with the estate, if not tithe-free. That, though a very strong proposition, does not come up to this case; for in those cases the Court probably speculates, that tithes and land are the subjects of separate and accurate valuation; and the value of the one does not affect the other; and therefore, though there is a failure as to the tithes, a part only of the subject of the contract, the whole is not affected; as it would be, if the contract was for tithes only. Suppose it proved, that this farm was taken for the purpose of enjoying the corn-tithe principally: that the hay-tithe was a very small object; great part of that capable of being taken in kind; but a small part, not much affecting the bargain, liable to an exemption or modus: the Court in such a case might decree upon the doctrine of compensation. But it will be very different, if it turns out upon examination, that 1 or 2000 acres are capable of being converted to the purpose of producing hay; or, that a part or the whole may be converted from arable to meadow. All those considerations are very material upon the question of compensation; and

it is impossible to determine, now, that this will not be within the reach of some of the authorities a case for compensation.

Upon the conduct of the party this may differ materially from Fordyce v. Ford. In that case, only seven acres were freehold, and all the rest leasehold: but the abstract distinctly stated what was freehold, and what leasehold. From the delivery of the abstract it was perfectly understood beyond dispute, without any ground for inquiry, that it was leasehold unquestionably and irrevocably. The purchaser receives the abstract; treats upon it with full knowledge up to, and long after, the day, on which the contract was to be performed, not upon the nature of the property, but the title; and the Master of the Rolls thought, there was a clear waiver. I doubt extremely, whether that will turn out to be the case here. Taking the representation in the conversation to be, that they believe it to be a modus, and supposing the purchaser could have been off the bargain at that moment, which is very questionable, can it be said from what passed afterwards, that he cannot now; having contracted under this representation, and learning no more afterwards than that they conceive it to be a modus? That is not like the representation as to the leasehold property, but one requiring a reasonable time for inquiry. Suppose, he had said, he would take it notwithstanding, if the quantity of land likely to produce hay was small, or, provided it would not affect the value of the other part of the purchase: some time was necessary to inquire into that; to know, whether the tenants mean to convert the arable land into meadow, and can by that force him to an agreement as to his corn-tithe. The answer swears, they threaten this; that they have done it in some instances; and mean it in more. The inference will depend a great deal upon the extent, to which the fact may exist; and till that is determined, I cannot say, whether this can lie in compensation. If it goes to the destruction of the corn-tithe, he not only loses the hay-tithe, but he does not get the thing which is the principal object of the contract. It is not merely a small abatement.

I cannot therefore decide this cause upon the grounds now before me. There is question enough, independent of the conduct of the defendant, to lay a fair ground for litigation. The Injunction must therefore be continued.

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## ROYAL BRISTOL PERMANENT BLDG. SOCIETY v. BOMASH.

(In Chancery, 1887. 35 Ch. Div. 390.)

The Royal Bristol Permanent Building Society, the Plaintiffs in this case, were mortgagees of two leasehold houses at Penarth, and under their power of sale put them up for sale by auction on the 14th of October, 1885, in two lots, under conditions that the purchase was to be completed on the 11th of November. In the particulars it

was stated that each lot was "recently in the occupation of Mr. Fleming." The conditions were in a form used by the building society, the 15th being that:

"The rents or possession will be received or retained and the outgoings discharged by the vendors up to the day appointed by the special conditions of sale for the completion of the purchase, and as from that day the outgoings shall be discharged and the rents or possession shall belong to the purchaser; but unless otherwise provided by the special conditions he shall not be let into the actual possession or receipt of the rents until the completion of the purchase."

By the 16th it was provided that if the delay in the completion of the purchase should arise from any cause other than the neglect of or default of the purchaser, and if he deposited the remainder of the purchase-money in the bank named in the special conditions, the vendors should during the continuance of such deposit be entitled to the interest on the deposit, and not to the rents and profits.

T. S. Bomash, the Defendant, became the purchaser, and signed an agreement with the conditions annexed, and paid the deposit. The houses were at the time still in the occupation of Fleming, the mortgagor, who was said to be insolvent; and Bomash refused to complete until he could have actual possession. Many letters passed between the parties, and on the 10th of November the building society brought an action of ejectment against Fleming. The sheriff went into possession on the 14th of December, and Fleming was turned out on the 15th, or the following day, but as to the exact dates there was some dispute. The sheriff did not give the keys to the building society until the 28th of December. Bomash had refused to take possession until the building society could give possession, and the building society had not offered to give possession until the 12th of December. He had refused to complete without compensation for the loss of a tenant, and he had also claimed damages for injury by removal of the fixtures and otherwise, and also claimed certain fixtures. Several offers for a settlement were made on each side, and not accepted by the other side. The houses had remained vacant. Proposals had been made for their being let without prejudice, but the parties could not agree as to the terms.

The building society on the 17th of December, 1885, had brought this action for specific performance simply. The Defendant alleged that he had bought the houses in the belief that they were vacant, and with a view of immediately letting them; and that he had lost a tenant by not having possession: and by counter-claim he claimed specific performance with damages. It appeared that soon after he became the purchaser, he agreed to let one of the houses to one Wilson for fourteen years, and Wilson was to have possession on the 16th of November, but as he found that he could not then have possession the agreement was broken off. Bomash also claimed some fixtures. The decision on that point was against him, and does not require to be re-

ported. He had on the 28th of November deposited the balance of his purchase-money in the bank.

KEKEWICH, J.[6] I have now to dispose of two questions, which depend more or less on the main question who is in default. In saying this, I do not wish to cast any blame upon either party. In the correspondence the solicitor on the one side has, on behalf of his client, contended very fairly for his view; and the solicitor on the other side has contended very fairly for his view, and I must decide which of the two is right.

The first question is as to the possession. I have no doubt, quite independently of the case of Hughes v. Jones, 3 D., F. & J. 307, that this contract was a contract for the sale of these houses, with vacant possession. I have no doubt that this contract contains what I may describe as a guarantee that on completion of the purchase the purchaser would be let into possession. That being so, and it being admitted on all hands that he could not have possession at the date fixed for the completion of the contract, and could not have had possession until either the 15th or 16th of December, the question is, whether the purchaser or the vendors were in default, and whether, if the vendors were in default, the purchaser is entitled to any and what compensation.

Mr. Ford has argued with considerable force that the sheriff could have given possession and would have given possession to the purchaser on a day which would have satisfied all the reasonable requirements of the purchaser. I do not think that a purchaser having a contract to sell with vacant possession, is bound to take possession from the sheriff when he knows, as he did know in this case, that the man to be evicted, the man who had been holding over, was still on the premises and would have to be turned out by force. I think the purchaser is, under those circumstances, entitled to say:

"Exercise your rights; first turn the man out, and then give me vacant possession."

Therefore I think the vendors were in fault, that they had contracted to give vacant possession, that they were not prepared to give vacant possession at the time when the contract ought to have been completed, and that in fact the purchaser could not have got within a reasonable time that vacant possession for which he had contracted; and to that extent he has obtained something less than that which he contracted to buy.

Now, the question is, whether he is entitled to be compensated for that? On the 2d of November, 1885, that is, before the date fixed for the completion, he entered into an agreement with a Mr. Wilson to let him these houses for a term of fourteen years, at the yearly rent of £85, and that was to be completed on the 16th of November, 1885. The day of completion of the original contract having been the 11th,

[6] Part of the opinion is omitted.

there was five days' margin. As a matter of fact, Mr. Wilson's contract went off. He wanted vacant possession; he could not get vacant possession; and on some day not accurately fixed, but varying, I think, from the 16th to the 23d of November, 1885, he threw up his bargain, as he was entitled to do. He was cross-examined to shew that he was willing to stay on. I dare say he was. The premises seemed suitable to him. He does not seem to say that it was too much rent to pay, and it may be that after all he will take them; but was the purchaser bound to urge him to wait, and can we say now that Mr. Wilson was not reasonable in throwing them up? At that time there was no proof that Mr. Fleming would be turned out at any particular day. He was still in possession, and was apparently not intending to go out, and I do not think Mr. Wilson acted otherwise than prudently in throwing up a bargain of that kind, nor that the purchaser acted otherwise than prudently in acquiescing, and saying:

"I cannot help it. I am not prepared to give you the possession which I bargained for, and I must part with you."

Therefore the Defendant suffered some reasonable loss. I think he might fairly presume that the vendors would do their duty and get rid of Fleming, so as to complete the contract say by the 3d of December; and I do not think it was an unreasonable contract for him to enter into. He did enter into it, and lost it; and he claims to be compensated for that loss.

This question deals with a branch of law which is very difficult, and for this reason, that there is certainly a distinction between compensation and damages. It has always been held that a purchaser may, if he likes, take specific performance with compensation, though a vendor cannot force it upon him; but where what he wants is strictly damages, such as were claimed in Bain v. Fothergill, Law Rep. 7 H. L. 158—damages for the loss of a bargain where the title has failed—then it has been held that he cannot get those damages. The question here is not, whether this is compensation or damages, because the distinction is not sufficiently defined for that, but whether it is damages in the nature of compensation or not. In the second edition of Lord Justice Fry's book on Specific Performance, page 550, the distinction is drawn, and he refers to a case of Prothero v. Phelps, 7 D., M. & G. 722, in which damages were given in the nature of compensation. I hold the distinction applicable here, and giving the purchaser damages in the nature of compensation, I must consider what is the proper measure of those damages. There again I am assisted by the case of Jaques v. Millar, 6 Ch. D. 153. Lord Justice Fry (then Mr. Justice Fry) says in his judgment, 6 Ch. D. 159:

"The question of damages is a more difficult one. Damages are claimed, in addition to the specific performance of the agreement, in respect of the delay which was caused by the defendant's wilful refusal"—here it is the Plaintiffs' refusal, though there is no wilful refusal on their part, and I do not impute it to them—"to perform his contract, and the consequent loss of profit to the plaintiff. I think I am at liberty to consider what would have been the

value of the possession of the premises to the plaintiff for the period between the 5th of September, 1876, and the time when he actually obtained possession of other premises. I shall not attempt to explain in detail the motives which operate on my mind. But I am entitled to have regard to the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract."

I hold this case to fall not within Bain v. Fothergill, which seems to me to deal with a different class of circumstances altogether, but to fall within a class of cases which is illustrated by Jaques v. Millar, and I must give the Defendant damages calculated on some such principle as Lord Justice Fry indicated. I think that the proper way of doing that is simply to take the rent which he would have received under that contract, against which there is nothing to set off. That seems to me to be the reasonable way of dealing with the case. I take it at a year and three months roughly, and I shall award the Defendant £110 damages by way of compensation for not having obtained that vacant possession which I think he was entitled to under the contract. * * *

Therefore there will be judgment on the claim and counter-claim for specific performance, and for the payment by the Defendant to the Plaintiffs of the purchase-money with interest until the agreed day when the money was deposited in the bank, with the following deductions: £1 for damage to the garden, £110 as compensation for the want of vacant possession, and £25 for the damage to the property since the date of the contract. That is a mere matter of arithmetic, which can be worked out on the face of the judgment.

Then as regards the costs. I think that though the question about the fixtures has been treated as being much more important than to my mind was at all necessary, still it has been treated as an important question, and costs have been incurred about it. I think the Defendant has failed as regards that, and he must pay those costs. The Plaintiffs must pay the general costs of the action.

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## NELSON et al. v. GIBE.

(Supreme Court of Michigan, 1910. 162 Mich. 410, 127 N. W. 304.)

The bill of complaint was filed in this case by complainants against defendant to foreclose a land contract, claiming a balance due. In the contract the complainants agreed to sell, and defendant to buy, a lot in the village and county of Newaygo, state of Michigan, for the consideration of $500 with interest at 6 per cent. Defendant was put in possession, and paid all of the purchase price and interest except $100, when he discovered that a Mr. Boyd, owner of the lot next to the one he had purchased, had for many years been in possession of the east 23

feet and 2 inches of said lot he had purchased. He notified complainants, stating that the balance of the purchase price was ready and demanding that they dispossess Boyd and give him possession. Complainants offered him a deed, and on his refusal to complete the purchase unless Boyd was dispossessed and he put in possession, they filed this bill. In his answer defendant repeated his offer to complete the transaction if Boyd were dispossessed and himself put in possession and contends that, complainants not being in a position to convey to him all of said lot, he is entitled to an accounting, and a repayment of the excess he has overpaid, and a conveyance of such lot as he has actually received from complainants.[7]

McALVAY, J. The question is, Are [the complainants] entitled to the relief they seek? More than one-third of this lot never belonged to complainants. Whether at the time of entering into the contract complainants believed that they owned it is immaterial. As far as the proposition of law is concerned they might have intended to purchase it, or if it was incumbered have expected to remove the incumbrance. They are bound by the terms of their contract. They agreed to sell all of the land described. To grant them the relief asked would operate to allow them to take advantage of their own default. Specific performance of a land contract will not be granted where the vendor is unable to perform, but the purchaser may elect to proceed pro tanto, with an abatement in the purchase price for the deficiency. 26 Am. & E. Enc. of Law (2d Ed.) 116; Pomeroy on Contracts (2d Ed.) § 347 et seq. It is immaterial what the form of the action may be if the relief sought be identical. This principle is applicable to this case.

Defendant by proper pleadings had asked the court to equitably determine the rights of the parties. He is willing to accept a warranty deed for the portion of the premises complainants own, but asks that they account to him for overpayment already made. He should have been given the affirmative relief he asked. It is in accord with sound principles of equity, and is supported by reason and authorty. The court having obtained jurisdiction of the subject-matter and the parties was authorized to finally determine the dispute.

The decree of the circuit court must be reversed, because there is no evidence in the case from which this court can determine the amount which should be deducted from the contract price by reason of complainant's default in title to 23⅙ feet of this lot, and how much less said premises are worth by reason thereof. The case must be remanded for the purpose of taking testimony upon that question to determine that amount, and also to determine the amount defendant has overpaid, if any, and the interest thereon, and all other interest to which he is entitled, and that thereupon a decree be entered in his favor for a conveyance by warranty deed to him of 42⅚ feet of said

[7] The statement made in the opinion by McAlvay, J., has been rewritten.

lot, and for a money judgment for the amount to which he is found to be entitled to over and above his payments, with interest from August 20, 1909, and that he recover all costs of both courts to be taxed.

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## MARTIN v. MITCHELL.

## MARTIN v. PEILE.

(In Chancery before Sir Thomas Plumer, 1820. 2 Jac. & W. 413, 37 E. R. 685.)

THE MASTER OF THE ROLLS.[8] * * * The original bill, which was filed in February, 1815, was for a specific performance, by J. Mitchell and his wife, of their agreement to sell to the Plaintiff their reversionary interest in this property. * * *

The acts of a married woman, with respect to her estate, are perfectly void; she has, as is said by the Master of the Rolls, in Wright v. Rutter (2 Ves. Jr. 676), no disposing power, though she may have a disposing mind. This agreement signed by her with her husband cannot affect her estate, and cannot give the party a right to call upon her in a court of equity to execute a conveyance to bar her if she survives, and to bind her inheritance. It was only under the power reserved by the settlement, that its validity could be contended for, and on that point I wished to be satisfied, whether being void on general principles, it was made good by the reservation of the power. I wished to know if there was any case in which a husband and wife having a power of appointment by deed over the wife's estate, a paper, not executed modo et forma pursuant to the power, was held to take effect as an appointment. If it is signed by a person competent to contract, and is for a valuable consideration, but defective in form, there is a remedy in equity, for you have a valid contract to stand upon. But with a married woman there can be no binding contract; the instrument is good as an agreement, then how can it be said to bind her? She had a power to convey by deed, attested by two witnesses; her disability as a married woman was taken away as to that mode of proceeding: and she might, by an instrument executed with the required formalities, point out the uses to which the estate was to be conveyed and the fine would then enure to those uses. But where the instrument is not executed according to the power, it is nothing but an agreement signed by a married woman, and as an agreement it is invalid. This is a point on which I do not mean to give a definitive opinion, because it is not necessary for the decision of this cause; but I feel that there would be very great difficulty in extending the doctrine of the Court as to defective executions to instruments signed by married women; it would be introducing quite a new line of cases. The power

[8] The statement of facts and parts of the opinion are omitted.

gives a competency to act, with certain protections, but it is a very weighty question whether it can be held that that gives a general competency.

Then, if it was only the agreement of the husband, what becomes of the Plaintiff's case? The point, that the Court should compel the husband to coerce the wife to join with him in the conveyance, was abandoned. The counsel did not urge that that is the law now, and that the husband was to go to prison, if she refuses to concur. It is not necessary, therefore, to go into the class of cases upon that subject, the authority of which has been very much weakened. Morris v. Stephenson, 7 Ves. 474; Emery v. Wase, 8 Ves. 505; Howell v. George, 1 Mad. 7. They were much shaken by the remark of the Lord Chancellor, upon the difficulty of a court of equity compelling her to consent to a fine, while the Court of Common Pleas always examines her to ascertain whether she acts freely, and if they find her to be under constraint, still her consent must be taken, or the husband will be punished. * * *

With all these difficulties hanging over it, it is not a case for a specific performance; the parties must be left to their legal remedies. On the original bill I think the Plaintiff is not entitled to a decree.[9] * * *

[9] In Howell v. George (1815) 1 Madd. 1, 56 E. R. 1, Vice Chancellor Plumer said: "The Defendant thought, when he entered into the agreement, he had an absolute power over the estate, but has since found he is only tenant for life, and his wife and son refuse to join with him in suffering a recovery, so as to enable him to perform his agreement. He is willing to convey as far as he can, and to compensate the Plaintiff for any injury he may have sustained. It is contended that the Defendant ought to be compelled to procure his wife and son to join with him in a recovery; or that, under the proviso, he ought to acquire a fee in the lands in question, and convey them to the Plaintiff. It was not much pressed in argument that he ought to be decreed to procure his wife and son to join in a recovery. It could not be argued that a man should be compelled to use his marital and parental authority to compel his wife and son to do acts which ought only to be spontaneously done. In Hall v. Hardy (1733) 3 P. Wms. 189, the Master of the Rolls says, there have been an hundred precedents where, if the husband, for a valuable consideration, covenants that his wife shall join with him in a fine, the Court has decreed the husband to perform his covenant; and in Morris and Stephenson (1802) 7 Ves. 474, a husband was, under the circumstances, decreed to procure his wife to join a surrender of copyhold estate; but in Emery v. Wase (1803) 8 Ves. 505, Lord Eldon reviews the cases, and expresses great doubt, whether under a contract by a husband to sell the estate of his wife, the Court will decree him to procure her to join. In Davis v. Jones (1805) 1 B. & P. N. R. 267, the Chief Justice of the Common Pleas, Sir James Mansfield, who was very conversant in the doctrines of a Court of Equity, thought nothing could be more absurd than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued and thrown into gaol, when the general principle of the law was, that a married woman shall not be compelled to levy a fine. Those cases in which a husband was compelled to make his wife concur have been where he has agreed she should convey, and her consent might be supposed to have been previously obtained; but in this case there is no pretence that the Defendant agreed that his wife and son should join in a recovery. None of the cases have gone so far as to say a father can be compelled to procure his son to join in a recovery."

## JONES v. EVANS.

(In Chancery before Sir Launcelot Shadwell, 1848. 17 Law J. Ch. 469.)

This was a bill filed by the purchaser of an estate for the specific performance of an agreement, dated the 8th of January, 1847, by which it was recited that James Evans and Thomas Jones were each of them entitled to two-sixth parts of and in the residue of a term of ninety-nine years in certain lands; and by the said agreement it was witnessed that, in consideration of the sum of £140 to them the said J. Evans and T. Jones, paid by the plaintiff, Hector Jones, they, the said J. Evans and T. Jones, respectively agreed to assign to the plaintiff the said two sixth parts or shares in the said leasehold property, together with all other their rights and interests therein; and each of the said parties was further bound in the sum of £30, to be recovered as liquidated damages, to perform the said agreement. Upon the execution of the said agreement the sum of £1 was paid by the plaintiff to each of the said vendors by way of deposit. It turned out upon investigation of the title of the vendors, that instead of being entitled to two sixth parts of the said premises, they were only entitled to two twenty-one parts each, and in consequence of this discovery they refused to complete the contract, and tendered the sum of £30 by way of damages, according to the terms of the agreement. The plaintiff, however, being satisfied to accept performance of the contract to such extent only as the interests of the vendors extended, upon having a proportionate reduction in the amount of purchase money, filed this bill for specific performance.

THE VICE CHANCELLOR. As to one of the parties being entitled in right of his wife, that is a matter for the consideration of the purchaser; he may if he likes waive the conveyance from the wife. It is evident from the terms of the agreement that the intention of the purchaser was to buy what the vendors had to sell. This is very unlike the case where parties contracted to sell an entirety, and then it turned out that they had only seven sixteenth; here the contract was to sell two sixths, and it afterwards appeared that the vendors had only two twenty-one parts each. The intention of the vendors was to sell what they had, and it seems to me to be quite right that there should be a specific performance of that agreement to the extent of the vendors' interests, and that a proportionate abatement should be made in the purchase-money.

## EBERT v. ARENDS.

(Supreme Court of Illinois, 1901. 190 Ill. 221, 60 N. E. 211.)

Appeal from circuit court, Ford county; John H. Moffett, Judge.

Suit by Theodore Arends against Samuel Ebert. * * *

This is a bill, filed on March 22, 1900, by the appellee against the appellant, for the specific performance of a written contract for the sale of 80 acres of land in Ford county by the appellant to the appellee. Answer was filed to the bill by the appellant, and the cause was referred to a special master to take evidence and report his conclusions. Objections were filed to the report before the master, and by him overruled. The master reported in favor of the appellant, and recommended that appellee's bill should be dismissed. Exceptions were filed to the master's report, and, upon the coming in of the report to be heard upon such exceptions, the same were sustained by the circuit court; and the circuit court entered a decree in favor of the appellee, and ordered a specific performance of the contract by the appellant. From the latter decree by the circuit court the present appeal is prosecuted. * * *

MAGRUDER, J.,[10] delivered the opinion of the court. * * * There is one feature, however, of the decree, entered by the court below, which we cannot but regard as erroneous. The decree provides that, if the appellant shall deliver a deed, in the execution of which his wife shall join with him, to the master, then the master is to pay to appellant the full amount of money required to be deposited with him by the appellee. But the decree also provides that if appellant shall deliver a deed signed by himself alone, without the execution thereof by his wife, so as to release her dower, then the master shall pay over to the appellant all of the money so deposited, except the sum of $1,000, and that said sum of $1,000 shall be retained by the master until the value of the dower interest of the wife of appellant can be ascertained. As the appellant is still alive, his wife's dower is as yet inchoate. In Humphrey v. Clement, 44 Ill. 299, which was a proceeding to compel the specific performance of a contract for the sale and conveyance of land, the court decreed a conveyance upon payment by the purchaser of $880, the amount due on the contract, and also decreed that, in case the wife of the defendant should refuse to join in the deed, the purchaser might retain $250 out of the purchase money; and it was there held that this provision in the decree, authorizing the purchaser to retain $250 out of the purchase money, as an indemnity against the contingent right of dower, was erroneous, there being no grounds upon which to base such judicial action. See, also, Sloan v. Williams, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496. Under the doctrine laid down in Humphrey v. Clement, supra, the retention of the $1,000 out of the purchase money is unauthorized. We do not regard

[10] The statement of facts is abridged and part of the opinion is omitted.

the case of Humphrey v. Clement, supra, as overruled by the case of McCord v. Massey, 155 Ill. 123, 39 N. E. 592. In the latter case, the appellee therein brought suit to recover the residue of the purchase money of certain premises, and the appellants there sought to set off against his demand an amount which appellants had been obliged to pay to remove an inchoate right of dower; and it was there held that the damages sustained by the covenantee through a breach of covenant against incumbrances was not established by proof of the amount paid to discharge such inchoate right of dower. The vendee, in cases like the one at bar, must take his deed without the execution thereof by the wife, and rely upon its covenants. If a purchaser of land desires to protect himself against the dower of the vendor's wife, he should provide against it in his contract.

The decree of the circuit court is affirmed so far as it awards to appellee a specific performance of the contract, but is reversed so far as it authorizes a part of the purchase money to be held back until the value of the dower interest of appellant's wife can be ascertained; and the cause is remanded to the court below with directions to change and modify its decree in accordance with the views herein expressed. Partly affirmed and partly reversed, and remanded with directions.

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## WALKER v. KELLY et al.

**(Supreme Court of Michigan, 1892. 91 Mich. 212, 51 N. W. 934.)**

Appeal from circuit court, Gratiot county, in chancery; Sherman B. Daboll, Judge.

Bill by Ella Walker against Frederick S. Kelly, Simon Munson, and Rudolph Walker, to enforce specific performance of a contract to convey land. From a decree for defendants, complainant appeals.

McGRATH, J.[11] This is a bill for specific performance of a contract for the conveyance of 120 acres of land. Complainant, who is the daughter of defendant Kelly, owned 80 acres of other land, and defendant Walker, the husband of the complainant, owned 40 acres adjoining. Complainant and husband, in September, 1881, sold their land, receiving therefor $1,000 in cash and a mortgage of $1,300. They were to give possession in April, 1882. Defendant Kelly owned a farm of 200 acres, upon which he, with his wife and son, resided. Kelly's wife was complainant's stepmother. The proceeds of the land sold by complainant and her husband were turned over to defendant Kelly, with which he purchased a small farm near the village of Ithaca, to which Kelly and wife removed from the farm in dispute. After the lapse of two years and a half, complainant and her husband moved upon the land in question, where they have since resided. Since she

[11] Part of the opinion is omitted.

moved upon the farm complainant has turned over one-third of the crops to her father. These facts are not disputed. Complainant claims that, after she had sold her farm, her father represented to her that he was getting too old to work his farm, and desired to buy a small place near the village, and divide up the 200-acre farm between complainant and her brother; that he had been looking at the Kinwitter place, near the village of Ithaca, and he agreed that, if she would let him have the proceeds of her farm, he would buy the Kinwitter place, and remove thereto, and would give her a deed of the premises in question, provided that she would agree to give him one-third of the hay, wheat, oats, clover-seed, corn, and apples that would be raised on said farm during his life; that, in consideration thereof, he would pay the taxes assessed upon said land; that she accepted her father's proposition, and went with her father to Kinwitter, assigned her mortgage to him, and paid over to him the $1,000 in cash; that in the spring, after her father had removed from the farm, she refused to go upon the farm, because her brother, who was about to get married, occupied the homestead, and her father insisted that her brother should remain there for an indefinite period, until he, the father, should build a house for the brother on the adjoining 80 acres, which was to go to the brother. She claims that she told her father that no one house was large enough for two families. The father finally agreed to build a house for the brother at once, and complainant moved upon the farm, the father built the house for the brother, and the brother removed thereto. She claims that the deed to her was to be delivered at once, but the father, when first asked for the deed, told her that he had not yet obtained his wife's signature, but he promised to obtain it; that afterwards he represented to her that his wife refused to sign the deed, but assured her that she should be protected; that she relied upon her father's promises made from time to time; that the father continued making these promises, and giving these assurances, until two years before this suit was brought; and that this suit was instituted because she learned that her father had sold and conveyed 10 acres of the land in question to defendant Munson. * * *

It is insisted, however, that the contract is not enforceable, because the wife cannot be compelled to release her dower. There is no question but what the contract here was for a deed from both Kelly and wife, and, while the wife cannot be compelled to release her dower, (Richmond v. Robinson, 12 Mich. 193; Phillips v. Stauch, 20 Mich. 369,) there is no reason why complainant may not have a decree for specific performance so far as defendant Kelly is concerned, and for compensation as to the dower interest of his wife. In Phillips v. Stauch, supra, the wife did not join in the contract, which related to a homestead. The court could not decree a conveyance of the homestead, for, under the statute, a deed by the husband alone of the homestead is wholly invalid. The present case is without that complication. Here there is no partial alienation, no severance of the property, and

the dower interest is unaffected. There is no legal obstacle to the conveyance by a husband of his interest in real estate, and, if so, why may not the husband be compelled to so convey, when he has contracted so to do, and to give compensation wherein he has failed to perform his contract? The complainant is entitled to a deed from defendant Kelly of the premises described in complainant's bill, subject to a reservation of one-third of the crops above named to defendant Kelly, for and during his natural life, upon payment of the taxes upon said premises, and complainant is also entitled to compensation for the present value of the contingent right of dower of the wife of defendant Kelly. The decree below is reversed, and a decree entered here in accordance with this opinion, and the record remanded, with directions to proceed to the award of compensation in accordance herewith, with costs of both courts to complainant.

LONG, J., did not sit. The other justices concurred.

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## SECTION 7.—THE STATUTE OF FRAUDS IN EQUITY—ORAL CONTRACTS PARTLY PERFORMED

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### LASSENCE v. TIERNEY.

**(In Chancery before Lord Cottenham, 1849. 1 Macn. & G. 551.)**

THE LORD CHANCELLOR.[12] * * * Here is a bill filed by a married woman, alleging a parol agreement before marriage, and a marriage following. The contract alleged is one solely and entirely for her benefit; nothing is given up by the husband, nothing contracted to be done by him, but he is to take £3000, which he does take, and taking £3000, he contracts that the wife shall enjoy the rest of her property. Nothing is done upon that; the marriage takes place, and then a deed is prepared, to which the name of the wife appears attached (a circumstance quite immaterial, as she was incapable of binding herself in that way). The deed was not acknowledged by her, and therefore never underwent that ceremony which by law is necessary for the purpose of binding her interest. Under these circumstances she dies, and then her husband files a bill; and the equity which he asserts in that bill is this: that he and his wife contracted before marriage that there should be, if necessary, a settlement ("if necessary," of course, means necessary for the purpose of the contract which was to secure to the wife the enjoyment of her separate estate); that nothing took place subsequently to bind the wife; that if a settlement had been prepared,

[12] Parts of the opinion are omitted.

it ought to have contained (as the deed purporting to be such settlement did contain) a power to her to give away the property by will; that she made a will, of which he, the husband, was to have the benefit to a certain extent; and that as devisee, and as against her heir, he claims to have this will carried into effect.

Now, in the first place, if the wife was alive, could any equity be asserted against her? There is nothing against her but a parol contract before marriage, and nothing but marriage following, which will not support the contract; and such a contract cannot be carried into effect under the Statute of Frauds. The case of Hammersley v. Baron de Biel, 12 Cl. & Fin. 45, was referred to in support of this equity. That case, as it came before this Court, is not reported at all, except in a note to the report of the case before the House of Lords, in which my judgment only is given. I was very glad to find that in giving judgment in that case, I guarded myself, as I supposed, against such a use being made of the case, for I there said that a parol contract followed only by marriage is not to be carried into effect, marriage being no part-performance of the contract. If it were, there would be an end of the statute, which says that a contract in consideration of marriage shall not be binding, unless it be in writing; but if marriage be part-performance, every parol contract followed by marriage would be binding. That is no new doctrine; it is what Lord Eldon lays down in Dundas v. Dutens, 1 Ves. Jr. 196, and has always been considered and recognized as law. * * *

The appeal must therefore be dismissed with costs.

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## MOORE v. SMALL.

(Supreme Court of Pennsylvania, 1852. 19 Pa. 461.)

Error to the Common Pleas of Lawrence County. Action of ejectment.

Buffington, J., charged as follows:

"There are a few prominent facts in this case that seem to be satisfactorily established, and not controverted. John Small was the owner of the whole tract prior to the year 1820. From the year 1823 till the time of his death, Matthew was taxed with one hundred acres; John Small with two hundred acres till 1825, and from that time till 1831 with one hundred and sixty acres, and Matthew Small with one hundred acres, part of Thompson's, for 1828. A house was built in 1824 on the land in dispute; attempts were made to dig a well, estimated altogether at $200. A second cabin was erected on the land, and a quantity of land cleared, amounting to upwards of five acres. A tenant, Samuel Stanton, resided there from the spring of 1829 to the fall of 1838. On the 19th of November, 1835, John Small made his will, devising this land to the plaintiff, and shortly afterwards died. In the spring of 1847 a suit was brought in the Court of Common Pleas of Mercer county, by the present defendants, which resulted in a verdict and judgment in their favor, in the spring of 1849.

"If John Small was the owner of the land at the time he made his will, and at the time of his death, the devise passed the land to the plaintiffs, and

they are entitled to recover. The question, then, in dispute is, did the old man give the property to his son Matthew by a parol gift, which is valid in law to pass the title? The defendants so allege." * * *

The opinion of the Court was delivered by

WOODWARD, J.[18] The statute of frauds and perjuries, regarded as a rule of property, is simple and intelligible. Every mind is capable of understanding that contracts about land, if more is meant than a three years' lease, must be in writing. This rule is as apprehensible and appreciable by the common mind as those other statutory rules which make twenty-one years' adverse possession of land, title thereto; bar actions on simple contracts after six years' delay; require judgments to be revived once in five years; and liens of mechanics and material men to be entered within six months after the contract executed.

And what rule is more reasonable? Land is the most important and valuable kind of property. Or if it be not, there is no other stake for which men will play so desperately. In men and nations there is an insatiable appetite for lands, for the defence or acquisition of which money and even blood sometimes are poured out like water. The evidence of land title ought to be as sure as human ingenuity can make it. But if left in parol, nothing is more uncertain, whilst the temptations to perjury are proportioned to the magnitude of the interest.

The infirmities of memory, the death of witnesses, the corruptibility of witnesses, the honest mistakes of witnesses, and the misunderstandings of parties, these are all elements of confusion and discord which ought to be excluded from titles to the most coveted, if not most valuable of terrestrial objects. And it is the purpose of the statute of frauds and perjuries to exclude these elements, and to compel men to create testimonials of their intentions which are certain and enduring.

Blackstone speaks of the reign of Charles II as more polite than its predecessors, and it was distinguished by several enactments that marked an advancing civilization. The statute for prevention of frauds and perjuries was one of those enactments. Though enacted before the charter to William Penn, this statute has been held not to extend to Pennsylvania. But its most material provisions were supplied to us by our Act of 21st March, 1772. It is remarkable how completely, both in England and Pennsylvania, the public mind has acquiesced in these enactments. History tells of no popular movement, in either of these representative governments, for the repeal or material modification of the statute of frauds and perjuries. Chancellors and judges have often manifested great uneasiness under its operation, and have expounded and refined until the rule has ceased to be looked for in the statute itself, but must be tracked through volumes of jarring and contradictory decisions. The people however, whose representatives furnished the rule, have indicated their willingness that it should have free course, by never calling on their representatives to repeal it.

[18] The statement of facts, excepting a part of the charge of the trial court, and a part of the opinion of Woodward, J., are omitted.

And yet it must be confessed, the idea first started in England, I believe by Sir William Jones, that a statute made to suppress perjuries and frauds should be so construed as not to become an instrument of fraud, was a logical deduction. The popular acquiescence of which I have spoken may be due, in some measure, to this necessary and reasonable construction. But, that the statute should have effect except where its operation would defeat its objects, is a corollary from this principle of construction, and agreeable to reason, though lost sight of in the decision of many cases. Hard cases make bad precedents, is a maxim that has been strikingly illustrated by the course of decision under this statute. Judges have been borne away, by sympathy for parties from the letter of the law, and in their benevolent efforts to accommodate it to the changeful circumstances of cases, copious fountains of litigation have become unsealed. Nobody has lamented this judicial amiability more than the judges themselves. For the last twenty years there has scarcely been a judge of any considerable reputation, either in England or the United States, who has not in some manner put on record his regrets, the results of large experience that the statute had been so widely departed from, and his conviction, that more evils have resulted from such departures than they have remedied.

The best rule of construction that I have ever seen applied to the statute of frauds and perjuries, is that suggested in some of the English cases, and adopted by the Legislature of Pennsylvania in the Act of 10th March, 1818, providing for the proof and specific execution of the parol contracts of decedents, where such contract shall have been so far in part executed as to render it unjust to rescind the same.

This excludes the possibility of the statute becoming an instrument or occasion of fraud, for if, in any case, it is not unjust to rescind a parol contract, it cannot be fraud to rescind it. The Legislature seem to have considered all parol contracts as within the statute of frauds and perjuries, and that, though partly executed, they ought to be rescinded, if it can be done without injustice to the parties; but if they have been so far executed as to render it unjust to rescind them, then the Courts shall hold them to be without the statute, and go on and execute them fully. In passing upon the question of injustice, reference is to be had to the fact that the 4th section of the British statute, which forbids any action on a parol agreement, unless there be a note of it in writing, signed by the party to be charged, is wholly omitted in our statute. Actions for damages on parol contracts for land have been often sustained in Pennsylvania. Bell v. Andrews, 4 Dall. 152, 1 L. Ed. 779; Ewing v. Tees, 1 Bin. 450, 2 Am. Dec. 455. The measure of damages in such actions is not the value of the land, for that would work an evasion of the statute, but is the price paid or services rendered. Hastings v. Eckley, 8 Pa. 197.

The rule of construction, then, which is deducible from the Act of

1818, may be stated thus: Every parol contract is within the statute of frauds and perjuries, except where there has been such part performance as cannot be compensated in damages. This rule seems to me more reasonable than that delivery of possession under the parol contract shall be part performance to take it out of the statute, as has been asserted in many cases, English and American, and especially in Pugh v. Good, 3 Watts & S. 63, 37 Am. Dec. 534. Without possession taken and maintained under the contract, there can be no pretence of part performance, but generally that is an act which admits of compensation, and therefore too much is made of it when it is treated as sufficient ground for decreeing specific execution. * * *

In the third place, the evidence of possession is wholly defective. That Matthew took possession of the land in pursuance of the contract, can scarcely be said to be proved, whilst it is proved that he never had the exclusive possession. There were the old hill fields on the disputed tract, spoken of by Andrew, as worked sometimes by Matthew and sometimes by the old man; and there were the saw logs, barn logs, firewood, and rails taken from the land by the old man, to show that his possession had never been fully surrendered.

Nor, finally, were the improvements such as to raise an equity. The log house which Matthew commenced he removed to the Thompsons' tract, where he resided, and converted it into a barn. The small piece of land he cleared, if not long since paid for in the use of the improved fields, admits of compensation.

Without discussing the evidence in full, we think it failed entirely to make out these essential points. The consequence is, the defence fails. A chancellor would not decree a conveyance on such proofs. If the defendants were seeking specific execution in the Common Pleas or the Orphans' Court, they could not have it, for the "contract was not so far in part executed as to render it unjust to rescind the same." Nor is there anything in the charge of the learned judge to indicate his satisfaction with the evidence. The whole case was turned over to the jury, and they were substituted for the chancellor, to pass on the equities of the defendants, and of course they were dealt with loosely. In all this the principles I have stated were contravened, and the judgment must be reversed.

Reversed and a venire de novo awarded.

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## WATT v. EVANS.

(Court of Exchequer, 1834. 4 Younge & C. 579.)

A contract by parol was entered into fifteen years ago for the purchase of an estate for the price of £800, and £50 was paid. This did not take the case out of the Statute of Frauds.

LORD LYNDHURST, C. B. The balance of authority upon the cases was in favour of the contract not being taken out of the statute, al-

though the payment was of a substantial or material part of the purchase-money, and so was the reasoning.

The two arguments were, first, the impossibility of drawing the line between substantial and insubstantial; and, secondly, that the statute allowed earnest-money, or part payment of purchase-money, to be available in the case of personal estate, which negatived its being allowed to have that effect in the case of real estate.

To this argument it had been replied, that it had proved too much; for delivery or part delivery of goods is expressly allowed by the statute to take a contract out of it, and yet it is not considered to negative the position, that delivery of possession of real estate shall have the same effect.

But to this it is answered, that, were not the delivery of possession of lands to take the case out of the statute, the purchaser would be led into difficulties, and would be a trespasser.

Considering that there was a conflict of opinion, the Chief Baron dismissed the bill seeking to establish the contract, without costs.

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## LESTER v. FOXCROFT.

(High Court of Parliament, 1700. 1 Coll. P. C. 108, 1 E. R. 205.)

The appellant stated, that Isaac Foxcroft was seized in fee of a part of an ancient messuage called Wildhouse, in the parish of St. Giles in the Fields, in the county of Middlesex, and possessed of other part thereof for a long term of years, and agreed with several builders to pull down parts thereof, and build new houses thereon; and about 25th March, 1695, proposed to make such agreement for part of the said house with appellant, and promised to assist him with money without interest, in case he should want it to finish the building; and it was particularly agreed between them, that appellant should at his own cost pull down a certain part of the messuage, and build thereon fourteen or more good messuages; and that Foxcroft should, in consideration thereof, lease the said part to appellant, from Michaelmas, 1695, for ninety-nine years, at a pepper-corn for the first year, and £150 yearly rent for the last ninety-eight years. At the time of making which agreement, there was no memorandum or note thereof in writing; but in performance of the agreement, appellant entered into that part of the messuage, and, at his own cost pulled down the same, and built several new houses thereon (the whole fourteen being almost finished) and therein disbursed several thousand pounds; about £2000 his own money, and several sums borrowed from Foxcroft upon his own securities, yet unsatisfied, and was all along in possession, and acted as sole proprietor and owner, and was acknowledged as such by Foxcroft; who frequently declared that he had only a ground rent, and that appellant was the landlord; and as any of the new houses

were finished, appellant demised the same in his own name, received the rents, and Foxcroft never received nor claimed any part thereof: And about August, 1698, Foxcroft (being then ill of the sickness whereof he died) made his will, and his daughter, Elizabeth Foxcroft, sole executrix; and devised to his second son, Isaac Foxcroft, his heirs and executors, all his estate in the said ancient messuage called Wildhouse; and if he died under twenty-one, to his eldest son Henry Foxcroft. * * *

The vendor, Isaac Foxcroft, ordered a lease prepared according to the agreement, which was done, but objected to by Foxcroft on account of a mistake made. Corrections were made.

And appellant a few days before the death of Foxcroft, brought the deeds so amended to his house to have them executed as he had directed but respondent refused to let appellant see or speak with Foxcroft, and used several indirect and unfair methods to prevent him from executing the said leases, by means whereof he died without executing them; and since his death respondents refused to execute leases, according to the agreement, whereon appellant, in Hilary term, 1698, exhibited his bill in Chancery for a specifick execution of the agreement, and the cause being heard 6th March, 1700, the Lord Keeper declared that there was no sufficient proof of the said agreement, and ordered appellant's bill to stand dismissed without any relief; which decree appellant insisted ought to be reversed, for that the agreement was sufficiently proved; and though not originally reduced into writing, occasioned by the entire confidence the parties had in each other, yet the same having been at appellant's great expense so far executed on his part, there ought to be a reciprocal performance of it on the other part; and the rather so, as the terms of the agreement were reduced to a certainty, by the lease prepared by direction of the lessor, and the execution thereof prevented by the unfair practices of the respondents, or some of them. * * *

Die Lunæ, 7 Aprilis, 1701. Upon hearing council on this appeal, it was ordered and adjudged by the Lords, that the decretal order of dismission complained of should be reversed, and that the respondent, Isaac Foxcroft, or such other of the respondents to whom the estate in question should come by virtue of his father's will, should when he or they should be of age execute to the appellant Lyster, his executors, &c., such a lease of the premises in question as was prepared and approved of by the said Isaac Foxcroft, the father, before his death, and that, the appellant and his assigns should in the mean time hold and enjoy the same under the covenants and agreements in the said intended lease contained, discharged of all incumbrances done by said Isaac Foxcroft, or any claiming under him.—Lords' Journ. vol. XVI, p. 644.[14]

[14] Parts of the opinion are omitted.

## PAWLING et al. v. PAWLING et al.

(Supreme Court of New York, General Term, Third Department, 1895. 86 Hun, 502, 33 N. Y. Supp. 780.)

Appeal from special term, Montgomery county.

Action by Catherine E. Pawling, as administratrix of Henry Haskell Pawling, deceased, and others, against William M. Pawling and Margaret Pawling, individually and as administrators of Henry Pawling, deceased, and Mary Jane Herrick, for specific performance of a contract for the sale of land. Judgment was entered in favor of plaintiffs, and defendants appeal.

Argued before PUTNAM, HERRICK, and STOVER, JJ.

PUTNAM, J. Henry Pawling, father of the original plaintiff, Henry Haskell Pawling, and the defendants William M. Pawling and Mary Jane Herrick, died in 1892, leaving said parties his only heirs, and the defendant Margaret Pawling his widow, and owning the lot of land described in the complaint. In 1874, Henry Pawling and Henry Haskell Pawling entered into a partnership, and the former conveyed to the latter an undivided half of the premises in question. In 1877 the firm borrowed from one Stairs $2,600, which it used in its business. For this loan Henry Pawling and Henry Haskell Pawling executed their joint and several bond secured by a mortgage on the property. In 1882 the partnership was dissolved, and Henry Haskell Pawling reconveyed to his father the undivided one-half of said premises. In December, 1889, Stairs demanded payment of said bond and mortgage of Henry Pawling, who said he would furnish the money, and then made the proposition to Henry Haskell that, if the latter would pay off said bond and mortgage to Stairs, the said Henry Pawling would give him a deed of the property in question. Henry Haskell at first objected, but afterwards accepted said proposition, and in pursuance of the verbal contract paid said bond and mortgage, and obtained a satisfaction thereof. The amount paid was $2,865.63. Afterwards, and about June 1, 1892, Henry Pawling, being in poor health and intending to carry out said agreement, requested Henry Haskell to have a proper deed drawn to convey said premises in pursuance of said verbal contract, and promised to execute the same. Said Henry Haskell thereupon procured a deed to be drawn, and presented the same to Henry Pawling for execution. Said deed was read to and approved by Henry Pawling, and he promised to execute the same, but soon afterwards, and before he had performed his promise, died. The learned trial court, on sufficient evidence, found the facts substantially as above stated, and also found as follows:

"And the plaintiff has for the use and purpose of his said mill and business, ever since his said agreement with said decedent in December, 1889, and for some time prior thereto, taken and used the water from said dam, and maintained a pipe for his said purposes extending from his said mill and premises into said dam above, and drawing and conducting the water therefrom, and supplying his said mill therewith, with the knowledge and

assent of said decedent, until the time of his death, and still uses the same for such purposes; and ever since said agreement was made in December, 1889, the plaintiff has also used and occupied a portion of the said old mill building as a carpenter shop, and a portion thereof for storage purposes, in connection with his said mill and manufacturing business adjoining on the west thereof, and with the knowledge and assent of said decedent to the time of his said death, and still uses and occupies the same for such purposes."

The subject of the specific performance of oral contracts for the conveyance of land void by the statute of frauds has been extensively discussed by elementary writers and by courts in many cases. It is well settled that equity will, to prevent injustice, enforce the performance of a parol contract partly carried into execution, on the ground that otherwise one party would be enabled to practice a fraud on another, and that it could not be the intent of the statute to enable one party to commit such a fraud with impunity. Story, Eq. Jur. § 759; Dygert v. Remerschnider, 32 N. Y. 629–642. A parol contract for the sale of land, where the vendee has paid the whole purchase price, and entered into possession under the contract, may be specifically enforced. Pom. Spec. Perf. § 115. In Dunckel v. Dunckel, 141 N. Y. 427–435, 36 N. E. 405, Earl, J., remarks:

"We think it is a general rule to be gathered from the authorities that mere payment of the purchase price of land is not sufficient to authorize the specific performance of the contract of sale, unless the peculiar circumstances of the case be such that an action at law to recover back the money paid would not give the purchaser an adequate remedy. But it is also a general rule that when the consideration has been paid, and possession under the contract of sale has been taken, the contract will be specifically enforced, and to take the case out of this rule the circumstances must be peculiar and exceptional."

A multitude of cases might be cited holding the same doctrine. Malins v. Brown, 4 N. Y. 403–410; Dugan v. Gittings, 3 Gill (Md.) 138, 139, 43 Am. Dec. 306; Gregory v. Mighell, 18 Ves. 328; Fitzsimmons v. Allen, 39 Ill. 440; Shirley v. Spencer, 9 Ill. (4 Gilman) 583; Bigelow v. Armes, 108 U. S. 10, 1 Sup. Ct. 83, 27 L. Ed. 631; Fannin v. McMullen, 2 Abb. Prac. (N. S.) 224. There are some authorities holding that the mere payment of the whole of the purchase price by the vendee, and full performance by him of the verbal contract, will entitle him to a specific performance. Will. Eq. Jur. p. 284; Morrill v. Cooper, 65 Barb. 512–517.

In this case there is no serious dispute as to the facts. The deceased, Henry Pawling, in December, 1889, was the owner of the premises described in the complaint which were subject to the mortgage held by Stairs, on which was due $2,865.63. Stairs demanded the money on the mortgage. Deceased, being unable to pay him, then made a verbal contract with his son, the original plaintiff, Henry Haskell Pawling, by which, if the latter would pay up the mortgage, he would convey the premises in question to him. Henry Haskell accepted the proposition, paid up the mortgage, and procured a satisfaction thereof, and remained in occupation of the premises from that time until the death of Henry, in 1892. Shortly prior to this event, Henry Haskell, at the request of Henry, prepared a deed for the latter to execute, which

he was prevented from doing by his death.[15] I do not regard it as of much consequence whether Henry was legally bound to pay the whole mortgage or only one-half of it. The evidence indicates an understanding between the parties that it was for Henry to pay off the whole mortgage. But whether so or not, he was liable for his proportion of the mortgage debt, and it was clearly shown that he agreed with Henry Haskell that, if the latter would satisfy the mortgage, he (Henry) would convey the premises in question to him; that Henry Haskell did pay up the mortgage, and remained in possession of the premises, and, according to the terms of the verbal contract, was entitled to a conveyance thereof.

I think that the parol contract entered into between the father and son, in 1889, and which the former was about to carry out at the time of his death, should be enforced by this court. It would be most unjust, and a virtual fraud, if the defendants, the heirs of Henry Pawling, after the acts of part performance done by the plaintiff's intestate, could be allowed to interpose successfully the statute of frauds as a bar to plaintiff's rights. There has been such a part performance of the original oral contract by Henry Haskell as enables this court to decree a specific performance. There has been a payment of the full purchase price, and possession of the premises under the oral contract, for a period of three years. See Pom. Eq. Jur. § 409, and note, and cases above cited. It is suggested by the learned counsel for the appellants that, although Henry Haskell remained in possession of the premises in question from the time of the making of the oral contract to the time of the death of Henry Pawling, such possession was not under or referable to the oral contract, as he was also in occupancy of the premises at the time and prior to the making thereof. It is true that Henry Haskell was in possession of the premises in question before and at the time of the making of the oral contract. It is not shown how, whether by license from deceased or as a tenant. I think, however, that on the making of the oral contract, and the payment of the purchase price according to its terms, and when Henry Haskell was entitled to a deed of the premises by the terms of said contract and to the possession thereof thereunder (Miller v. Ball, 64 N. Y. 286), that his possession should be deemed as under the contract. It is held, in reference to a tenant, that his possession after the expiration of his term, and a payment of an increased rent, are together a part performance of a verbal contract for a renewal of the lease. So possession

[15] See Bruns v. Huseman (1914) 266 Ill. 212, 214, 107 N. E. 462, 463, where the court said: "Appellant contends that the signing of the undelivered deed will satisfy the statute. While an undelivered deed may be resorted to, to supply the description or other matters of detail in respect to a contract, if the contract is so referred to in the deed that the two instruments can be said to constitute one transaction, still the law is well settled that an undelivered deed which does not in any way refer to a prior written contract is not a compliance with the statute. Kopp v. Reiter (1893) 146 Ill. 437, 34 N. E. 942, 22 L. R. A. 273, 37 Am. St. Rep. 156."

after the term, and a payment shown, which could not be referred to the old rent, but could only be explained on the supposition of a contract, should be part performance of a verbal contract for the lessee to sell and convey the land. Pom. Spec. Perf. § 124. Henry Haskell was in possession before he made a verbal contract to buy the land. In pursuance of the verbal contract, he afterwards paid the purchase price and remained in possession, to which he was legally entitled under the contract. His possession thereafter should be deemed thereunder. In Dunckel v. Dunckel, 56 Hun, 28, 8 N. Y. Supp. 888; Id., 141 N. Y. 430, 36 N. E. 405,—the plaintiff, at the time of making the contract for a life lease sought to be enforced in that action, was in possession of the premises, and the general term, in reversing the judgment first rendered in the action, adverted to the fact as follows:

"The plaintiff was at the time in possession and actual occupancy of the premises in question; had no occasion to move or make any change in her business or condition in consequence of the agreement. She simply continued to occupy the same as she had done while her husband was living." 56 Hun, 28, 8 N. Y. Supp. 888.

But the court of appeals in effect held (141 N. Y. 430, 36 N. E. 405) that, although the plaintiff was in possession of the house and lot affected by the action when the verbal contract was entered into, after the making thereof her possession was referable to and under such contract. In this case, as in the one cited, there was a possession of three years by Henry Haskell prior to the death of his father, and after full performance by him of the contract. As we have seen, on the full performance by Henry Haskell he was entitled to the possession of the premises thereunder, and it seems proper that his actual possession should be deemed taken, rather under the contract, as he lawfully could, than in any other way. See Spear v. Orendorf, 26 Md. 37–44; Wills v. Stradling, 3 Ves. 379. We conclude, therefore, that the learned trial justice properly disposed of this case, and that the judgment should be affirmed, with costs.

HERRICK, J., concurs. STOVER, J., not acting.

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## MATTHES v. WIER.

(Court of Chancery of Delaware, 1912. 84 Atl. 878.)

THE CHANCELLOR [CURTIS].[16] The bill sets up a right to specific performance of an agreement to lease to the complainant a lot of land, with a store thereon erected, for a term of years with the right of the lessee to purchase the demised premises during the term. It is alleged and shown that the defendant, Margaret Wier, owned a lot of land and store in Wilmington, known as No. 811 King street, and that her brother, Thomas M. Wier (as her agent), on or about Decem-

[16] Parts of the opinion are omitted.

ber 16, 1909, made a parol agreement with the complainant to lease to him the premises, No. 811 King street, for five years, commencing March 25, 1910, at a rent of $360 per annum, payable in monthly installments of $30 per month, the first payment to be made April 25, 1910, the lessor agreeing that the lessee during the term could purchase the premises for $6,500, and that upon payment of the purchase money the premises should be conveyed to the lessee and the lease be thereby determined. Subsequently the complainant submitted to Thomas M. Wier a draft of a lease embracing the above terms to be executed by the owner, and at the same time delivered to Thomas M. Wier a certified check for $100 as a payment on account of the purchase price. The lease was not at that time signed by either party, but Thomas M. Wier then stated he was satisfied but wanted to submit the draft of agreement to a lawyer and would send to the complainant a receipt for the money paid. A few days later the complainant received a receipt for the money, as follows:

"Received December 16th, 1909, from Arthur M. Matthes a check for one hundred dollars, in payment on account of purchase of property 811 King St.
"$100. Received payment. Thomas M. Wier, M. W."

It was admitted that the whole of the receipt was written by the defendant, Margaret Wier, by the direction of her brother, Thomas M. Wier. * * * It was shown by the testimony of George E. Miller, a witness having no interest in the matter, that Margaret Wier admitted that Thomas M. Wier was her agent "partly," and that she had been satisfied with the terms of the lease until she consulted her attorney. Margaret Wier retained the $100 for nearly four months and then endeavored to return it to the complainant, who refused to accept it. The testimony of Margaret Wier, and her explanations, are unsatisfactory, but it does appear therefrom that when she took the $100 and wrote the receipt she knew that it was a payment on account of the purchase price of the premises, No. 811 King street, and that according to the arrangement made by her brother for her, and the draft of the lease, the complainant had the right to purchase the property at the price therein stated. When she signed the receipt she knew that the form of agreement which the complainant submitted involved a possible purchase of No. 811 King street. (See page 100 of the testimony of Margaret Wier; also her answer.)

It is not denied that the draft of the lease stated the agreement made between Thomas M. Wier and the complainant, but the agency of Thomas M. Wier to act for Margaret Wier was denied, and it was urged further, as a defense, that there was no written evidence of the agency.

The prayer of the bill is that the defendant be decreed to specifically perform the agreement and be required to grant a lease pursuant thereto.

The jurisdiction of the Court of Chancery to require a vendor to specifically perform an executory contract to sell land is well establish-

ed and based on the broad principle that to do so would do more perfect and complete justice than by remitting the vendee to the recovery of damages at law. Inadequacy of the legal remedy is always assumed. But a surer ground for the remedy is the consideration, that the vendee by reason of the contract acquires an equitable interest in the land, which the court perfects by requiring the transfer to him of the legal estate. Therefore the right to specific performance of a contract for the sale of land depends not merely upon the inadequacy of the legal remedy of damages, but also on the equitable interest which he acquires by the contract. 1 Pom. Eq. Jur. § 221, note.

In this state the equitable interest which a vendee acquires under a valid contract for sale of land has been recognized. Flanagin v. Daws, 2 Houst. 476. But the existence of this equitable interest has not here been regarded as the basis for relief of specific performance to the vendee, and the prevention of fraud has generally been regarded here as the origin of the jurisdiction.

In a sense the making of a decree is discretionary, but this should be taken to mean that if the elements, conditions and incidents which equity regards as essential to the administration of its peculiar modes of relief are present, the remedial right is perfect in equity. With respect to the remedy of specific performance of executory contracts, the elements are thus stated by Pomeroy:

"The contract must be concluded, certain, unambiguous, mutual and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant; and finally it must be capable of specific execution through a decree of the court." 3 Pom. Eq. Jur. (2d Ed.) § 1404, note 1, p. 2162.

This summary is in accord with the decisions of the courts of this state. Where the defendant alone has signed the memorandum required by the statute of frauds, the requisite mutuality is supplied by the complainant filing his bill. 3 Pom. Eq. Jur. (2d Ed.) § 1405, note 1, p. 2163; Clason v. Bailey, 14 Johns. (N. Y.) 484; Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; Moses v. McClain, 82 Ala. 370, 2 South. 741; Docter v. Hellberg, 65 Wis. 415, 27 N. W. 176; Mastin v. Grimes, 88 Mo. 478.

The parol contract set up by the bill meets all these requirements. The requisites stated by Chancellor Saulsbury in Connaway v. Wright, 5 Del. Ch. 472, are present, viz.:

"A valuable consideration, particularity, certainty, mutuality and a necessity for performance."

All these appear in the draft of the proposed lease submitted to the defendant for execution as containing all the terms agreed upon—the premises to be demised, the terms, and the rent and the terms of the purchase, including the price to be paid, and the time within which the purchase could be made. No inequitable elements appeared to impeach the fairness of the bargain, or mistake, imposition or hard bar-

gain, or even inadequacy of rent or purchase price. Mutuality is supplied by the filing of the bill.

In this case there is not in the memorandum signed by the vendor such full statement of the terms of the contract as is required. There is, for instance, no statement of the purchase price, and there is no mention in it of a lease, and, therefore, no such memorandum of the terms thereof as the court must have in awarding the relief asked for, viz., a decree that the defendant execute a certain lease to the complainant. To prove the contract, therefore, the complainant must resort to oral testimony, if the defendant is entitled to the protection of the statute of frauds. * * *

Elsewhere than in Delaware payment, in whole or part, of the purchase money is not of itself such part performance as justifies a court of equity to disregard the prohibition of the statute of frauds. But in Delaware part payment of the purchase price, if shown in writing, is such part performance as removes the bar of the statute. In Townsend v. Houston, 1 Har. 532, 27 Am. Dec. 732, as early as 1835 the highest court in Delaware definitely established the rule that payment of a part of the purchase money is such a part performance of a parol agreement for the sale of land as will take the case out of the statute of frauds if the payment be either admitted by the vendee, or be proved upon him by writing. There the court said:

"If the fact of payment is connected with the concurrent act of the vendor receiving and appropriating the money paid as purchase money, and this appears either by the defendant in his answer confessing the receipt of the money for that purpose, as charged in the bill, or if denied, it be proved upon him by writing, as by a letter under his hand, or other written evidence, * * * in all such cases and upon every principle it seems to me such a fact thus appearing would be conclusive evidence of an existing agreement of which it was part performance and which the defendant having carried part into execution should be compelled specifically to perform the whole." * * *

As to part payment, there is no difference in principle between the effect to be given to payment of a small part of the purchase money and the payment of all or a considerable part of it. * * *

The conclusion is that the complainant is entitled to a decree for specific performance of the agreement to make the lease set out in the bill, with such correction in the description of the premises to be demised as will make it conform to the fact.

Let a decree be submitted in accordance herewith.

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## PERKINS v. PERKINS.

(Supreme Judicial Court of Massachusetts, 1902. 181 Mass. 401, 63 N. E. 926.)

Appeal from superior court, Suffolk county.

Action by Elmer H. Perkins against Charles E. Perkins. From a decree dismissing the bill, plaintiff appeals.

MORTON, J. This is a bill in equity to compel the defendant to convey to the plaintiff certain land in Scituate, and to cancel and dis-

charge any mortgage placed by him thereon. There was a demurrer to the bill as originally filed, which was sustained, and the bill was thereupon amended. There was also a demurrer to the amended bill, and this, too, was sustained, and the bill was dismissed. The plaintiff appealed.

It is this demurrer which is before us, and the ground of it is the statute of frauds,—that what is relied on is an oral contract for the conveyance of land. The plaintiff contends that there was a resulting trust in his favor, and that therefore the statute of frauds does not apply. But we see no ground on which such a contention can be sustained. No part of the consideration for the conveyance moved from, or was furnished by, the plaintiff. The most than can be said is that the defendant orally agreed with the plaintiff and his mother at the time of the conveyance that as part of the plan which the latter had formed for dividing her property amongst her children, of whom the defendant was one, at her death he would take a deed of the premises, and did so with the understanding that he would convey the property to the plaintiff when his mother requested, and that in the meantime the plaintiff should be permitted to occupy on payment of the taxes and repairs, and that the plaintiff entered and took possession, and had occupied openly and exclusively, and had made expenditures and improvements, but that the defendant had refused to convey the property to the plaintiff when requested by his mother.

It is manifest that this falls far short of establishing a resulting trust or any trust in the plaintiff's favor. Indeed, it is doubtful whether, upon the allegations of the bill, there was a trust in the mother's favor, or any consideration for the alleged agreement on the part of the defendant. The money with which the premises in question were paid for was the proceeds of a mortgage placed by the defendant on property which the mother had conveyed to him several years before as a part of the same plan of division already referred to, and in which, therefore, it would seem she had and could have no interest, by way of resulting trust or otherwise, that furnished or constituted the consideration for the conveyance to the defendant; and there is no allegation that the money thus obtained was lent to the mother, and used by her in paying for the land in question. Fitzgerald v. Fitzgerald, 168 Mass. 492, 47 N. E. 431; Campbell v. Brown, 129 Mass. 23; Whitten v. Whitten, 3 Cush. 191.

But if we assume that there was a good and sufficient consideration, and that the agreement was sufficiently definite, and was one that could have been enforced against the defendant but for the statute of frauds, we are of opinion that there has been no such part performance as to take it out of the statute, and to entitle the plaintiff to a conveyance. The only allegation is that the plaintiff entered and took possession under the agreement, and has had possession openly and exclusively, and has made expenditures and profitable improvements with the

knowledge of the defendant, and has also, it may be inferred, paid the taxes. This is plainly not sufficient. Burns v. Daggett, 141 Mass. 368, 6 N. E. 727. Indeed, the plaintiff does not contend that there was, and we only mention it to show that it has not been overlooked.

Decree affirmed.[17]

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## SMITH v. TURNER.

(In Chancery, before Sir J. Jekyll, M. R., 1720, Prec. Ch. 561, 24 E. R. 252 [cited].)

So where a man, on promise of a lease to be made to him, lays out money on improvements, he shall oblige the lessor afterwards to execute the lease, because it was executed on the part of the lessee; besides, that the lessor shall not take advantage of his own fraud to run away with the improvements made by another; but if no such expense had been on the lessee's part, a bare promise of the lease, though accompanied with possession, as where a lessee by parol agreed to take a lease for a term for years certain, and continued in possession on the credit thereof, yet there being no writing to make out this agreement, it is directly within the statute.

[17] In the case of Baldridge v. Centgraf (1910) 82 Kan. 240, 108 Pac. 83, Mason, J., said: "The mere payment of money is not such part performance as upon this principle to take a contract out of the statute of frauds, because the recipient can be compelled to restore it. 26 Am. & Eng. Encycl. of L. 54; 29 Same, 838; 20 Cyc. 297, 298; Baldwin v. Squier (1884) 31 Kan. 283, 284, 1 Pac. 591. The verbal agreement is not the basis of an action for that purpose, but evidence of its terms is often necessary to establish the implied contract upon which recovery is sought. 'In an action to recover upon an implied promise to pay for partial performance of a contract within the statute of frauds, the contract is admissible in evidence, not as being binding and conclusive as to the amount of recovery, but merely as a circumstance to be considered in estimating the value of what has been done.' 29 Am. & Eng. Encycl. of L. 842. The ground upon which a court, notwithstanding the statute of frauds, may compel the complete performance of an oral contract for the sale of real estate which has been partly performed is that such a decree may be necessary in order to avoid injustice toward one who in reliance upon the agreement has so altered his position that he cannot otherwise be afforded adequate relief. His mere entry into possession with the consent of the owner does not in and of itself meet this condition. It does not make him a trespasser in fact, and a decree of specific performance is not necessary to protect him from liability as such. Nor does it in and of itself place him at any disadvantage or involve him in any loss. True, whenever he has made permanent improvements upon the property the courts are ready to order a conveyance, even although it might be possible to provide compensation in damages.

A sufficient reason for this is that alterations in the artificial features of real estate are so largely a matter of individual taste that the loss to their designer in being deprived of their benefit might not be adequately measured either by the increased value of the property, or by his expenditures in making them. And whenever possession is taken under such circumstances that its relinquishment involves a disadvantage apart from the mere loss of the benefits of the bargain, a case may be presented for equitable relief, dependent upon the special circumstances. Nothing having been shown here beyond the bare fact of possession, we think the court erred in finding for the defendant."

## LAMB v. HINMAN et al.

(Supreme Court of Michigan, 1881. 46 Mich. 112, 8 N. W. 709.)

Appeal from Berrien.

COOLEY, J. Specific performance is prayed in this case of an oral contract alleged to have been made by complainant with Hugh Lamb, his father, now deceased. The defendants are the administrator and heirs at law of Hugh Lamb. The case made by the bill is that on or about October 12, 1872, Hugh Lamb owned a certain 80-acre lot of land in the township of Warsaw, of the value of about $2,400, upon which he lived alone; that he was then 72 years of age, and very infirm; that among his infirmities was an ungovernable temper which rendered it difficult for others to live with him; that he had been letting his land on shares and had not succeeded well in so doing; that he had no team, little live stock and few farming utensils; that complainant was then a married man, living with his wife and two children about a mile from his father; that his father went to see him, and after talking over his affairs and circumstances, entered into a verbal agreement with him in substance and effect, as follows:

On the part of complainant it was agreed that as soon as suitable preparations could be made, complainant with his wife and family should remove to his father's dwelling-house on the land aforesaid, and live with him during the remainder of his life, and should give him suitable care and attention, and should farm the land, rendering to his father annually two-fifths of all the wheat and one-half of all the corn raised on the land, all to be delivered on the land, the wheat in the half bushel and the corn in the shock or row; that complainant should furnish the seed, farming utensils and team for use on the farm, and supply his father with suitable board, lodging, washing and mending, and on the part of said Hugh Lamb it was agreed that he should pay annually to complainant $75, and let complainant have the south 40 acres of the land and give him a good and sufficient deed thereof; that this agreement was fully performed on his part to the satisfaction of his father; that complainant took possession of the south 40 as his own in July, 1873, and has since cultivated and improved the same; that his father often promised to give complainant a deed of said south 40, but neglected to do so, and died without having given a deed, in September, 1878, and that since his death the heirs at law and the administrator appointed to settle his estate refuse to recognize and perform the agreement; wherefore complainant prays the aid of the court.

The defendant answered, denying that Hugh Lamb ever made such an agreement, and the case was brought to a hearing on pleadings and proofs. We are convinced by the proofs that a contract substantially as set up in the bill was made by the parties, and that complainant has

strong equities in his favor which should be recognized if no inflexible rules of law forbid. The evidence that proves the contract discloses little discrepancies in the understanding of particulars, but not such as to make us doubt the parties having agreed upon the terms of an arrangement as complainant now describes them.

If there is any doubt as to the precise terms of the contract, it concerns the time when the deed was to be given. The complainant seems to have expected his father would give him a deed without any great delay; but the agreement fixed no time; and as the retention of the title constituted the father's security for the performance by complainant, it was not unnatural that he should delay putting the security out of his hands. If the contract had been in writing, Hugh Lamb would have had the legal right to decline to part with the title so long as he lived; and it is no reason for declining specific performance of the oral contract that complainant had expected his father would so far confide in him as to make the deed in person instead of leaving it to be made by his heirs. We think, therefore, that so far as proof of the contract is concerned, the case is sufficiently made out to answer the requirements of cases relied upon by defendants. Case v. Pelers, 20 Mich. 298; Wright v. Wright, 31 Mich. 380.

But it is said there has been no such part performance as can take the case out of the statute of frauds. The most important act of part-performance was the taking possession of the land, occupying and cultivating it during the father's life. But this it is said was not in fact the complainant's possession, but the possession of the father; so that on this branch of the case there is substantial failure to make out any recognizable equity. The reason why taking possession under an oral contract is recognized as a ground for specific performance when payment of the purchase price is not, is that in one case there is no standard for the estimate of damages when the contract is repudiated, and in the other there is a standard that is definite and certain. A purchaser who takes possession of land under an oral purchase is likely in so doing to change very considerably—perhaps wholly—the general course of his life as previously planned by him; and if he is evicted on a repudiation of the contract, any estimate of his loss by others must in many cases be mere guess-work. The rule, therefore, rests upon the element of uncertainty, and not upon any technical ground of exclusiveness in the possession. And upon this point no case on its equities could be plainer than this. Complainant abandoned one home and made a new one in reliance upon the oral contract: occupied the land bargained for and cultivated it for six years in confidence that the contract would be performed; and it is not too much to say that the whole course of his subsequent life was probably changed in consequence. To deny relief under such circumstances for no other reason than that he did not occupy exclusively, would be to make the whole case turn upon a

point in itself unimportant as affecting the real equities. The case is within Kinyon v. Young, 44 Mich. 339, 6 N. W. 835.

The decree of the court of chancery was in favor of complainant, and it must be affirmed with costs.[18] The other Justices concurred.

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## FRAME v. DAWSON.

(In Chancery before Sir William Grant, 1807. 14 Ves. 386, 33 E. R. 569.)

The bill stated that the plaintiff, possessed of a house for a term of thirty-one years from Christmas, 1800, at the yearly rent of 35*l.* with the usual covenant among others, for repairing and keeping in repair, &c., having in 1803, employed a builder to repair the house, the party wall was discovered to be in a very ruinous state. The plaintiff upon that discovery applied to the defendant, to whom, as purchaser of the premises, he had attorned, requesting that the defendant would either contribute to the repairs, or make some abatement in the rent. The defendant refused to do either; but promised in consideration of the plaintiff's repairing the party wall, to grant him a farther term of ten

[18] See Dalby et al. v. Maxfield (1910) 244 Ill. 214, at page 218, 91 N. E. 420, at page 422 (135 Am. St. Rep. 312); where the court, by Vickers, J., said: "It is next said that the contract cannot be enforced because appellant did not take possession under it. This contract does not belong to that class wherein it is necessary to show possession taken and the making of valuable and lasting improvements in order to take the case out of the operation of the statute of frauds. That statute, passed to prevent frauds, cannot be resorted to for the purpose of perpetrating a fraud. Any act performed under a parol contract which would work a fraud on the party if the contract was not enforced may be sufficient to take the case out of the operation of the statute of frauds. The case of Warren v. Warren (1882) 105 Ill. 568, is in point on this question. There a father verbally promised his daughter, if she would remain with him after her mother's death and keep house for him as long as he lived, he would leave his farm to her at his death. The daughter accepted the offer and complied with its terms. She kept house for her father for 38 years, took care of the infant children, managed all of the household affairs, and assisted her father, in his declining years, in managing the farm. The daughter lived on the farm with her father, but did not have any possession apart from his; neither did she make improvements, nor pay taxes. Still this court held that she was entitled to a specific performance of the contract. The situation there was, as it is in this case, that the promisee had such possession as the terms of the contract and the situation of the parties required. Such contracts have frequently been enforced by courts of equity without proof of exclusive possession."

See Bruns v. Huseman (1914) 266 Ill. 212, 215, 107 N. E. 462, 463: "It is said by appellant that there was such part performance as to take the case out of the operation of the statute of frauds, and that the contract should for that reason be enforced as a parol contract. At the time the alleged contract was made appellant was in possession of the premises as appellee's tenant. His possession was simply continued after the contract was entered into. Where possession and the making of improvements are relied upon as such part performance as to avoid the statute of frauds, it must appear that possession was taken in pursuance of the contract. A mere continuation of possession previously acquired is not sufficient. The possession should be referable to the contract and in accordance with its terms. Shovers v. Warrick (1894) 152 Ill. 355, 38 N. E. 792."

years. Upon the faith of that promise, the plaintiff proceeded and laid out 460*l.* being obliged to rebuild a great part of the wall. The bill therefore prayed, that the defendant may be decreed specifically to perform his agreement to grant an extension of the lease for ten years.

The defendant by his answer admitted that upon the plaintiff's request, that he would contribute something to the expense of rebuilding or repairing the party wall, the defendant said, that if the plaintiff should be obliged to pull down the wall and rebuild it, he might be induced to grant a farther term of ten years; but denied that he made any absolute promise or agreement, and insisted upon the statute of frauds.

Parol evidence was produced on both sides, proving the respective allegations in the bill and answer. * * *

THE MASTER OF THE ROLLS. It is admitted, that supposing an agreement ever so clearly proved, yet, as a parol agreement, the plaintiff is not entitled to have it executed. It is necessary, therefore, to shew a part performance; that is, an act unequivocally referring to, and resulting from the agreement; and such, that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement. But that is not the nature of the act in this case. First, it is equivocal. Secondly, it is such as easily admits of compensation without executing the agreement. This is not an unequivocal act, for it would have taken place equally, if there had been no agreement. The principle of the cases is, that the act must be of such a nature, that if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to shew what the agreement is. But this act would not infer existence of any agreement, as it must have been done by the party either at his own, or the landlord's expense. Then, is there such injury as cannot easily be repaired in any other way than by executing the agreement? No; for the money which he has expended, he may recover from the landlord, if it was by the landlord that the expense was to be borne. The circumstance that the party may be obliged to resort to an action to get back his money, is no reason for taking the case out of the statute.

Lord Redesdale, in a case before him, states his opinion (a) that payment of money is not a part performance: yet there the act can hardly be said to be equivocal in its nature, as the payment of a price presupposes a sale; but the money may be repaid, and the parties are restored to their former situation. This case is stronger, for the expenditure does not imply a precedent agreement.

Suppose my tenant should set up an agreement for a purchase, and get a witness to swear to it, and then offer as evidence of part performance, his possession and cultivation of the land; could that be deemed an act of part performance, which would have existed precisely in the same shape, whether there was any agreement for a purchase, or not?

The bill was dismissed.

## MILLER & ALDWORTH, Limited, v. SHARP.

(Chancery Division [1899] 1 Ch. 622.)

The defendants were the owners in fee simple of a beer-house called "The Jolly Millers" at Dartford, Kent, and which the plaintiffs Miller & Aldworth, Limited, held from them as yearly tenants at the rent of £14 per annum.

In May, 1894, it was verbally agreed between the landlords and tenants that the former should grant the latter a lease of the beer-house for twenty-one years from June 24, 1894, at the rent of £26 per annum, such lease to contain the usual covenants.

In pursuance and part performance of the agreement the plaintiffs Miller & Aldworth, Limited, and the purchasers of their interest, the plaintiffs the Dartford Brewery Company, Limited, remained or were in possession from June 24, 1897, to the time of the commencement of the present action paying the increased rent of £26, which the defendants accepted.

The defendants refused to execute the lease; the two plaintiff companies brought an action for specific performance of the verbal agreement by granting a lease to the Dartford Brewery Company, Limited, or alternatively to the other plaintiff company.

The defendants, amongst other defences, pleaded that the payment of the increased rent was not sufficient part performance to take the case out of the Statute of Frauds.

At the trial the receipts for the increased rent were produced, and also a letter of March 8, 1894, from one of the defendants to Miller & Aldworth, Limited, which was as follows:

"Jolly Millers.—My brothers and I have arranged for Mr. E. Waterman to receive the rent of the above, so kindly pay him in future. We are advised that the rent you pay is a great deal too low, but as we are unwilling to take it out of your hands we shall be glad to consider a proposal from you to take it on a lease. Kindly let us have your early reply."

The plaintiffs' counsel proposed to adduce evidence of the verbal agreement to grant a lease; but this was objected to by defendants' counsel. * * *

BYRNE, J. I am asked by the defendants to exclude parol evidence sought to be adduced to shew whether there was an agreement, and if so what that agreement was, with reference to an alleged new tenancy.

First of all, the case alleged is that there was a yearly tenancy. Then it is said that on March 8, 1894, a letter was sent from one of the defendants referring to a proposed lease, and that there was a series of receipts for the new rent, for example, one dated September 29, 1894, which acknowledges that rent has been received, less tax, for the Jolly Millers, the name of the public-house which is the subject of the action.

Now the case of Nunn v. Fabian, L. R. 1 Ch. 35, has been referred to, and has been commented on in an ingenious argument by Mr. Eve. That case has never been overruled, and is a leading authority. Lord Cranworth, L. C., there held that a parol agreement for a lease for twenty-one years at an increased rent might be established, notwithstanding the Statute of Frauds, when payment of a quarter's rent at the increased rental was proved, as part performance of the agreement. Evidence of the payment was there admitted, and it was held that the agreement was proved and must be specifically performed. Mr. Eve says that the decision turned on the special facts of the case, from the report of which it appears that other property was to be included in the new lease besides that which the tenant had formerly held from the landlord, whereas in the present case only the same property is alleged to have been taken at an increased rent.

I think, however, that in considering what was the ratio decidendi in Nunn v. Fabian, L. R. 1 Ch. 35, regard must be had to the observations of Baggallay, L. J., in Humphreys v. Green, 10 Q. B. D. 148, 156. The Lord Justice, after stating that he had been counsel in Nunn v. Fabian, L. R. 1 Ch. 35, and referring to the facts of it, said:

"The receipt for the balance of rent did not contain all the necessary elements of the contract; if, therefore, the plaintiff was entitled to a decree for specific performance, it must have been upon the ground of proof of a sufficient part performance to take the case out of the statute, and so Lord Cranworth held. The fact of the plaintiff being in possession of the property was not a sufficient part performance of the parol agreement, for it was equally consistent with his continuing in possession under his previous tenancy, as of his possession being due to some agreement between himself and his landlord; moreover, Lord Cranworth declined to treat a proved expenditure of money upon the property as a part performance; but he held that there was a clear part performance by payment and acceptance of the Michaelmas rent at the increased rate, being of opinion that the payment of the increased amount could be referable only to some agreement; and upon that ground, and upon that ground alone, he made a decree for specific performance."

I think, therefore, that Nunn v. Fabian, L. R. 1 Ch. 35, is an authority in point, and that there is nothing inconsistent with it in the observations of Lord Selborne, L. C., in Maddison v. Alderson, 8 App. Cas. 467, 478, where he said:

"Lord Hardwicke in Gunter v. Halsey (1739) Amb. 586, said, 'As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement' ('the terms of which,' he added, 'must be certainly proved'). He thought it indeed consistent with that rule to treat the payment of purchase-money, in whole or in part, as a sufficient part performance. * * * This Lord Cowper * * * and Lord Macclesfield * * * had refused to do. On that point later authorities have overruled Lord Hardwicke's opinion; and it may be taken as now settled that part payment of purchase-money is not enough; and judges of high authority have said the same even of payment in full. * * * Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged."

In the present case what was done could not refer to the old tenancy, but is in my judgment an unequivocal act referable to some new contract, and that could only be a contract of tenancy. Evidence must, therefore, be admitted to shew what the contract was.

(Before the conclusion of the trial the action was compromised.)

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## WASHINGTON v. SORIA.

**(Supreme Court of Mississippi, 1896. 73 Miss. 665, 19 South. 485, 55 Am. St. Rep. 555.)**

Appeal from chancery court, Harrison county; W. T. Houston, Chancellor.

Action in equity by Margaret Soria against J. J. Washington. From the decree both parties appeal.

COOPER, C. J.[19] Mrs. Soria exhibited her bill in the chancery court of Harrison county to subject certain lands therein described, heretofore conveyed by her to the appellant Washington, to the payment of the purchase price thereof. The bill, which was filed on December 5, 1894, charges that on the 26th day of July, 1887, in consideration of the sum of $500 to her in cash paid, and of the payment of a like sum to be made 12 months therefrom, and of the payment of a like sum to be made 18 months therefrom, she conveyed the land to the defendant, reserving a lien upon the land until payment of the full purchase price; that, though the defendant executed no writing promising to pay the deferred payments, he received and put to record the deed, and entered upon and has enjoyed the land thereby conveyed. The defendant filed a general demurrer to the whole bill, and for causes set forth: (1) No equity on the face of the bill; (2) that the contract sought to be enforced, not being evidenced by any memoranda or note thereof signed by the defendant, is unenforceable, under the statute of frauds; (3) that the claim sought to be enforced is barred by the statute of limitations of three years; (4) that the installment of the purchase money alleged by the bill to have been payable 12 months after the execution of the deed is barred by the 6-years statute of limitations. The chancellor entered a decree overruling the demurrer on all the grounds alleged, except the fourth, and on that ground sustained it, but directed the plaintiff to answer over. From this decree both parties appeal. * * *

The defendant, to avoid all liability, contends (1) that, because of the statute of frauds, no relief could ever have been afforded the complainant, either at law or in equity; and, if mistaken in this, then (2) that, if there ever was a right of action, it existed as well at law as in equity, and was barred within three years after the time named in

[19] Parts of the opinion are omitted.

the deed for the payment of the deferred part of the purchase price of the land.

The contention of neither party can be maintained. In many jurisdictions it has been held that part performance of an oral agreement takes it beyond the application of the statute of frauds; but this rule was repudiated in this state at an early day, and it has been uniformly here held that part performance is not sufficient to withdraw a case from the control of the statute. Payson v. West, Walk. 515; Beaman v. Buck, 9 Smedes & M. 207; Box v. Stanford, 13 Smedes & M. 93, 51 Am. Dec. 142; Catlett v. Bacon, 33 Miss. 269. In Hairston v. Jaudon, 42 Miss. 380, the court of the military commander of the district absurdly held that a vendee in an oral contract for the purchase of land, who had paid $750 of the purchase price, might recover the same back from the vendor, who was willing to complete the contract and tendered a deed with his plea. This never was the law, and that case is overruled. It is uniformly held that after full performance of an oral agreement the statute of frauds does not apply. The statute neither declares an oral contract to be illegal nor void. It does not prohibit the contract, but simply declares that no action shall be maintained to enforce it. Where the contract has been fully executed by one of the parties, and nothing remains to be done by the other than to pay the consideration, relief is very generally afforded at law by permitting the plaintiff to recover, not upon the special contract, but on assumpsit, or on the case, upon the promise implied by law, for the statute has no application to promises implied by law. 2 Reed, St. Frauds, § 640. Where there has been a special contract, fully performed by the plaintiff, he may recover either in case, on the contract, or in indebitatus assumpsit, for the consideration. Fowler v. Austin, 1 How. 156, 26 Am. Dec. 701; Hill v. Robeson, 2 Smedes & M. 541; Cutter v. Powell, 2 Smith, Lead. Cas. 17, and note; 2 Devl. Deeds, § 1074. When the vendor has made a conveyance of land to the vendee, who has executed no written promise to pay the purchase price, the courts, while uniformly affording relief, are not very well agreed upon what precise ground the right is rested. * * *

The decree is reversed on the appeal of Mrs. Soria, the demurrer overruled, and the defendant required to answer within 30 days after the mandate shall have been filed in the court below.[20]

[20] CLAIM FOR BETTERMENTS AS EQUITABLE DEFENSE TO EJECTMENT.—In Daniel v. Crumpler (1876) 75 N. C. 184: "Civil action to recover possession of two acres of land. Equitable counterclaim for value of improvements. On the trial the court refused evidence that defendant had taken possession under a parol contract of sale and had made improvements. There was judgment that plaintiffs recover the possession and damages, from which defendant appealed. Rodman, J., said (in part): We suppose that the Judge rejected the evidence because in his opinion it was immaterial, and did not tend to support any available defence, legal or equitable. In this we think he was in error. It tended to prove what was equivalent to a parol agreement by plaintiffs to convey the land, and acceptance of the purchase money from the defendant, or from some one from him, and that on the faith of this contract

## TOWNSEND v. FENTON.

(Supreme Court of Minnesota, 1884. 32 Minn. 482, 21 N. W. 726.)

Appeal from an order of the district court, Murray county.

MITCHELL, J. This court having, on a former appeal in this case, (30 Minn. 528; S. C. 16 N. W. 421), held that the complaint was bad for the reason that it did not show a part performance of the oral agreement to convey land, declared on such as would take it out of the operation of the statute of frauds. The plaintiff amended, and the case now presents the question of the sufficiency of the amended complaint. The most important amendment is the allegation that defendant was insolvent at the time of making the oral agreement, which fact was known to plaintiff, and hence that he would not have accepted the transfer of the note against defendant, and paid the money to Darms, but for defendant's promise to convey; further, that defendant is still insolvent. We have already decided, in accordance with the unbroken current of modern authorities, that the mere payment of purchase money is not such part performance as will take the case out of the statute. We have carefully examined numerous authorities, and can find none that hold, or even suggest, that this rule is at all changed or affected by the fact that the vendor is insolvent. It may be difficult, on principle, to distinguish such a state of facts from some which courts have held sufficient to take the case out of the statute, but it is our well-settled conviction that courts have gone quite as far in excepting oral contracts from the operation of the statute of frauds as a sound and wise policy will warrant, and that what is left of that statute ought to stand, unless the legislature sees fit to wipe it out entirely.

Plaintiff, indeed, concedes that insolvency of the vendor occurring after the making of the contract would not, under the authorities, take the case out of the statute, but claims a different rule should be applied when the insolvency existed at the time the contract was made, because, under such circumstances, presumably, the vendor would not have paid the money except in reliance on the promise to convey. We can find no authority, and are referred to none, which even suggests any such distinction. We cannot see any difference whether the inability of the vendor to repay the money results from insolvency existing at the date of the contract, or occurring subsequently. In either

the defendant entered and expended money in improving. It is settled law in this state that although a parol agreement to convey land is void by our statute of frauds (Bat. Rev. c. 50, § 20), yet if the vendee in reliance on it pays the purchase money and makes improvements, he cannot be evicted until the vendor repays the purchase money and makes compensation for the value of the improvements. Baker v. Carson (1836) 21 N. C. 381; Albea v. Griffin (1838) 22 N. C. 9. The doctrine stands on general principles of equity. * * *

"The rule for estimating the value of the improvements is declared in Wetherell v. Gorman (1876) 74 N. C. 603. It is not what they have cost the defendant, but how much they have added to the value of the premises."

case the practical wrong to the vendee is the same. Nothing is part performance which does not put the party into a situation that is a fraud upon him unless the agreement is performed. Clinan v. Cooke, 1 Schoales & L. 22. But the "fraud" on which courts of equity go in cases of part performance is not fraud merely of that nature which may be said to exist in every case of refusal to fulfill an agreement, but that sort of fraud "cognizable in equity only." O'Herlihy v. Hedges, 1 Schoales & L. 130; Ham v. Goodrich, 33 N. H. 39. Therefore, the courts have held that the inability of the vendor to repay the money by reason of his insolvency does not in that respect alter the relation of the parties so as to modify the rule, because, there being nothing intrinsically fraudulent in the transaction, this circumstance is not a sufficient ground for imputing to the vendor the wrongful intent which alone furnishes an occasion for the interference of equity to enforce verbal agreements. Pom. Cont. 161.

Counsel further urges that by the oral agreement this land was to be conveyed as soon as defendant acquired title, without regard to the maturity of the note; that defendant in fact acquired title and refused to convey before the note matured, and therefore that plaintiff, at that time, was without remedy at law, for the reasons—First, that he could not sue on the note because it was not due; and, second, that he could not sue defendant to recover the money paid to Darms because it was not paid on account of defendant, but on plaintiff's own account in purchasing the note. We are not prepared to concede that, under the terms of this tripartite agreement, when defendant refused to convey, plaintiff might not, at his election, instead of waiting for the note to mature and suing on that, have immediately sued defendant to recover the amount paid Darms as money paid at his instance and for his benefit. But, even if his only remedy was to sue on the note, we do not see how the fact that it was not yet due alters the case. He was not, within the meaning of the authorities, without remedy, because he might have to wait till the note matured before bringing an action. Regarding the other amendments we simply remark that we have examined them all, but do not think that, either singly or collectively, they aid the original pleading. Order affirmed.

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## FOUTS v. ROOF.

**(Supreme Court of Illinois, 1898. 171 Ill. 568, 50 N. E. 653.)**

MR. JUSTICE BOGGS [21] delivered the opinion of the Court:

This was a bill in chancery by the appellee to enforce specific performance of an alleged oral contract on the part of the appellant to convey certain real estate to the appellee. The bill alleged that the appellee is a married woman, having a husband and three children, and

[21] Part of the opinion is omitted.

that the appellant, her mother, was the owner of 65 acres of land in Marshall county, as her separate property; that on or about February 1, 1890, the appellant expressed a desire to provide the appellee with a home, and offered and agreed to convey her the said land in Marshall county if the appellee and her husband and family would move upon and occupy the same as a home; that appellee accepted the offer, and she and her husband and family at once moved upon the said premises, and have since lived and resided there as their home; that they made lasting and valuable improvements upon the property, and paid all taxes thereon since they have so occupied the same, a period of about seven years, and that appellant now refuses to execute a deed to the premises, etc. The appellant answered the bill, denying the material allegations thereof, and invoking the statute of frauds as a defense. The cause was referred to the master to take and report the proof, with his conclusion as to the facts. The master reported the evidence produced by the respective parties, and his conclusion thereon that the evidence supported the allegations of the bill. The appellant's exceptions to the report of the master were heard by the court and overruled, and a decree entered granting the relief asked by the bill. The defendant to the bill has removed the cause to this court by appeal. * * *

Upon full consideration of all the evidence, we have no doubt but appellant and her husband entered into the agreement as set forth in the bill, and testified to by appellee, and that they intended to invest appellee with title to the land in pursuance of the agreement, and for that purpose executed the deed to appellee, but held it for some reason,—possibly to await a convenient time to deliver it, or possibly until they should become satisfied appellee and her husband would improve the place, and make it their permanent home. While they were so holding the deed, the husband and father died; and then it was, and not before, that appellant conceived the idea that appellee should be required to accept the premises in question as in full of her share in the estate of her father, and destroyed the deed because appellee would not so accept it. The deed contained no such exception, nor was the agreement between appellee and appellant so conditioned. It would have been an injustice, amounting to a fraud upon appellee, to require her, after she had complied with the contract, to submit to a loss of her interest in the estate of her father, in order to obtain the fulfillment of the contract by the appellant. We have frequently held that where a parent makes a parol promise to a child to convey a tract of land if the child will take possession of, reside upon, and improve the same, and in reliance upon the promise the child takes possession, and makes improvements of a permanent and valuable character, a court of equity will decree specific performance of the agreement. Such a promise rests on a valuable consideration, and performance on the part of the child takes the oral contract out of the operation of the statute of frauds. Bohanan v. Bohanan, 96 Ill. 591; Bright v. Bright, 41 Ill. 97; Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665; Wood v. Thornly,

58 Ill. 468; Langston v. Bates, 84 Ill. 524, 25 Am. Rep. 466; Padfield v. Padfield, 92 Ill. 198; McDowell v. Lucas, 97 Ill. 489.

The decree is affirmed. Decree affirmed.

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## HENDERSON v. HENRIE.

(Supreme Court of Appeals of West Virginia, 1911. 68 W. Va. 562, 71 S. E. 172, 34 L. R. A. [N. S.] 628, Ann. Cas. 1912B, 318.)

Appeal from Circuit Court, Wood County.

Action by Jock B. Henderson against James M. Henrie and others. Judgment for plaintiff, and the mentioned defendant appeals.

POFFENBARGER, J.[22] The general nature of the contract involved in this cause is set forth in the report of a former decision here, on another appeal, found in 61 W. Va. 183, 56 S. E. 369, 11 Ann. Cas. 741.* This appeal is from a final decree, requiring Henrie to convey to Henderson a portion of the land purchased by him at the judicial sale, by way of specific performance of the verbal agreement constituting the basis of the suit.

The former decision disposes of the charge of illegality or invalidity of the contract, as alleged, on the ground of fraud or inhibition by public policy; and the remaining argument against the sufficiency of the bill, namely, that it does not allege irreparable injury, is wholly inapplicable; the legal remedy for breach of a contract to convey land being obviously inadequate, and the law affording no remedy at all for enforcement of a trust. Hence the demurrer was properly overruled.

The vital inquiry is the character of the contract, viewed in the light of the statute of frauds, relied upon in a plea to the bill—a question neither raised nor considered on the former appeal, involving only the ruling on a motion to dissolve an injunction, made in vacation. At that time no demurrer, plea, or answer had been filed. The contract is verbal, and prior in date to the purchase by the defendant. The plaintiff, though willing to pay, or, to be strictly accurate, repay, a portion of the purchase money, and claiming the right to do so, has in

[22] Parts of the opinion are omitted.

* The facts of the principal case are stated in Henderson v. Henrie, 61 W. Va. 183, 184, 56 S. E. 369, 11 Ann. Cas. 741 (1907), as follows: "The plaintiff alleges that on the day of sale he entered into an agreement with the appellant, James M. Henrie, by which they were both to bid on the sixty-two acre tract, and in the event either became the purchaser thereof Henderson was to have a certain portion of the tract, being about ten acres, laid off out of subdivision number one, and Henrie was to have the residue. At the sale the property was offered as a whole, and also by the several parcels into which it had been laid off, and the price bid for the whole being greater than the aggregate amount bid for the three several parcels, and Henrie being the highest bidder, he became the purchaser thereof. The terms of sale were one-third cash, and the remainder in installments, but Henrie, not desiring to pay interest, paid the entire amount in cash."

fact paid nothing at all, and title has vested in the defendant. At the date of the making of the agreement, neither party had any interest whatever in the land, either legal or equitable, and there was no copartnership relation. Each was to take and hold a portion of the land. In bidding, each acted for himself and as agent of the other at the same time; the action in one capacity relating to one portion of the land, and in the other to the residue thereof.

The basis of the cause of action, as disclosed by this inquiry and analysis, seems to be the oral agreement, and nothing more. We perceive nothing of a collateral nature, constituting an independent equity, such as payment of purchase money; a prior interest in the land, not released; lack of consideration moving from the grantee, accompanied by an agreement to take mere legal title as a necessary step in the execution of some plan or purpose previously agreed upon; or a copartnership, covering the subject-matter of the conveyance. Such an equity seems to be essential to the establishment of a trust or immunity of a contract of sale of land from the inhibition of the statute of frauds. In Floyd v. Duffy, 68 W. Va. 339, 69 S. E. 993, 33 L. R. A. (N. S.) 883, we said, speaking of certain provisions of that statute:

"These provisions absolutely prevent the acquisition of any estate in land for more than five years by means of a mere verbal contract. There must be something more—an equity outside and independent of, or in addition to, the contract. * * * By the great weight of authority, if not, indeed, by all courts, an agreement on the part of one purchasing land with his own money, and taking the conveyance in his own name, to hold it in trust for another person, or to reconvey it to the grantor, is within the statute of frauds."

In resulting trusts, the basis of the equity is the payment of money. In those instances in which deeds, absolute on their faces, are construed and enforced as mortgages, the antecedent interest in the land lies at the bottom of the equity. In cases of voluntary conveyances for specific purposes, the fraud of the grantee is the circumstance imposing an obligation in conscience. To apply the statute under such circumstances would allow the grantee to obtain the land for nothing, defeat the meritorious purpose of the conveyance, and make the statute an instrument of fraud, contrary to legislative design. As copartnership is a confidential relation, and there is a joint interest in firm assets, a conveyance to one member, under a purchase with partnership funds, creates a constructive or resulting trust; the confidential relation constituting the ground of equity. In cases of exception, on the ground of part performance, the altered situation of the vendee, in reliance upon the contract, working irreparable injury, constitutes the independent equity. In parol gifts of land, enforceable, the equitable foundation is the same.

No precedent or declaration of principle by this court is broad enough to except this agreement from the operation of the statute. * * * In every instance of exclusion from the statute, an independent equity has been found. * * *

Under these principles and conclusions, we reverse the decree, dismiss the bill, and decree to the appellant his costs in the court below, as well as in this court.

WILLIAMS, P., absent.[23]

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## PEEK v. PEEK.

(Supreme Court of California, 1888. 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244.)

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; Henry M. Willis, Judge.

Ejectment by Lee Peek, a minor, by Jerry McNew, his guardian, against Nettie A. Peek, for land in San Bernardino county. Defendant filed a cross-complaint, asking a conveyance of the legal title to the land.

HAYNE, C. Ejectment, with a cross-complaint by defendant praying for a conveyance of the legal title. The facts are as follows: One L. R. Peek orally promised the defendant that if she would marry him, he would, on or before the marriage, convey to her the property in controversy. She relied upon this promise, and married him "for no other reason or consideration." The conveyance was not made. He put it off by excuses and protestations, and on the morning of the marriage, without the knowledge of defendant, conveyed the property to his son by a former marriage, who was then a boy about 10 years old. The marriage with defendant did not prove a happy one, and after a year's residence upon the property Peek deserted the defendant, and the son, Lee Peek, brought the present action to recover possession of the property. The court below gave judgment for the plaintiff, and the defendant appeals.

The foundation of the defendant's claim being the promise of L. R. Peek, the first question to be considered is whether such promise was of any validity. It is clear that it was within the statute of frauds. But it is contended that there was such part performance and fraud as would induce a court of equity to give relief, notwithstanding the statute. We think that if the actual fraud of L. R. Peek be left out of view, there was no such part performance as would take the case out of the statute. There may undoubtedly be cases of a part performance of oral antenuptial agreements sufficient to warrant their enforcement in equity. See Neale v. Neales, 9 Wall. 1, 19 L. Ed. 590. But it seems to be generally agreed that the marriage alone does not amount to such part performance. See Ath. Mar. Sett. 90; Browne, St. Frauds, (4th Ed.) § 459; Henry v. Henry, 27 Ohio St. 121. With reference to this subject, Story says:

[23] On the rule in this case, see American Annotated Cases, 1912B, note.

"The subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case, standing on its own grounds." 2 Eq. Jur. § 768.

Nor does the fact that the defendant resided with her husband upon the property make any difference. The reason assigned for holding possession to be part performance is that, unless validity be given to the agreement, the vendee would be a trespasser. But it is manifest that this reason would not apply where the vendor was the husband and the vendee the wife, living with him upon the property. The possession which is referred to by the cases which hold it to be sufficient part performance is a possession exclusive of the vendor. Browne, St. Frauds, (4th Ed.) § 474. But the fact that the marriage was brought about by the actual fraud of L. R. Peek seems to us to make a difference. There can be little doubt upon the record that there was actual fraud on his part. He denies that he made any promise to convey the property in controversy. But the court finds that he did make it, and, taking this to be the fact, we think that the defendant's account as to the time of the promise, and of the reason she married him without the conveyance, must be accepted as the true one. According to her testimony, the promise was repeated up to the time of the marriage, and she was induced to have the ceremony performed before the conveyance was executed by means of excuses and protestations, which must have been made for the purpose of deceiving her. On the day before the marriage, he pretended that he was going to have the deed executed at once. He said to the defendant:

"The officers are in town that are required to draw up the papers. Come to-night, and I will have the place deeded to you, and the $15,000 put in your name. He left me in the hotel, and in a few minutes he came and told me that Mr. Frank McKenny was out of town, and it could not be attended to that evening."

The next day "he said he would have the deeds drawn, and he went up and said that they were all busy at the court-house, and he couldn't have it done at that time; and he called on me again with the same story, that the gentlemen at the court-house were busy, and that he could not have the deeds fixed, and that I could rest contented." He, however, succeeded in inducing the defendant to marry him that evening by protesting that the papers should be executed as soon as practicable. After the marriage he kept up for a short time the pretense that he was going to fulfill his promise, but never did so. It seems clear that he never intended to have the deed executed. The story that he could not have it done because the officers at the court-house were busy is ridiculous. On the very day that he was making this excuse he got a deed executed conveying the property to his son. And the fact that he induced the defendant to marry him by promising to convey the property to her, when at that very time he was conveying it to somebody else, seems conclusive as to his fraudulent intent.

We think, therefore, that the conclusion of the court below, that the deed was not made "with any fraudulent intent whatever," is not sustained by the facts. This fraud on the part of L. R. Peek, by which he induced the defendant to irretrievably change her condition, seems to us to be ground for relief in equity. It has been laid down that if the agreement was intended to be reduced to writing, but was prevented from being so by the fraudulent contrivance of the party to be bound by it, equity will compel its specific performance. 2 Story, Eq. Jur. § 768; Ath. Mar. Sett. 85. And the recent case of Green v. Green, 34 Kan. 740, 10 Pac. 156, 55 Am. Rep. 256, is exactly in point. In that case a widow, owning 160 acres of land, orally promised a man that if he would marry her, she would devote the proceeds of the land to their joint support. Relying upon this promise, he married her, but subsequently ascertained that on the eve of the marriage she had conveyed the property to her children by former marriage, "in consideration of love and affection." The court held that he could maintain an action to have the deed set aside on the ground of fraud. Compare, also, Petty v. Petty, 4 B. Mon. (Ky.) 215, 39 Am. Dec. 501.

We do not say that the mere fraudulent omission to have an agreement reduced to writing would of itself be ground for specifically enforcing the agreement. But where the fraudulent contrivance induces an irretrievable change of position, equity will enforce the agreement; and the marriage brought about by the fraudulent contrivance is a change of position, within the meaning of the rule. In Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418, in reasoning, upon somewhat different facts, to the conclusion that, in order to be ground for the enforcement of the oral contract, the fraudulent contrivance must have induced some irretrievable change of position, the court said:

"The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases, the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation that, if procured by artifice, upon the faith that the settlement had been made, or the assurance that it would be executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute."

This, we think, is a correct statement of the law.

It is argued, however, that the plaintiff knew nothing of the fraud, and therefore is not affected by it. But it is very clear that a mere volunteer, however innocent, cannot retain the fruits of the fraud, and we think that with reference to at least a portion of the property the plaintiff was a mere volunteer. There are two grounds upon which it is urged that he was a purchaser for valuable consideration. In the first place, it is said that his father was his guardian, and as such owed the plaintiff a balance of $148, and that this sum was part of the consideration of the deed. But there was no consent of the ward to such an application of the sum due him. His testimony is as follows:

"I never paid my papa any money for the deed that he showed me. I do not know anything about how much money was mentioned in the deed as being the consideration for it. I never knew anything about that. Nothing or

that kind passed between us. No property or money or anything. I did not have any property at that time to give him. If I had any, I didn't know it."

So that, even if the ward could have consented to such an appropriation of his funds without the sanction of the probate court, there was no such consent. Nor was there any sanction of the probate court. It may be that upon a proper settlement of the guardian's accounts a much larger sum will be found to be due from him. He cannot get rid of liability to his ward in that way. In the next place, it is said that L. R. Peek promised his first wife upon her deathbed that the son should have the property. But it is clear that such promise was a mere moral, and not a valuable, consideration. It did not prevent the plaintiff from being a volunteer. See, generally, Lloyd v. Fulton, 91 U. S. 484, 485, 23 L. Ed. 363. Finally, it is argued that the first wife furnished half of the money with which the property was purchased, and that a trust resulted to her in consequence. This was the view taken by the trial court. But, conceding that a trust did result, it did not affect the whole property, but at most only a portion corresponding to the proportion of the price which she furnished; and the portion which it did affect was in no sense a consideration for the deed which is involved here. Upon the theory that a trust resulted to the first wife, the plaintiff must claim as her successor in interest. It does not appear that she left a valid will in his favor, and if not he could succeed to a portion only of her interest. Furthermore, it might become a question as to whether the defendant took with notice of the son's equitable interest, and as to how she would be affected thereby. These latter questions have not been argued, and we think they should be left open upon the retrial. It is deserving of serious consideration whether L. R. Peek, who was a party to the contract which the defendant relies upon, should not have been joined as a party to the cross-suit. But the objection as to his non-joinder as a defendant to the cross-complaint was not taken by demurrer, and is not argued in the respondent's brief, and for these reasons we express no opinion concerning it. We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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## BRITAIN v. ROSSITER.

(Court of Appeal, 1879. 11 Q. B. Div. 123.)

Action for wrongful dismissal.

At the trial it appeared that the plaintiff entered into the defendant's service as clerk and accountant for one year.

The plaintiff and the defendant had interviews upon the 17th, 19th, and 21st of April, 1877. The 21st was a Saturday, and the plaintiff

entered upon the defendant's service upon Monday the 23d. The final arrangement between the parties was arrived at upon the Saturday.

The plaintiff remained some months in the defendant's service and was then dismissed without a three months' notice. The defendant relied upon the Statute of Frauds, § 4. At the trial before Hawkins, J., the verdict was entered for the defendant upon the ground, first, that the contract was made finally upon Saturday, the 21st of April, and being made upon that day was within the Statute of Frauds, § 4; secondly, that there was no evidence of a new contract on Monday, April the 23d, it not being proved that the contract made on the previous Saturday was altered or rescinded.

The Exchequer Division having refused a new trial on the ground of misdirection—

1878. May 29. Firth moved in this Court, by way of appeal; he contended first, that the contract of service for one year was to begin from Monday, the 23d of April, and therefore that it was a contract to be performed within a year; secondly, that the plaintiff could not be dismissed without notice, a verbal contract being in existence; thirdly, that the contract having been partly performed, was taken out of the Statute of Frauds, § 4. * * *

BRETT, L. J.[24] * * * No rule will be granted as to the point whether the contract is within the statute; but the plaintiff may take a rule upon the questions whether the operation of the Statute of Frauds, § 4, may be defeated by part performance, and also whether the plaintiff was entitled to any notice of dismissal, a verbal contract being in existence.

COTTON and THESIGER, L. JJ., concurred.

1879. March 4. J. C. Lawrance, Q. C., and P. B. Hutchins, shewed cause. * * *

As to the doctrine of part performance, it is true that the Court of Chancery formerly applied it only to contracts for the sale of land, and there may have been a difficulty in decreeing specific performance of a contract for personal services. Pickering v. Bishop of Ely, 2 Y. & C. (Ch.) 249; Johnson v. Shrewsbury & Birmingham Ry. Co., 3 D. M. & G. 914. But the Court of Chancery would not allow the provisions of a statute to defeat a claim, which good conscience required to be carried out. Bond v. Hopkins, 1 Sch. & Lef. 413; Morphett v. Jones, 1 Swan. 172. The defence set up by the defendant is wholly against good conscience. And now by the Judicature Act, 1873 (36 & 37 Vict. c. 66), § 25, subd. 7, the doctrines of equity may be applied to cases decided in the Common Law Divisions.

BRETT, L. J. Upon the best consideration which I can give to this case, it seems to me that this rule should be discharged. I think that Hawkins, J., was right, and that the Exchequer Division was also right.

[24] Part of the statement of facts and parts of the opinions of Brett, Cotton, and Thesiger, L. JJ., are omitted.

It was clearly established that on Saturday, the 21st of April, a contract of service was in express terms entered into between the plaintiff and the defendant that the plaintiff should serve the defendant for one year, the contract to commence the Monday following. It cannot be disputed that a contract of that kind is within the 4th section of the Statute of Frauds, that is to say, it is a promise founded upon a sufficient consideration, but it being only verbal neither party can bring an action upon it so as to charge the other. * * *

It has been further contended that as the contract of the 21st of April has been partly performed, it may be enforced, notwithstanding the Statute of Frauds, and that the equitable doctrine as to part performance may be applied to it. It is well known that where a contract for the sale of land had been partly performed, Courts of Equity did in certain cases recognize and enforce it; but this doctrine was exercised only as to cases concerning land, and was never extended to contracts like that before us, because they could not be brought within the jurisdiction of Courts of Equity. Those Courts could not entertain suits for specific performance of contracts of service, and therefore a case like the present could not come before them. As to the application of the doctrine of part performance to suits concerning land, I will merely say that the cases in the Court of Chancery were bold decisions on the words of the statute. The doctrine was not extended to any other kind of contract before the Judicature Acts: can we so extend it now? I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the Courts either of Law or of Equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure. Before the passing of the Judicature Acts no one could be charged on this contract either at law or in equity; and if the plaintiff could now enforce this contract, it would be an alteration of the law. I am of opinion that the law remains as it was, and that the plaintiff cannot maintain this action for breach of contract.

COTTON, L. J. * * * It has been further argued that the contract may be enforced, because it has been in part performed. Let me consider what is the nature of the doctrine as to part performance. It has been said that the principle of that doctrine is that the Court will not allow one party to a contract to take advantage of part performance of the contract, and to permit the other party to change his position or incur expense or risk under the contract, and then to allege that the contract does not exist; for this would be contrary to conscience. It is true that some dicta of judges may be found to support this view, but it is not the real explanation of the doctrine, for if it were, part-payment of the purchase-money would defeat the operation of the statute. But it is well-established and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th

section. What can be more contrary to conscience than that after a man has received a large sum of money in pursuance of a contract, he should allege that it was never entered into? The true ground of the doctrine in equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would, prima facie, make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken. Does this doctrine, when so explained, apply to the present case? I will first mention the provisions of the Judicature Act, 1873, § 24. subds. 4, 7. These provisions enable the Courts of Common Law to deal with equitable rights and to give relief upon equitable grounds: but they do not confer new rights: the different divisions of the High Court may dispose of matters within the jurisdiction of the Chancery and the Common Law Courts; but they cannot proceed upon novel principles. Could the present plaintiff have obtained any relief in equity before the passing of the Judicature Acts? I think that he could not. The doctrine as to part performance has always been confined to questions relating to land; it has never been applied to contracts of service, and it ought not now to be extended to cases in which the Court of Chancery never interfered.

THESIGER, L. J. * * * If we turn to equity, we find that it has been held as regards a sale of land, that when there has been an entry by one party to the contract, that is an overt act apparently done under a contract which entitles the Court to look at the contract to see to what contract the overt act is really referable. I confess that on principle I do not see why a similar doctrine should not be applied to the case of a contract of service, and as the doctrine of Equity is based upon the theory that the Court will not allow a fraud on the part of one party to a contract on the faith of which the other party has altered his position, I do not see why a similar doctrine should not comprehend a contract of service. At the same time I feel that doctrines of this nature are not to be unwarrantably extended, and that we ought not to go further than the decisions of Courts of Equity as to the principles of relief, and as to the instances to which the doctrine of part performance is to be applied. Therefore, as we cannot clearly see that the equitable doctrine of part performance ought to be extended to contracts of service, I think that we ought to keep within the limits observed by the Court of Chancery before the passing of the Judicature Acts, 1873, 1875.

Rule discharged.

## SECTION 8.—EQUITABLE DEFENSES TO PRIMA FACIE CLAIM TO SPECIFIC PERFORMANCE

### I. Delay Causing Loss of Equity's Interposition

#### *(A) Delay in Performance*

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### BARNARD v. LEE.

**(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 92.)**

Bill in equity alleging that the respondent, being seised in fee of a certain tract of land in Deerfield, entered into an agreement with the complainant for the sale to him thereof, and executed and delivered to him a bond, dated August 2, 1865, which was fully recited in the bill. The condition of this bond was, that if the complainant should "on or before the first day of April, A. D. 1866, pay or cause to be paid the full sum of six hundred dollars and the interest accruing upon the same," and, "upon request," the respondent should "make and deliver to said Barnard a good and valid deed in fee" of the land, then the obligation should be void. The bill further alleged that the complainant, after the execution of this bond, was in possession of the land with the knowledge and consent of the respondent, and cultivated and improved it; that the respondent made no tender of a deed on April 1, 1866; that on May 25, 1866, the complainant tendered to him six hundred dollars, with interest thereon, "according to the tenor of the bond," and demanded of him a conveyance of the land, which he thereupon refused to give; and that since the latter day the complainant has always been and is ready and willing to pay the price, but that the respondent still refuses to convey the land. The prayer of the bill was for a decree to compel such a conveyance. The respondent filed a general demurrer, and the case was reserved by Chapman, J., for determination by the full court.

Gray, J. The doctrine that time is not of the essence of a contract is generally applied in equity to stipulations for the payment of money upon an agreement for the sale and purchase of real estate. The principal grounds of the doctrine are that the rule of the common law, requiring performance of every contract at the appointed day, is often harsh and unjust in its operation; that although some time of performance by each party is usually named in any agreement for the sale of land, it is often not regarded by the parties as one of the essential terms of their contract; and that a court of chancery has the power of moulding the remedy according to the circumstances of each case, and of making due compensation for delay, without punishing it by a forfeiture of all right to relief. This equitable doctrine was for-

merly carried to an unreasonable extent, and the specific performance of contracts enforced after such a lapse of time and change of circumstances as to produce as much injustice as it avoided. In modern times, the doctrine has been more guardedly applied; and it is now held that time, although not ordinarily of the essence of a contract in equity, yet may be made so by clear manifestation of the intent of the parties in the contract itself, by subsequent notice from one party to the other, by laches in the party seeking to enforce it, or by change in the value of the land or other circumstances which would make a decree for the specific performance inequitable.

The best statements, in the English books, of the rule and its reasons and limitations are perhaps to be found in the opinions of those judges whose practical experience in the common law enabled them more intelligently to restrain the application of the rule within proper limits; as, for instance, by Lord Eldon in the leading case of Seton v. Slade, 7 Ves. 273, 274, by Lord Erskine in Hearne v. Tenant, 13 Ves. 288, and by Baron Alderson in Hipwell v. Knight, 1 Y. & Col. Exch. 411, 415, 416. In this age and country, as suggested by Mr. Justice Livingston in his dissenting opinion in Hepburn v. Auld, 5 Cranch, 279, 3 L. Ed. 96, by Mr. Justice Chapman, in Richmond v. Gray, 3 Allen, 30, 31, and Goldsmith v. Guild, 10 Allen, 241, 242, and by many judges in other states, the more frequent fluctuations in the value of land, and in the business and circumstances of men, than in England when the doctrine was established, are important to be considered in each case, and especially when the vendor sues to compel the specific performance of a contract for the purchase of land to which he is unable to make a good title at the time of bringing his suit. But the general doctrine has been adopted by American courts of chancery, and has been repeatedly recognized and affirmed by the supreme court of the United States and by this court. Hepburn v. Dunlop, 1 Wheat. 196, 4 L. Ed. 65; Brashier v. Gratz, 6 Wheat. 533, 5 L. Ed. 322; Taylor v. Longworth, 14 Pet. 174, 175, 10 L. Ed. 405; Fuller v. Hovey, 2 Allen, 325, 79 Am. Dec. 782; Goldsmith v. Guild, 10 Allen, 241.

Although the parties may make time of the essence of their contract by express stipulations to that effect, it is not sufficient that they should name the time of performance in the contract, and thus manifest their intention distinctly enough for the purposes of a court of law. But it must appear that they really intended to make such time an essential element of their agreement; in the words of Lord Erskine in 13 Ves. 289, "a material object to which they looked in the first conception of it;" or as Baron Alderson, in 1 Y. & Col. Exch. 415, stated the result of the previous authorities:

"A court of equity is to be governed by this principle: It is to examine the contract, not merely as a court of law does, to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect."

The mere circumstance therefore that the instrument is in the ordinary form of a bond, concluding with the clause that it shall be void

in case of a breach of the condition, otherwise remain in full force, does not necessarily make time of the essence of the the contract. Molloy v. Egan, 7 Irish Eq. 592; Jones v. Robbins, 29 Me. 351, 50 Am. Dec. 593.

It is doubtless for the party who, having failed to perform his part of the contract according to its terms, yet asks to have the agreement of the other party specifically performed, to satisfy the court that he is entitled to the relief which he seeks. Hipwell v. Knight, 1 Y. & Col. Exch. 415; Taylor v. Longworth, 14 Pet. 175, 10 L. Ed. 405; Todd v. Taft, 7 Allen, 377. But the fact that the obligee, with the knowledge and consent of the obligor, has entered upon and occupied the premises and made improvements thereon, is ordinarily decisive to entitle him to the favorable interposition of a court of equity, when it does not appear that there has been any other change in the value of the land, when time was not originally of the essence of the contract and has not been made so by notice, and he has been guilty of no laches in applying for relief. Gibson v. Patterson, cited 4 Ves. 690, note; West Ch. 235, and note; Waters v. Travis, 9 Johns. (N. Y.) 457, 466, 467; Edgerton v. Peckham, 11 Paige (N. Y.) 352.

The decisions of this court afford no precedent for sustaining the demurrer. In Richmond v. Gray, 3 Allen, 25, the suit was by the obligor; it was one of the terms of the contract that the title should be examined; the defendant, who had entered by agreement before such examination, and removed a cellar wall, cut trees, and done other similar acts upon the premises, abandoned the possession, upon discovering that the title was defective, and, after vain attempts to make arrangements with the plaintiff to perfect the title, gave him notice that he should not accept a conveyance; and the plaintiff was unable to make a title until six months after such notice, and even then subject to a liability for debts which continued when the suit was brought. In Fuller v. Hovey, 2 Allen, 324, 79 Am. Dec. 782, the plaintiff, after requesting and being refused an extension of the time of payment of a sum already due by the terms of his agreement, neglected for more than three years to make any payment or bring his suit. In Goldsmith v. Guild, 10 Allen, 239, the land was in Boston, and there was evidence that it was subject to frequent fluctuations and had actually altered in value.

The land described in this bill is in the country, and there is nothing in the case as now presented to show that its value was subject to fluctuation or had in fact changed between the dates of the agreement and of the tender of payment; and it is alleged in the bill and admitted by the demurrer, that the price agreed, with interest, was tendered by the plaintiff within two months after the time stipulated, and before any demand or notice by the defendant; and that the plaintiff from the date of the agreement, with the knowledge and consent of the defendant, was in possession of the premises and cultivated and improved the

same. Upon proof of such a state of facts, unqualified by other evidence, time could not be held to be of the essence of the agreement.

The question whether time is to be deemed of the essence of the contract depends upon all the circumstances of the case, and is not ordinarily to be decided until the hearing. Levy v. Lindo, 3 Meriv. 81; Foxlowe v. Amcoats, 3 Beav. 496; Verplank v. Caines, 1 Johns. Ch. (N. Y.) 59. If indeed it were clear upon the face of the bill that proof of all its allegations exactly as stated would not support it, the defendant might take the objection by demurrer, without being put to the trouble and expense of further proceedings. Foster v. Hodgson, 19 Ves. 184; Hovenden v. Annesley, 2 Sch. & Lef. 638. But as upon the case set forth in this bill the plaintiff shows himself to be entitled to the specific performance for which he prays, the order must be

Demurrer overruled.

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## JONES v. ROBBINS.

**(Supreme Judicial Court of Maine, 1849. 29 Me. 351, 50 Am. Dec. 593.)**

This was a bill in equity, praying that the defendants might be decreed to convey certain specified real estate, according to their bond to the plaintiff.

The opinion of the Court (HOWARD, J., dissenting) was delivered by SHEPLEY, C. J. By this bill the specific performance of a written contract, for the conveyance of real estate is sought. The defendants by their bond made on October 28, 1845, engaged to convey to the plaintiff, certain premises therein described upon condition, that he should pay to them two promissory notes made by him on that day, and payable to the defendants with interest annually, one payable in one year and the other in two years from that time. The notes were for one hundred dollars each, and one hundred dollars had already been paid as part of the purchase money. The condition of the bond contained the following clause:

**"In case said Jones shall neglect or refuse to pay the above described notes according to their tenor or any part thereof, then this bond shall be void, otherwise to remain in full force and effect."**

The plaintiff did not pay the first note, when it became payable, and did not make any tender or offer of payment until December 17, 1846, when he tendered an amount sufficient to pay that note, but not sufficient to pay it together with the interest, which had accrued on the second note during the first year. When the second note became payable, an amount sufficient to pay both notes was tendered.

The plaintiff presents proof of certain circumstances in excuse for the delay of payment; and the question presented for decision is, whether according to the established principles of equity jurisprudence they can be regarded as sufficient.

It becomes necessary in the first place, to disencumber the case of certain other matters, introduced by each party.

The plaintiff alleges, that he placed confidence in the defendant Robbins, that being a lawyer he would make the bond correctly, that it did not exhibit the contract fairly, and that he received it without reading it.

These allegations are denied, and they are wholly unsupported. There does not appear to have been any just cause for their insertion.

He further alleges, that having taken possession of the premises, he expended about five hundred dollars in making improvements upon them. The parties have taken testimony to prove and to disprove the amount alleged to have been expended, all of which is of no further importance than to exhibit the expenditure of some money as an indication, that the plaintiff intended to complete the purchase.

The defendants in their answers allege, that the plaintiff committed trespasses upon their adjoining lands. If he had, the law would afford them protection, and compensation, and his right to have a conveyance will not thereby be affected.

They further allege, that he unexpectedly changed his business and occupied the premises for purposes, for which they had not before been occupied. The premises do not appear to have been sold subject to any restriction respecting their use, and the rights of the parties will not be changed by their application to a different use.

Courts of equity have frequently decreed the specific performance of contracts for the conveyance of estates, when there had been a failure to comply with the terms of the contract, in point of time. That is not considered to be of the essence of the contract, unless the parties have expressly agreed, that it should be so regarded, or unless it follows from the nature of and purposes of the contract. A reasonable regard is to be had to the convenience of man, and to the accidents and infirmities incident to all the transactions of business. The effect of neglect to make punctual payment upon a contract for the purchase of lands was considered by this Court in the case of Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635, and it has found no occasion to change the opinions then expressed. In the ordinary cases of sales of estates, the general object being to make a sale for an agreed sum, the time of payment is regarded in equity as formal and as meaning only, that the purchase shall be completed within a reasonable time, and substantially according to the contract, regard being had to all the circumstances.

The party seeking relief from a forfeiture must show, that circumstances, which exclude the idea of willful neglect or of gross carelessness, have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived. Hepwill v. Knight, 1 Younge & Collier, 415; Brashier v. Gratz, 6 Wheat. 533, 5 L. Ed. 322; Wells v. Smith, 2 Edw. Ch. (N. Y.) 78; Dumond v. Sharts, 2 Paige (N. Y.) 182.

The excuse presented by the plaintiff, for his neglect to pay at maturity the note, which first became due is, that he was at that time unable to attend to business on account of illness.

The testimony shows, that he was quite unwell, occasioned by a severe attack of influenza, from October 23, to the very last of the month of November, 1846. He was found walking out on a pleasant day, October 29, by a physician, who observed to him, that he looked very sick. He replied that he was, and requested the physician to visit him that day. The physician states, that he did so, and after examination concluded that he had been sick some time, that his symptoms were alarming, that he considered his case a critical one, and that he attended upon him through the month of November. The testimony of the physician was introduced by the defendants. The testimony would seem to be sufficient to show, that he ought not to be subjected to a forfeiture of a right for not attending to the transaction of business of no more importance to others than the payment of a small sum of money, a month or two earlier or later.

The bill states, that he had made an arrangement with Samuel Thompson before the middle of October, to obtain the money to pay the note becoming due on the 28th of that month. This is proved by the testimony of Thompson.

It further states, that about the first of December, and on the first occasion of his being able to ride out, the plaintiff met Robbins and stated to him, that he wished to take up the note which had become due during his illness, and would also take up the note becoming payable the following year, and that Robbins replied, that he would see Mr. Parshley and let him know about it. The answer of Robbins admits, that he met the plaintiff walking in the street about that time, but it denies, that the conversation is correctly stated in the bill; and asserts that the plaintiff said to him, my first note is out, if you will wait about three weeks, I will pay you that, and also the other, which becomes due next year, and that he made no answer to that proposal. The conversation as stated by the plaintiff is not proved, and that stated in that answer must be regarded as correct. From this silence, so noticeable, and from the conduct and observations made by the defendants, when the tenders were subsequently made, a fair inference arises, that the defendants did not intend to waive the strict performance for a day on account of the plaintiff's illness, but intended to insist upon a forfeiture. If this be so, they cannot have been injured by the delay to tender until the 17th of December, for if that tender had been made on the first day of that month, it would not have been accepted. The omission to tender the interest, which had accrued during the first year upon the note last payable, rests upon the same position.

There is no reason to believe, that the defendants would have varied their course in any degree, if it had been tendered. If the defendants had intended to overlook the omission to perform during his illness, and to insist upon an immediate performance on his recovery, and to

set up an omission to do that as a cause of forfeiture, fair dealing would seem to require that an answer should have been given to his proposal, and that he should have been informed, that any further delay would be considered as a forfeiture of his rights. The conclusion seems unavoidable that the defendants have not refused to perform on account of the delay, which occurred after the plaintiff's health was so far restored, that he could attend to business, or on account of the insufficiency of the amount tendered. The hostile feelings, which had existed between the parties before the first note became payable, and the conduct and remarks made by the defendants show, that they intended to avail themselves of the first omission to perform. The forfeiture was occasioned only by that omission, not by any subsequent delay. Upon the principle already stated, that omission having been occasioned or accounted for by occurrences not within the power of the plaintiff to avert, and for the happening of which he was not in fault, should not be allowed to prevent a decree for specific performance. The plaintiff had failed to perform in time. No exertion to make immediate payment after his discovery, could restore him to his former position, without the consent of the defendants or the interposition of the Court. He appears to have sought their favor and to have been met by silence. Subsequent delay could only be evidence of laches or abandonment, which would prevent a court of equity from preserving his rights from forfeiture by the first omission. That he had no intention to forfeit those rights by laches or by abandonment may be inferred from the facts, that he had paid one third part of the purchase money, that he had expended money to improve the estate, that he had before his illness made an arrangement to obtain the money to pay, that on his recovery he endeavored to obtain time to perform and offered to make compensation for the delay in payment of the first note by paying the second before it was payable. The defendants have suffered no loss, which the law does not presume to be compensated by the interest, which accrued. The estate was not of a character to be subject to unusual rise or fall in value.

A decree for specific performance, is to be entered, with costs.

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## BROWN v. REICHLING et al

(Supreme Court of Kansas, 1912. 86 Kan. 640, 121 Pac. 1127.)

MASON, J. On September 13, 1909, John C. Brown entered into a written contract with Pete, Jake, and Mary Reichling, by the terms of which they were to sell to him 200 acres of land for $7,000, of which $500 was paid at the time. He was to pay the remainder on or before February 20, 1910. Upon receiving this payment, they were to execute a deed conveying to him a good title. They also agreed to give him an abstract showing a clear title. The contract contained a pro-

vision that if he made default the agreement should be forfeited at their option; they to retain the payment made, in satisfaction of damages. A controversy arose over the matter, and on April 9, 1910, he began an action, asking for the specific performance of the contract. A demurrer to his evidence was sustained, and he appeals.

The evidence tended to show these facts: The contract was left at a bank. Shortly after its execution, the Reichlings placed with it an abstract of title to the land. On February 12, 1909, Brown called for and received the abstract. He noticed that the description of a 40-acre tract in one conveyance appeared as the northwest quarter of a quarter section, instead of the northeast quarter, the correct description. The next day he called upon the Reichlings and called their attention to the defect, and asked to have it remedied. They refused to do anything about it, and told him to return the abstract to the bank. The next day he did so, and called the attention of the banker to the matter. The banker discovered that in a deed made in January, 1907, to the Reichlings by some of their relatives, which he had himself drawn, he had by inadvertence written the word "west" in place of "east," and that the erroneous description had been followed in the record and transferred to the abstract. Upon his own responsibility, and without conference with the parties to the deed, he changed the erroneous description therein, and caused corresponding changes to be made in the record by the register of deeds and in the abstract of title by the abstractor. Brown was informed by the banker of these changes before the 20th. He told the banker he was not satisfied with the title; that he desired a quitclaim deed to be made by the grantors in the defective conveyance. February 20th was Sunday. On Saturday, the 19th, Brown went to the bank, expecting that the Reichlings would come there, and that some adjustment of the matter could be had; but they did not appear. On Monday he went to their home, talked over the situation with them, and asked them to procure the quitclaim deed. They refused to do so, saying that it was too late; that the time was past. A week later Brown was told that the $500 would be returned to him if he would accept it; but he refused to do so. On April 6, 1909, Brown made a formal tender of $6,500 to the Reichlings and demanded a deed. The tender was made with money he had borrowed for the purpose. He had never previously made a tender; nor had he had sufficient money to enable him to do so. He had made arrangements to borrow the money by using the land he was buying and an 80-acre tract that he already owned as security. He also had some hogs, worth $1,100, which he could have sold at any time. He had no property from which he could have raised the $6,500, except as stated.

The argument in behalf of the defendants is substantially this: The contract was that the payment of the purchase price should be completed on February 20th; the plaintiff made no offer to pay, and was unable to pay until after that time, and until after the defendants had notified him that the deal was off, and had offered to return the amount

he had paid; therefore his right to specific performance had been lost. We think the conclusion unsound, for these reasons: Ordinarily the time of payment is not regarded as of the essence of such a contract. 26 A. & E. Encycl. of L. 73; 36 Cyc. 707. There was nothing in the terms of the contract here involved, or in the circumstances of the transaction, to take this case out of the general rule. The plaintiff had a right to require that upon his payment of the $6,500 the defendants should deliver him a deed conveying a good and marketable title, as well as an abstract showing the state of the title. There was no occasion for his making a formal tender of the money until the defendants were prepared to comply with the terms of the agreement on their part.

Under the evidence, the defendants were the actual owners of the property; but the misdescription in one of their deeds made their paper and record title defective. The changes procured by the draftsman of the deed, without the knowledge of the grantors, did not cure the defect. True the record and abstract had been made to show a good title; but they did not show its actual condition. They showed a deed to the defendants, not in the condition in which it had been signed, but in a condition that resulted from a change which was unauthorized, and therefore ineffective in law, although made in good faith and with the best intentions. It was entirely reasonable that the purchaser, knowing of the fact, should ask that, if possible, the flaw be remedied by a deed from the grantors in the altered conveyance, or in some other suitable manner. "A reasonable objection to the vendor's title is a good excuse for the vendee's delay." 36 Cyc. 731. It seems probable that a quitclaim could have been procured. Fair dealing required that the Reichlings should procure such a deed, if able to do so. They apparently made no attempt, basing their action, not on the ground of inability, but upon the contention that the plaintiff had lost the right to enforce the contract.

That the plaintiff did not have the money with which to complete the payment is not a bar to his recovery, if he had, as he testified, made arrangements to obtain it. The fact that this arrangement contemplated the use, as security, of the property he was buying is not a bar, if by this means he was able to procure the money at the time it was needed to complete the transaction according to the terms of the contract; and after he had made a reasonable requirement with respect to the completion of the title and the abstract it was not incumbent upon him to produce the money until the requirement had been met, if that were practicable, or, in case of a refusal to attempt to meet it, until the lapse of a reasonable time in which to determine upon his course. It cannot be said, as a matter of law, that, under the circumstances indicated by the evidence, the delay on his part forfeited his rights under the contract.

The judgment is reversed, and a new trial ordered. All the Justices concurring.

## GREY et al. v. TUBBS.

(Supreme Court of California, 1872. 43 Cal. 359.)

Appeal from the District Court of the Fourth Judicial District, City and County of San Francisco.

Action was commenced on the 4th day of January, 1869, to enforce specific performance of the contract. Wright assigned the contract to the plaintiffs on the 27th day of November, 1868.

The court below gave judgment in favor of the plaintiff and the defendant appealed.

The facts are found in the opinion of the court.[25]

By the Court—RHODES, J. The contract of sale which the plaintiffs, who are the assignees of the purchaser, seek to have specifically enforced, provides that the interest on the purchase money shall be paid quarterly in advance, on the first days of January, April, July, and October. The principal sum was to be paid on or before July 1st, 1870 —three years from the date of the contract. The interest up to January 1st, 1868, was paid in advance, but the interest for the next quarter was not tendered until the last day of February, 1868. The defendant refused to receive the money and stated to the purchaser that he had forfeited his contract. The plaintiff, in December, 1868, before the commencement of the action, tendered to the defendant the principal sum and all the interest then due, according to the terms of the contract.

The fact that the purchaser did not tender the amount which became due on the first of the two quarters succeeding January 1st, 1868, is not material; for if a Court of equity can excuse the delay in tendering the money which became due on the last mentioned day, the failure to tender the interest for the next two quarters at the times mentioned in the contract is, under the circumstances, readily excusable.

The contract contains the following covenant: "In the event of failure to comply with the terms hereof by the party of the second part [the purchaser] the party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto." The plaintiffs rely upon the rule which has so frequently been applied by Courts of equity, that time is not of the essence of the contract, or as it is better expressed by Parsons in his excellent work on Contracts, that time is not necessarily of the essence of a contract. The defendant, while denying the applicability of the rule to contracts for the sale of property of the character of that in controversy—city or town lots—particularly in this State, where such property is as marketable and as subject to fluctuations in value, and is bought and sold with the same facility as personal property, yet he relies more upon a necessary qualification

[25] The statement of facts is abridged.

of the rule: which is that time is of the essence of a contract, if it be made so by the parties themselves, or by the circumstances of the case. He insists that the clause of the contract above cited, shows that the parties intended that the time for the performance of the contract on the part of the purchaser should be material, and of the essence of the contract. The parties agreed that a failure on the part of the purchaser "to comply with the terms hereof"—that is to say, to pay the money according to the terms of the contract—should operate as a release of the vendor from all obligation to convey the premises to the purchaser or his assignees; and to make the matter still clearer, and to show that the parties intended to make time essential, it was agreed that such failure should release him from all obligation "in law or equity" to convey the premises. The parties further agreed—as if to place the matter beyond all doubt—that in case of such failure on the part of the purchaser he should *forfeit all right* to a conveyance. It would be difficult to express with greater clearness and certainty, than the parties did in this contract, that time is of the essence of the contract, except it were done by the insertion of those very words in the instrument. Courts of equity have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and whenever it appears that the parties have *in fact* contracted, that if the purchaser make default in the payments, as agreed upon, he shall not be entitled to a conveyance, and shall lose the benefit of his purchase; and when it also appears that the purchaser is without excuse for his delay, the Courts will not relieve him from the consequences of his default. They will not inquire into the motive or the sufficiency of the motive that induced the parties to contract, that time should be essential in the performance of any of the agreements contained in the contract of purchase; but if it appears that the parties have thus contracted, the Courts of equity will not disregard the contract in order to give effect to some vague surmise, that all that the vendor intended to secure by the contract, was the payment of the purchase money, with interest, at some indefinite time.

Judgment reversed, and cause remanded for a new trial.

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## CROSS v. MAYO.

**(Supreme Court of California, 1913. 167 Cal. 594, 140 Pac. 283.)**

ANGELLOTTI, J.[26] We have in this case an appeal from what is declared by defendant to be the final judgment in an action brought by plaintiff to obtain a decree declaring and adjudging that defendant had failed to perform his part of a contract for the purchase by him from plaintiff of certain real property of plaintiff, fixing a time within which

[26] Parts of the opinion are omitted.

he should so comply, and decreeing that if he did not so comply within said time he should be forever foreclosed of all right or interest in the property or to a conveyance thereof. We have also an appeal from an order denying defendant's motion for a new trial. The written decision of the trial judge, findings of fact, and conclusions of law were signed by the trial judge on April 8, 1911, and filed April 10, 1911. These findings of fact fully disposed of all the issues made by the pleadings. By the conclusions of law it was declared that defendant has failed to perform his part of the contract; that plaintiff is entitled to a decree adjudging defendant to be in default in the sum of $1,000 for interest unpaid, $8,160 for cattle sold without the permission or consent of plaintiff and unaccounted for, and $2,923.68 for taxes unpaid, in all $12,083.68; that plaintiff is entitled to a decree directing defendant to pay to him said sum of $12,083.68 with interest from certain specified dates, within ten days from the signing, serving and filing "of this decree and the judgment herein," or that, failing so to pay said sums, he shall be immediately foreclosed of all his rights under the contract, and plaintiff shall, upon such failure, be entitled to the possession of the land described in the contract, and to receive back from the Stockton Savings Bank the deed placed in escrow therein; that defendant is not entitled to a rescission of said contract, nor a reconveyance from plaintiff of all or any of the real estate conveyed to him by virtue of the agreement, nor the return of any money paid plaintiff by defendant or expended by him on the property, nor any sum of money, or property or thing, nor to any reformation of the contract; that defendant is entitled to nothing under his cross-complaint, and that plaintiff is entitled to recover his costs. * * *

The contract between the parties was one for the purchase and sale of a large tract of land, described therein as being "all land in Swamp Land survey No. 589 in Solano county, and all land in Swamp Land survey No. 115 in Napa county, which lies south of the center line of South Slough, so-called; the said lands containing about sixty-five hundred acres, more or less." The contract was executed on March 3, 1909, the day it bore date. Cross agreed that upon the payment of the stipulated purchase price, with interest, within the time designated, he would transfer this property, free and clear of liens and incumbrances, to Mayo, together with all the personal property thereon. The stipulated purchase price was $350,000, of which $50,000 was recited to be paid by the transfer by Mayo to Cross of 320 acres of land in Sutter county and a lot in the city of Oakland, which transfer was made as agreed upon. Mayo was to have until March 3, 1914, within which to pay the remaining $300,000, with interest thereon at the rate of 4 per cent. per annum from January 1, 1910, which was payable semiannually from said January 1, 1910. Mayo was to enter into possession of all the property, real and personal, at once, and to remain in possession during the life of the agreement. Mayo agreed to pay on account of the interest for 1910, $2,000 on or before June 15, 1909, and $3,000

on or before December 15, 1909. He further agreed to pay all state, county, or other taxes levied or assessed upon said lands during the life of the agreement. It was further agreed that upon obtaining the written consent of Cross, Mayo might sell any of the cattle on the land, or the increase thereof, but that the entire proceeds of any such sale or sales shall be paid to Cross immediately upon the same being made, and the amount thereof applied upon the unpaid purchase price. Mayo was to farm the lands for his own benefit, and he agreed to keep the levees and other reclamation works thereon in a state of efficiency, and repair any breaks therein. Cross was to place a deed of the property in escrow with the Stockton Savings Bank, to be delivered upon the payment by Mayo of the full purchase price. It was agreed that if Mayo failed to perform the terms of the agreement on his part, or failed to make the payments therein provided to be made, Cross might end and determine the agreement. It was further provided that in the event of any such failure, "any and all payments made" to Cross by Mayo "shall be and belong" to Cross "as compensation for the use of said land" by Mayo, and that Mayo "shall have no claim, either at law or in equity" against Cross "or said lands" because of any of such payments, and that the $50,000 paid by the conveyance of said land in Sutter county and in the city of Oakland "shall be and belong" to Cross, and that Mayo "shall have no claim either at law or in equity thereto."

In his complaint in this action, filed August 11, 1910, plaintiff alleged the failure of defendant to perform his contract in three particulars, viz.: Failure to pay interest due July 1, 1910, amounting to $1,000; failure to pay state and county taxes amounting to $2,923.68, which plaintiff had been obliged to pay to save his land from sale; the sale without the consent of plaintiff of the cattle on said property; and the failure to account to plaintiff for the proceeds of such sales, or any part thereof. The value of such cattle was alleged in the complaint to be $5,590, but this was changed by amendment on the trial to $8,160. It was further alleged that on August 2, 1910, plaintiff had made a written demand on defendant that he comply with these conditions of his contract within one week, but that defendant had failed to do so.

* * *

The trial court followed the practice suggested in Keller v. Lewis, 53 Cal. 113, and followed in Kornblum v. Arthurs, 154 Cal. 246, 97 Pac. 420, and many other cases, of fixing a time within which defendant should pay the amounts due upon said contract, or be foreclosed of all his rights under the contract. As was said in the case last cited, "this was in consonance with equity." We cannot say that the time fixed, 10 days, was, under all the circumstances, "an unjustly short limit of time." We are further satisfied that it cannot be held that the trial court was guilty of any abuse of discretion in subsequently refusing to grant an extension of time, even if we assume that it had the

power thus to change the provision as to time contained in the judgment of April 8th.

While the point is not available on the appeal from the order denying a new trial, there is no force in defendant's claim that he is, in any event, entitled to a return of the payments already made by him under the contract. The authorities relied on by him state the rule in cases where there is a rescission, or abandonment by consent. There was no rescission or abandonment by consent in this case, defendant's claim for a rescission being denied by the judgment. Plaintiff has not attempted to rescind, but has always insisted on the contract and is standing on its terms. His right to retain the purchase price already paid, including the property deeded to him in part payment thereof, is fully sustained by many decisions in this state. See Glock v. Howard, etc., Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Odd Fellows' Savings Bank v. Brander, 124 Cal. 255, 56 Pac. 1109; Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007.

There is unquestionably a sufficient appeal from the judgment or order of April 21, 1911. Whether the latter be considered the judgment, or a special order made after judgment, it is undoubtedly erroneous in decreeing the recovery by plaintiff from defendant of the sum of $12,083.68 and interest, in addition to decreeing a foreclosure of all his rights under the contract. If it be an order after judgment, this portion thereof is erroneous, in that it finds no support in the judgment of April 8th, which simply required defendant to pay this amount within a specified time or be foreclosed of all rights under the contract. There is no provision therein for any money recovery, except costs, in the event of foreclosure of defendant's rights because of nonpayment of such money within the specified time. If it be considered as the judgment in the action, this portion is erroneous in that it is without support in the pleadings and findings. It is to be borne in mind that this action was not one for the recovery of any money, but simply one to require defendant to pay the moneys due under the contract or be foreclosed of all rights under the contract. Manifestly defendant cannot properly be required to pay the amount for failure to pay which his rights under the contract are declared forfeited, or, to state it in different words, plaintiff cannot have both a forfeiture and enforcement of the contract at the same time. To sustain such a recovery here would be in effect to require defendant to partially perform his agreement of purchase, and at the same time foreclose all his rights under such agreement. No authority is cited by plaintiff to sustain any such claim.

In view of our conclusion upon the matters already discussed, certain other claims made in the briefs of learned counsel for defendant are immaterial and need not be considered.

The order denying a new trial is affirmed. The judgment or order of April 21, 1911, is modified by striking therefrom the following: "It is further ordered, adjudged, and decreed that plaintiff have judg-

ment for $12,083.68, with interest thereon at the rate of 7 per cent. as follows: On the sum of $1,000, being a part thereof, from July 1, 1910; on the sum of $8,160, being a part thereof, from January 1, 1910, and on the sum of $2,923.68, being the balance thereof, from April, 8, 1910," and as so modified is affirmed.

BEATTY, C. J., does not participate in the foregoing.

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## In re HECKMAN'S ESTATE.

(Supreme Court of Pennsylvania, 1912. 236 Pa. 193, 84 Atl. 689.)

Appeal from Orphans' Court, Berks County.

In the matter of the estate of William A. Heckman, deceased. From a decree enforcing specific performance of a contract to sell real estate, George A. Heckman, executor, appeals.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

STEWART, J. This was a proceeding in the orphans' court begun by the appellee here, John Witman, a vendee, to compel specific performance of a written contract entered into between himself and one William A. Heckman, whereby the latter covenanted to sell and convey to the former a certain tract of land in Robeson township, Berks county. Heckman having died, his personal representative was the party proceeded against. A decree for the specific performance of the contract followed, from which decree this appeal is taken. The case presents a single question, and it is only necessary to indicate the particular features of the contract, which are important in connection therewith. The contract was executed the 21st October, 1910. It provides that the deed was to be delivered and possession given on or before the 11th January, 1911. The consideration to be paid by Witman was $2,800, in manner following: Two hundred dollars on the execution of the contract, acknowledged to have been paid, $1,300 on delivery of the deed, and the balance on the 1st April, 1911, to be secured by mortgage on the premises. Then follows this provision:

"And in the event of the second party refusing to comply with the terms of this agreement the sum paid down shall be retained by the said William A. Heckman as liquidated damages for the breach; and all other rights under this agreement shall be at an end and the said William A. Heckman, for the true performance of all the covenants of this agreement, acknowledges himself to be bound to the said party of the second part in the sum of two hundred dollars to be recovered as liquidated damages for his failure to perform the covenants herein."

With this provision in the contract, could Heckman or his representative, Heckman having died, have required specific performance against Witman, had the latter defaulted?

If in that case specific performance must have been denied, it necessarily follows that it must be denied here; for nothing is better settled

than the rule that, where a contract is incapable of being specifically enforced against one party to it, that party is incapable of enforcing it against the other. A contract to be enforced specifically must be mutual both as to remedy and obligation. Bodine v. Glading, 21 Pa. 50, 59 Am. Dec. 749.

Had the contract in this case provided simply for the forfeiture of the hand money paid by the vendee in case of the latter's failure to keep his covenants, the question then would have been whether the provision for the forfeiture for the $200 was intended to secure the performance of the contract, or whether it was one of two things over which the vendee had the right of election, the performance of his covenants or the loss of the money paid. If the former, the right of the vendor to enforce performance would remain; otherwise, if the latter. But, in view of the provision in the clause above quoted, that in case forfeiture occurs, "all rights under this agreement shall be at an end," no such question can here arise. Had the default been that of the vendee, and the vendor had undertaken to specifically enforce, he would at once have been met with the answer from the vendee.

"All rights under the contract are at an end. I cannot recover back the money I paid you. No more can you demand anything further of me. Our contract has been fully executed in one of two ways expressly provided for."

What reply could be made to this, or what possible ground for contention could remain? There can be no other conclusion than that the parties to this contract mutually waived their right to a specific performance of it, and limited the remedy to recovery of damages.

It should be said in justice to the learned judge of the orphans' court that this feature of the case was suggested for the first time on the hearing of this appeal. The point was neither discussed nor raised in the court below. We have considered it here only because the law requires it of us. Act June 16, 1836 (P. L. 682), makes it our duty in all cases of appeal from the several orphans' courts to hear, try, and determine the merits of such cases, and to decree according to the justice and equity thereof. The enforcing of specific performance of a contract is a matter resting exclusively in equity, and is allowed only when the equitable right to it has been made to appear. In this case it is evident that no such right existed, and the petition should have been dismissed. The first assignment of error complains of the decree itself.

It is sustained, and the decree accordingly reversed, at cost of appellant.

### *(B). Delay in Bringing Suit; Laches; Statute of Limitations*

#### LEWIS v. LORD LECHMERE.

(In Chancery before Lord Parker, Chancellor, 1721. 10 Mod. 503, 88 E. R. 828.)

This was a bill brought by the plaintiff for a specific performance of articles, bearing date the thirtieth day of August 1720, whereby Lord Lechmere had covenanted to purchase such an estate at forty years purchase; provided the plaintiff did, on or before the tenth day of November following, lay such an abstract of the title before Lord Lechmere's counsel, as they should approve.

The bill was dismissed with costs; because the plaintiff had not laid his title before Lord Lechmere's counsel within the time limited by the articles; which time, the Lord Chancellor was pleased to say, was very material; the price of South-Sea stock, from whence the money for the purchase was to be raised, being upon the tenth of November two hundred and sixty per cent. and at the time of the hearing the cause, but ninety-two per cent.[27] * * *

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#### GUEST v. HOMFRAY.

(In Chancery before Sir Richard Pepper Arden, 1801. 5 Ves. 818.)

Upon the 31st of January, 1798, the plaintiff entered into an agreement in writing to sell to the defendant an unfinished house in Cardiff in fee for the sum of £800 payable by instalments. At the execution of the agreement the keys were delivered to the defendant: and he looked over the house. On the 1st of February he went to Bath; where he staid till April. Then finding, that no abstract had been delivered, he called for an abstract; which was delivered upon the 18th

[27] For other parts of this case, here omitted, see pages 447 and 480, infra.

"A mistaken and very injurious practice long prevailed, from the courts of equity considering time as of no consequence, and delay as affording no impediment to decreeing specific performance of agreements. This was supposed to originate in a dictum attributed to Lord Hardwicke in the case of Gibson v. Patterson (1737) 1 Atk. 12, which is now proved to be totally erroneous." Manuscript note of Mr. Campbell (afterward Lord Chancellor Campbell), to Lloyd v. Collett, 4 Bro. C. C. 469, 29 E. R. 993.

"In Milward v. Earl Thanet, at the Rolls, March 24, 1801, the bill for a specific performance was dismissed. The parties differed as to the construction of the agreement; and the bill was delayed for seven years. Lord Alvanley, then Master of the Rolls, observed, that Lord Kenyon was the first who set himself against the idea that had prevailed, that, when an agreement was entered into, either party might come at any time: but that it is now perfectly known, that a party cannot call upon a Court of Equity for a specific performance, unless he has shown himself ready, desirous, prompt, and eager." (1801) 5 Ves. Jr. 702, note.

of April. Objections were taken to the title upon that abstract: 1st; that no title appeared farther back than 1782: 2dly; it did not appear, what estates two persons of the name of Richards had: 3dly; a person named Priest, stated to have conveyed in 1790, was at that time an infant: 4thly; several married women were stated to have conveyed in 1796; and there ought to have been fines. The defendant took another house in Landaff; and refusing to perform his agreement with the plaintiff, the bill was filed; praying a specific performance; charging, that the defendant's reason for refusing to perform the agreement was, that he had taken the other house.

The answer stated the defendant's reason for declining to complete the agreement to be, the plaintiff's neglecting to make a title.

In support of the bill it was proved, that upon the 5th of April, 1798, the defendant went to look over the house at Landaff; and upon the 2d of April he told the landlord, he should like to become his tenant, provided he could get rid of Guest's house; and on the 2d of June he entered into the contract for that house, to take place from Midsummer following.

The solicitor for the plaintiff by his deposition stated, that soon after the delivery of the abstract the defendant and his solicitor called on the deponent. A conversation upon the objections ensued; and they were informed, the deponent was not then prepared to give a farther abstract on account of the absence of his partner; but it should be furnished. The abstract was taken away by the defendant's solicitor a few days afterwards. Some written observations and queries were some time afterwards delivered to the deponent. The deponent applied for the abstract again, in order to complete it; but did not receive it till August. A fine was levied, as required, at the Autumn Great Sessions. A second abstract was left at the defendant's lodging at Bath upon the 23d of April, 1799: but the defendant said he would not take it as considering himself bound to have any thing to do with the purchase; and afterwards wrote a letter to that effect. The deponent understood from his conversation with the defendant, when the first abstract was returned, that he would not fulfil the agreement, unless compelled.[28] * * *

MASTER OF THE ROLLS. No one can doubt the motives of the parties in this cause. The only question is, whether the plaintiff has done enough to show, he took all the pains he could to be ready to carry into execution the agreement; which, it is perfectly clear, the defendant meant to get rid of, if he could. The plaintiff does not seem to me to have done all he ought to have done. It rests entirely upon that point; without balancing the evidence of the two solicitors; which it is not very easy to reconcile. By the contract immediate possession was to be given; and was given without doubt; though the defendant says in his answer, he never took possession: but the keys being in

[28] The statement of facts is abridged.

his possession, it must be considered, that he was in possession. Without doubt by the delivery of the keys the possession was ready for him; and indeed he had it. I do not like his answer in that respect. Having the keys in his possession, that is possession, if he chose to take it. Neither the defendant demanded, nor the plaintiff tendered, the abstract immediately. I do not agree, that it is solely incumbent upon the vendor to move by making a tender of the abstract. Something is also incumbent upon the purchaser, to ask for it. But neither the one asked for, nor the other tendered it. Then what happened? Before the 5th of April the defendant had determined to get rid of the bargain, if he could; and was looking out for another house. I do not know what his reasons were: but he had no right to make use of those reasons, whatever they were, in order to make improper objections, or to expect any thing unreasonable from the vendor. Finding he could make a bargain for a house at Landaff, he throws up the negotiation with Mr. Kay for the other premises, to be held with this house; and then without doubt he asked for the abstract with a view to make objections to the title. Objections were made; and I think, it is fairly put in issue by the answer, that the defendant had stated, that the contract was at an end. I think, that called upon the plaintiff's solicitor to state, that the conversation was not so. The plaintiff's own attorney does not deny that he saw, the defendant meant to abandon the purchase, if he could. That should have made them more ready to cure the objections; and I should have expected the most decisive evidence from the plaintiff's solicitor, that he never had an intention not to give another abstract; and he should have apprised the defendant of that. There is no evidence, that, even when the abstract was sent back, he said, the defendant was to be still bound, and was not released; and desired him to take notice of that. There is nothing to show, that he was proceeding with due diligence; and meant to proceed with the contract; nor that he was even holding the purchaser to it. It is clear, therefore, the plaintiff was called upon to be more quick than he has been; and has not done all he ought. It happened, that he met with an unwilling purchaser. I think he has not entitled himself to a specific performance; but I do not at all like the defendant's answer; for he pretends, he wished to go on with the purchase. It would have been better for him to have said, he did not wish to go on with it; and therefore wished to come to a determination upon it; that the objections were fair objections; and he thought himself entitled to take them. If he had done that, I should have dismissed the bill with costs. On the other hand, they should have cautioned him; and have told him, they were going on to make out the title; and that they were in hopes of doing it. If they had done all that, and shown a probable ground to him, that they might make a good title, I should perhaps not have thought a year too long.

Upon the whole, the bill must be dismissed; but, under the circumstances, without costs.

## ALLEY v. DESCHAMPS.

(In Chancery before Lord Erskine, 1806. 13 Ves. 225.)

Crichton Horne, being in 1794 possessed of leasehold premises in London for the residue of a term of 99 years, commencing in 1792, with a view to a partnership, to be entered into between him and John Deschamps, junior, one undivided moiety of the premises, consisting of a glass-house, with the fixtures, utensils, &c. was in consideration of £1,430 assigned to John Deschamps, senior, for the residue of the term; and he and Horne demised all the premises to Peter Mellish for 14 years, at the yearly rent of £50; upon trust to assign to Horne and Deschamps, junior, for the purpose of carrying on the partnership; and Mellish assigned to them accordingly.

In January, 1796, Horne and Deschamps, junior, borrowed from Deschamps, senior, £800 upon mortgage of the whole of the premises. In November, 1797, Horne and Deschamps, junior, dissolved their partnership, and assigned all their stock in trade, debts, &c. for the benefit of their creditors; and by an agreement, dated the 21st of November, 1797, Deschamps, senior and junior, agreed, that upon payment by Horne, his executors, &c. to Deschamps, senior, his executors, &c. of £2,000, in part satisfaction of the sum of £2,230, by equal instalments, at 2, 4, and 6 years, with interest payable half-yearly, Deschamps, senior and junior, would after the expiration of the six years, and after full payment and satisfaction of the said sum of £2,000, and interest as aforesaid, assign all their respective interests in the premises, fixtures, utensils, &c. to Horne.

Horne was upon the execution of the agreement put in possession, and carried on the business on his own account until his bankruptcy; which took place upon the 19th of April, 1800. The only payment he made to Deschamps, senior, was £100. The premises were purchased by the directors of the London Dock Company, under the act of parliament, for the sum of £3,500; and the different parties claiming having executed the conveyance without prejudice, the bill was filed in July, 1802, by the assignees under the commission of bankruptcy against Horne; praying that the plaintiffs may be declared to have been entitled to a specific performance of the agreement of November, 1797; and therefore to be entitled to the residue of the money, paid by the London Dock Company, or to a moiety thereof.

The defendants, Deschamps, senior and junior, by their answer stated, that, Horne becoming soon after the agreement very much embarrassed, and wholly unable to comply with the terms, it was considered as relinquished; and was in fact made void by his non-compliance; but he was suffered to continue in possession as lessee of Deschamps, senior, at the rent of £100 a year; and as such lessee, about two years after the agreement, Horne paid to Deschamps, senior, £100 being one

year's rent; which was the only payment he ever made as lessee, or otherwise.

THE LORD CHANCELLOR. I have upon another occasion stated my opinion upon the doctrine of specific performance. This Court assumed the jurisdiction upon this simple principle; that the party had a legal right to the performance of the contract, to which right the Courts of Law, whose jurisdiction did not extend beyond damages, had not the means of giving effect. Even that was considered by the Courts of Common Law to be a great usurpation. Afterwards, however, the Court went much farther; and the doctrine of compensation has been carried to an extent, not justified by the ancient course, and which I never will follow; as upon the contract for the house and the wharf, and the other cases, that have been noticed with disapprobation by Lord Eldon. This Court ought not to interfere, unless it is clear that the party will substantially have that for which he contracted. With regard to this particular case, it would be very dangerous to permit parties to lie by, with a view to see, whether the contract will prove a gaining or losing bargain, and, according to the event, either to abandon it, or, considering the lapse of time as nothing, to claim a specific performance, which is always the subject of discretion.

December 18. THE LORD CHANCELLOR.

Under the circumstances of this case there is not a colour for decreeing a specific performance of this agreement. Lord Hardwicke could not have stated what is supposed to have been laid down in the case of Gibson v. Patterson, 1 Atk. 12, that, as a general proposition, time is in equity perfectly immaterial; a proposition, very extraordinary, when the origin of this jurisdiction to grant a specific performance is considered. This relief, I have formerly observed, was first given upon a legal right, instead of damages; which was followed by another class of cases equally clear, that where a party was not able to perform his engagement, according to the strict letter, if the failure was not substantial, the other should not be permitted to take advantage of the strict form. But the relief was never given in the extravagant manner, which the circumstances of this case would require; that a man, having done nothing, having broken his contract, may at any distance of time claim all the advantage, as if he had fulfilled it.

In the case of Harrington v. Wheeler, 4 Ves. 686, which is not unlike this case, particularly in the circumstance that money was paid, Lord Roslyn dismissed the bill with costs; the plaintiff not having done any act. The same principle is laid down in Lloyd v. Collet, 4 Bro. C. C. 469, 4 Ves. 689, 690, note (b), and the report of Gibson v. Patterson, 1 Atk. 12, in which the lapse of time appears to have been considered as perfectly immaterial, is in those cases corrected. This is a most extravagant case.

I take it upon the evidence, that possession was given upon the faith of the agreement; and that the sum of £100 was paid, not, as it has been strongly contended, as rent, but in part satisfaction of the contract.

I will also take it, that the agreement was not abandoned; that the bankrupt did not by his own act consent to rescind it; though there is evidence for that. But my judgment proceeds upon a plain principle, that a bill for specific performance of an agreement will not be endured under such circumstances: nothing farther having been done towards performance when the purchaser became bankrupt nor afterwards, until these premises by a subsequent event proved to be much more valuable, than they were at the time the contract took place. Where then, as Lord Roslyn says, is the equity, placing him in the same situation, as if he had in due time availed himself of the contract?

The bill, as far as it prayed a specific performance of the agreement, was dismissed with costs.

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## HEARNE v. TENANT.

(In Chancery before Lord Erskine, 1807. 13 Ves. 286.)

A motion was made, upon the answer, for an injunction to restrain an ejectment, under the following circumstances:

The plaintiff was assignee of the lease of a house, demised by the defendant. Upon the expiration of that lease a treaty for a new one took place, the defendant insisting upon a rent of £84 and the sum of 1,000 guineas. The plaintiff, after some fruitless endeavours to procure an abatement, consented to give that rent and premium; and, the plaintiff requesting the defendant to put down the negotiation upon paper, a memorandum was put down by the defendant in writing, dated the 23d of October, expressing that the lease was to be granted for 21 years, to commence upon the expiration of the old lease, "upon condition" of the plaintiff's paying on or before the end of the month, 1,000 guineas. Of that memorandum two copies were signed; the plaintiff taking one, the defendant the other. After the expiration of the time mentioned in the memorandum for payment of the 1,000 guineas, the plaintiff calling upon the defendant, apologized for not bringing the money: the defendant asked, if he had the memorandum with him: the plaintiff produced it; the defendant taking it, observed, that the time for payment was expired, and therefore the memorandums were of no use, and it was better to destroy them; and he then took the other out of a bureau, and tore them both.

The answer, as to that transaction, stated, that the plaintiff did not express disapprobation, nor did he say he agreed to it, but he entreated a week or a fortnight farther time: but whether the plaintiff had any suspicion of the defendant's views in making such request, or why he acceded to it, the defendant cannot set forth.

The Solicitor-General and Mr. Trower, in support of the motion, cited Williams v. Thompson, from Mr. Newland's Treatise on Con-

tracts (Newland, on Contracts, 238), and referred generally to Gregson v. Riddle (Id. 239) and the other cases upon lapse of time.

THE LORD CHANCELLOR. The question is, whether under the circumstances appearing upon this answer, the injunction should be continued to the hearing. The impression upon my mind is, that the Court has gone farther than it ought to go in these cases. Upon looking into the whole of this case as it now stands, my opinion is, that I ought to continue the injunction to the hearing. The principle, upon which the Court acts, is now upon all the authorities brought to the true standard; that though the party has not a title in law, as he has not complied with the terms, so as to entitle him to an action, as to the time, for instance, yet, if the time, though introduced, as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other, is not the essence of the contract, a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a Court of Equity will compel the execution of the contract, upon this ground, that the one party is ready to perform, and the other may have a performance, in substance, if he will permit it.

In the course of the negotiation between these parties, previous to the memorandum, nothing was in difference but the amount of the sum, the premium upon renewal; nothing as to time appears to have been in contemplation; nothing to shew that payment at a particular day was the object. It would be rash in this stage of the cause upon the words of the memorandum, as represented by the answer, the defendant stating, that he cannot set it forth more particularly, the memorandum being destroyed, to decide, that the payment must be taken to be a condition precedent, as it might be, if that stipulation was inserted by the consent of both parties, the consequence of previous negotiation. It does not appear that the defendant, who made this memorandum himself, had any authority to put down any time; and the nature of the transaction does not look like it. It does not appear that he had any pressing occasion for the money at a particular time. Then, his conduct in destroying the papers was not such as will entitle me to say in the middle of the cause, that this is a fair proceeding.

Combining all the circumstances, I think this injunction must be granted until the hearing.[29]

[29] In Davis v. Hone (1805) 2 Schoales & Lefroy, 341, at 347, Lord Redesdale, L. C., said: "A court of equity frequently decrees specific performance, where the action at law has been lost by the default of the very party seeking the specific performance, if it be notwithstanding conscientious that the agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance, and to sustain an action at law performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case."

## SETON v. SLADE.
## HUNTER v. SETON.

(In Chancery before Lord Eldon, 1802. 7 Ves. 265, 32 E. R. 108.)

The plaintiff in the first of these causes, being entitled to an estate, called Kilorough, in the county of Glamorgan, under a contract entered into in 1799, by the trustees of the Marquis De Choiseul, to convey to him and his heirs in consideration of £8500 employed Josiah Phipps to sell the estate by auction or private contract; and the following memorandum in writing, dated the 12th of April, 1800, was signed by the defendant Robert Slade, but not by the plaintiff or any one on his behalf:

"I Robert Slade of Doctors Commons in the city of London Esquire have this day purchased of Josiah Phipps the estate described in the within particular at and for the sum of £10,000 including the timber and underwood growing thereon have paid a deposit of £1000 do hereby undertake and agree to pay the remainder of the purchase money and complete my purchase within two months from the date hereof the proprietor making a good title thereto at his own expense and executing a proper conveyance to be prepared at my expense. And I do further agree to pay for the fixtures household furniture at a fair valuation and for the growing crops seeds fallows &c. in the same way according to the custom of the country and possession to be given upon the completion of the contract to which time all out-goings are to be cleared up and I am entitled to the rents and profits. Upon failure of my complying with the terms and conditions before-mentioned the deposit money shall be forfeited the proprietor shall be at full liberty to resell the estate and the deficiency if any there shall be by such second sale together with all charges attending the same shall be made good at my expense."

The bill in the first cause prayed a specific performance of this agreement; which was resisted under the following circumstances appearing by the answer and the evidence.

The defendant the day after he signed the agreement wrote to Phipps from Brighthelmstone; stating objections to the title, and that if the title should not be made out and possession delivered to him by the 12th of June then next, he should insist upon having the deposit money returned to him with interest. Phipps' letter in answer, dated the 19th of April, stated the plaintiff's answer, as given verbally by his solicitor, thus:

"Mr. Seton desired I would inform you, that he accedes to your request respecting the interest as a matter of course."

The defendant about the beginning of May informed Phipps, he had sold out stock for the purpose of being ready with his purchase money; and expressed his surprise, that no abstract had been delivered. He afterwards pressed Phipps for the abstract; and proposed that Phipps should copy and send in his name to the plaintiff a note written by the defendant, expressing that finding no progress made in the delivery of the title, he called to remind Phipps, that in the event of its not being completed at the expiration of the two months he expects in compliance with the promise the plaintiff made in answer to his let-

ter from Brighthelmstone to have his deposit money returned with interest; and requesting authority to fulfil the engagement on the plaintiff's part. Phipps declined writing that letter. On Saturday the 7th of June the abstract was left at the defendant's solicitors, with a note; stating, that the plaintiff had only a title under an agreement; but all necessary parties were ready to convey; and making a proposal for that purpose. On Monday the 9th the plaintiff's solicitor called there, to say, that he would not vouch for the authenticity of the abstract; as it was not prepared by him, but by the solicitors, for the trustees of the Marquis De Choiseul. Nothing further passed till the 13th of June; on which day the defendant wrote to Phipps; demanding his deposit with interest; and stating his reasons; that the two months, within which the plaintiff agreed to complete the contract, were expired; and the defendant's solicitors had not received an abstract till within these few days; and, so far from showing a right in the plaintiff to convey, it states merely a contract for purchase by him without noticing a suit in Chancery against the trustees of the Marquis and Marchioness De Choiseul, previous to the contract for purchase by the plaintiff, which renders it impossible for the plaintiff to carry into effect his agreement with the defendant within the time limited

The defendant afterwards recovered his deposit with interest in an action. Several objections were taken to the abstract; the principal of which, (mentioned in the defendant's letter of the 13th of April,) were the suit instituted by the Marquis De Choiseul, and his creditors, to remove his trustees and for an account of their conduct; and a prior contract with a person, named Darby; who gave notice of his claim. He was made a defendant; and put in an answer amounting on the whole to a disclaimer. Afterwards being examined as a witness by his depositions he renewed his claim. The Lord Chancellor held, that he could not get rid of the disclaimer upon the record without a strong case upon affidavit; and therefore he was a good witness; but the defendant reading his depositions must admit, that he has no interest. The defendant then declined reading his evidence.

The second cause was instituted upon a bill by the trustees of the Marquis De Choiseul; praying a specific performance of their contract with Seton. * * *

THE LORD CHANCELLOR.[30] If it were necessary for the decision of this case, to express myself with great accuracy upon the principle of the Court as to suits for specific performance, as far as objections are to be founded upon what the Court has done, and has forborne to do, in a great variety of cases, in which the objection has been taken, that the agreement was not carried into execution within the time stipulated upon the face of it, I should think it my duty to look through a great number of cases. But, in the view I have of this case, I incur no hazard of making a decree in its principle inconsistent with any authority that can be stated.

[30] Part of the opinion is omitted.

To say time is regarded in this Court as at law, is quite impossible. The case mentioned of a mortgage is very strong: an express contract under hand and seal. At law the mortgagee is under no obligation to re-convey at that particular day; and yet this Court says, that though the money is not paid at the time stipulated, if paid with interest at the time a re-conveyance is demanded, there shall be a re-conveyance; upon this ground; that the contract is in this Court considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine upon which this Court acts against what is the prima facie import of the terms of the agreement itself; which does not import at law, that, once a mortgage always a mortgage; but equity says that; and the doctrine of this Court as to redemption does give countenance to that strong declaration of Lord Thurlow, that the agreement of the parties will not alter it; for I take it to be so in the case of a mortgage; that you shall not by special terms alter what this Court says are the special terms of that contract. Whether that is to be applied to the case of a purchase is a different consideration. I only say, time is not regarded here as at law. So in the instance of a mortgage with interest at 5 per cent. and a condition to take 4, if regularly paid; or at 4 per cent. with a condition for 5, if not regularly paid. At law you might in that case recover the 5 per cent. for it is the legal interest. But this Court regards the 5 per cent. as a penalty for securing the 4; and time is no further the essence, than that if it is not paid at the time, the party may be relieved from paying the 5 per cent. by paying the 4 per cent. and putting the other party in the same condition as if the 4 per cent. had been paid: that is, by paying him interest upon the 4 per cent. as if it had been received at the time. So in this Court before Courts of Law dealt with a bond, under a penalty, as they do now. Time was of the essence there: but this Court relieved against the penalty long before a Court of Law; and there are many other instances.

But there is another circumstance. The effect of a contract for purchase is very different at law and in equity. At law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be to be discussed between the representatives of the vendee. Therefore I do not take a full view of the subject upon the question of time, unless that is taken into consideration; and many very nice and difficult cases may be put, in which the question would be to be discussed between the representatives, founded upon the conduct between the vendor and vendee. It is obvious, that a due consideration of the value of the objections will embrace that consideration also.

The cases seem to have varied a good deal. The cases before Lord Thurlow proceed upon this;. that in the nature of the thing there must

be a degree of good faith between the parties, not to turn round the contract upon frivolous objections. As to the contract of the party the slightest objection is an answer at law. But the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, not merely as to the time, but an alteration of circumstances affecting the value of the thing, or objections arising out of circumstances, not merely as to time, but the conduct of the parties during the time, unless the objection can be so sustained, many of the cases go the length of establishing, that the objection cannot be maintained: even the later cases; which have given great weight to the objection; particularly Harrington v. Wheeler, 4 Ves. 686, referring to older cases, particularly two in the House of Lords. The objection was not put merely upon the conduct in not making the title in time, but upon the circumstances, connected with the thing and the value of it.

But I need not address myself to the consideration of what is the precise principle with much industry; for no authority would support me in saying, that under the particular circumstances of this case the defendant can resist a decree, if a good title can be made. * * *

This case is not like Lloyd v. Collett, 4 Bro. C. C. 469, 4 Ves. 689, in the note, in which the defendant immediately sent the abstract back, and would not look at it. What right had this defendant to read the abstract, if it came too late? He had either an intention to execute the contract, or a hope, that he had time to get through the abstract, in order to carry it into execution: but the evidence in this respect is totally silent; and it is clear upon the objection stated in the solicitor's depositions, that at some period or other he had gone into the abstract.

As to the other circumstances, stated by the defendant, his selling out stock, &c. there is no evidence whatsoever. As to his intention of making this place his residence, there is nothing in the contract, having the least reference to that; and upon an intention, not disclosed in the contract or afterwards, as essential, this Court has never been in the habit of acting.

Under the circumstances therefore, whether the time is or is not an objection, founded upon the authorities the reports of this Court furnish, which I will not discuss, let the authorities upon that point turn the scale either for the defendant or the plaintiff, there is no authority, that has not some reference to the conduct of the party in the mean time; and upon the conduct this defendant has no right under the circumstances to say, this contract was not performed within the two months. There must therefore be a decree for a specific performance; and, as to all the rest, a reference to the Master to see whether a good title can be made. Where the party has not been able to make his title before the decree, it is always a question very important as to the costs, but not, whether he shall take the title or not. According to old cases it was sufficient, if the title was made by the time of the report.

## ELLISON v. MOFFATT et al.

(Court of Chancery of New York before James Kent, 1814. 1 Johns. Ch. 46.)

The plaintiff filed a bill, in 1809, against the defendants, as the executors, heirs and devisees of Thomas Moffat, deceased, for an account, stating an agreement, under seal, dated in April, 1769, between John and William Ellison and the testator, by which they agreed to furnish the testator with a store of goods, which he was to sell on certain terms; and the agreement was to continue for three years. In April, 1772, the agreement was renewed for six years, and it was unexpired when the American revolutionary war broke out, in 1775, and interrupted the business. The parties lived in the county of Orange. J. & W. Ellison took the goods remaining unsold, and the books. The object in taking the books was said to be, to prevent the debts being paid in continental money. They returned them to Moffat, at the end of the war, and after some of the debts had been collected by J. & W. Ellison. Moffat died in 1805, and in October, 1808, the books were redelivered to the plaintiffs, by the executors. By the books, it appeared that the testator had received debts as late as in the year 1791. The bill charged that the executors had offered to pay $2,500 which was refused.

The answer stated that executors were unable to state an account, having no books nor vouchers for that purpose; that they were ready to deliver over the bonds, notes, &c., which were in their hands, when required; that the executors did make such an offer of payment in satisfaction of the plaintiff's demand; but that it was made under a belief that nothing was due, and with a view to purchase peace, and to avoid the expense of litigation with rich men, which the estate of the testator was unable to bear; and they insisted on the staleness of the demand, and that it was barred by lapse of time.

THE CHANCELLOR. The parties lived in the same county, and, without accounting for the delay, the plaintiff suffered a period of 26 years to elapse, from the termination of the American war, to the time of filing his bill. The offer made by the executors being for peace, and without any recognition of the justness of the demand, and being rejected by the plaintiff, cannot affect the question.

It would not be sound discretion to overhale accounts, in favour of a party who has slept on his rights for such a length of time; especially, against the representatives of the other party, who have no knowledge of the original transactions. It is against the principles of public policy, to require an account, after the plaintiff has been guilty of so great laches.

The bill must be dismissed, on the ground of the staleness of the demand; but without costs.

## MOORE v. BLAKE.

(In Chancery in Ireland, before Lord Manners, 1808. 1 Ball & B. 62.)

THE LORD CHANCELLOR.[81] This cause comes before the Court upon a petition for a re-hearing by the defendant, who complains of Lord Chancellor Ponsonby's decree, in directing a specific execution of the article of 1769.

The material facts of the case are, that the plaintiff, in 1769, being possessed of an interest for years under the see of Tuam, and being then much embarrassed in his circumstances, in order to satisfy his creditors and exonerate himself, enters into a treaty with Darcy for the sale of his interest; and an article is accordingly executed, whereby Darcy covenants to make a lease at the reasonable request of Moore, of a moiety of those lands, subject to the rent of £5. 5s. and half the renewal fines. Richard Moore thereby also covenanting, to exonerate Darcy from all incumbrances, affecting the lands; the plaintiff then continued in possession of one moiety of the lands, and Darcy having entered into possession of the other moiety, in 1777, sells his interest to Richard Blake, subject to plaintiff's equitable interest, and at the same time assigns to him the judgments he had obtained against the plaintiff, on the bonds passed by him; during all this period the plaintiff remained in possession of the moiety. Blake afterwards became pressing for payment of the judgments, and in 1781, issued executions on foot of them, and plaintiff's equitable interest under the article was taken and sold by the sheriff to Blake's brother; the sale was in fact to Blake himself, who immediately afterwards brought an ejectment to recover the possession. Blake having succeeded therein, the plaintiff in 1782, filed his original bill for a specific execution of the article of 1769, and obtained an answer before Blake executed the habere.

If this suit had been prosecuted with reasonable diligence, I am not prepared to say, that the equitable title of the plaintiff, would have been more affected by the sale in equity, than it could have been at law, if the being present at it could have no effect. But if any relief would have been given, it must have been on the terms of paying all that was due on the foot of those judgments; for by the article of 1769 it appears, that the equitable interest in these lands, was to be made a security for the judgment of £200, and the Court could never have restrained Darcy, or Blake his assignee, from issuing execution on the judgments; there being no principle either in law or equity, to prevent the conusee of a judgment, from levying the amount thereof.

It has been stated that the sale by the sheriff was held under circumstances that were fraudulent; of that there has been no proof; and in the view I take of the proceedings, I shall put the sale entirely out of my consideration. The plaintiff then was in possession, judgment is

[81] The statement of facts and part of the opinion are omitted.

obtained on the ejectment, and in 1782, the bill is filed, the relief sought by it was, in the answer of the defendant, traversed; and in that year he was put out of possession, to which he submits, never making any application to restrain the proceedings; he might have applied for an injunction, which probably would have been granted upon the terms of his paying the money he then owed, on the foot of the judgments; but he neither does that, nor does he proceed on his bill till 1801. Where is the case or principle to be found, which decides, that a party having an equitable title, and being dispossessed, has, after a lapse of 19 years unaccounted for, obtained, or is entitled to relief? A bill of this description (that is, for the specific performance of an agreement) is an application to the discretion, or rather to the extraordinary jurisdiction of this Court, which I apprehend cannot be exercised in favour of persons, who have so long slept upon their rights, and acquiesced in a title and possession adverse to their claim. Due diligence is necessary to call this Court into activity, and where it does not exist, a Court of Equity will not lend its assistance, it always discountenances laches and neglect; and here the plaintiff does not offer by his bill to pay the money he owes, he only seeks to set off his debts against the rents and profits. Is a plaintiff so conducting himself entitled to call on this Court, to exercise its discretion, using that discretion according to the facts and circumstances of the case? Upon the principles adopted by Courts of Equity in respect to cases seeking a specific execution, I think the laches equally as strong against a plaintiff in not prosecuting, as in not commencing a suit. * * *

I therefore think it inconsistent with every principle of equity, to give relief to a person, who has been guilty of such laches in not prosecuting his suit. A party so conducting himself has lost his equity; whatever title the plaintiff may have had in 1782, must now be so materially varied, that I do not feel myself authorized, by any principle of equity, to give him assistance: on these grounds I differ from Lord Chancellor Ponsonby.

The decree pronounced must be reversed,* and the bill dismissed.[32]

* An appeal to the House of Lords was taken from the decision of Lord Manners, and there the latter was reversed. See Moore v. Blake, 4 Dow. 230, 246, 247 (1815–16). There Lord Redesdale said: "Then the only question is as to the delay. The bill was filed the moment Blake executed this contrivance, and therefore there was no undue delay in filing the bill, as it was filed before Moore was turned out of possession under the ejectment, and before Blake got possession. There was delay in prosecuting the suit, but then Blake might have moved to dismiss the bill for want of prosecution. He suffered the matter to rest however until Moore proceeded with it and obtained a decree, from which it appears that the Lord Chancellor acted upon somewhat of a mistaken notion of the nature of the case. He decrees a lease of a moiety to be executed; but it was not a moiety, but a distinct portion. When the cause came on for a rehearing Lord Manners dismissed the bill, and it was stated that the ground of that decision was the delay in prosecuting the suit. If there was no other ground, that ground did not apply. Whether that was the ground or not I do not know, but I have heard of no other, except the alleged practice

[32] See footnote 32 on following page.

in Ireland of selling interests of this nature under writs of fi. fa., and even that is stated to have been the practice only in 1781, for I do not understand it to be said that it is the practice now. The judgment must be somewhat special, as allowance must be made to Blake for improvements, and the first decree has not provided for the application of the rents to the reduction of the fines and rent to the Archbishop, after which they must be applied to the reduction of the principal and interest of the mortgage money. This requires further consideration, but the contract must be held to be still binding. On the 26th of March, 1816, the formal judgment was delivered in by Lord Redesdale, reversing the decree of 1808, and affirming that of 1801 with alterations and additions as above; Lord Redesdale stating (Lord Eldon, C., concurring) that the costs were calculated on the principle that the landlord might refuse to execute the lease till paid his debt, interest, and costs."

[32] In Findley et al. v. Koch et al. (1904) 126 Iowa, 131, 101 N. W. 766, McClain, J., said: "Without elaboration, we think the real question before us is this: Did the plaintiffs negligently fail to take such steps as they should have taken toward the carrying out of the contract until they found that the value of the land had materially increased, and then attempt to enforce specific performance merely because of this increase in value, and not on account of the continuing purpose to carry out the original contract? If so, they are not entitled to relief, for the purchaser has no right to speculate with the seller, practically abandoning the contract so far as its performance is concerned, until he finds that to insist upon performance will be of material advantage, and then, against the interests of the seller and to his prejudice, insist that the contract shall be performed. A court of equity, in the matter of specifically enforcing a contract to convey, will insist on a showing of the utmost good faith on the part of the purchaser, and require that he make it appear that he has been ready, willing, able, and even eager throughout to have the contract enforced, and will refuse relief if, on account of his negligence or unwillingness at any time to perform his part, the performance has been delayed, especially if such delay renders performance inequitable and unjust as to the seller. * * * Counsel for appellants seem to take the position, however, that, even though they are not entitled to specific performance or damages for breach, they nevertheless are entitled in this action to recover the purchase money paid. We do not feel called upon to discuss the question whether in any event they can be entitled to have back the money paid, where the failure of vendor to carry out the contract has been due to their own fault. If there is any such right of recovery, it is subject to a counterclaim for any proximate damages resulting to defendant Koch from the breach of the contract on the part of plaintiffs. But these questions are not for determination in this action. Of course, in an action for specific performance, the plaintiff may have relief by way of damages, if, on account of any fault or wrong on the part of defendant, or any change of condition not due to the plaintiff's fault, equitable relief by way of decree for specific performance cannot be effectually afforded. But certainly a court of equity in an action for specific performance cannot render damages on account of the refusal of the defendant to return the purchase money paid. Such relief cannot be predicated on breach of contract to convey, but, if available under any circumstances, is to be secured in an action sounding in quasi contract. The trial court was right, therefore, in dismissing plaintiffs' bill, saving to the plaintiffs the right to sue at law by way of original action, and to defendants the right to interpose by counterclaim, or to prosecute in an original action any claim which may exist on account of plaintiffs' breach of contract."

## SOUTHERN PAC. R. CO. v. ALLEN.

(Supreme Court of California, 1896. 112 Cal. 455, 44 Pac. 796.)

Appeal from a judgment of the Superior Court of the City and County of San Francisco; John M. Seawell, Judge. The facts are stated in the opinion of the court.

VAN FLEET, J.[33] This is an appeal from the judgment, upon the judgment roll. The action is to compel the payment of moneys alleged to be due under contracts for the purchase of lands, and, in default of payment, to foreclose defendant's rights under the contracts, and for general relief. The action is on more than one contract, but they are alike in terms, and one will serve as a type of all. Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract, defendant paid one-fifth of the purchase price, and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract, together with all taxes and assessments levied upon the land, and to pay the remainder of the purchase price "on or before the 1st day of February, 1893." Defendant is given the right of immediate possession of the land, and, upon the performance of all the conditions of his contract, is to receive a deed for the land, which deed plaintiff agrees to make, upon demand, "after the receipt of a patent therefor from the United States." * * *

This action was brought upon default of defendant in paying the second, third, and fourth years' installments of interest. It was commenced before the expiration of the five-years limitation for the payment of the balance of the purchase money, but was brought to trial and decided after the lapse of that period. Defendant, by answer, denied title in plaintiff, and, by cross complaint, alleged false representations by plaintiff of its title, injury to himself therefrom, and concluded with an offer of rescission, and demand for a return of the moneys paid by him. The findings are in favor of plaintiff, except as to the fact of possession by defendant of the lands described in the complaint, and against the answer and cross complaint; and the decree requires defendant to pay within six months the amount found due as unpaid interest, or be debarred and foreclosed of all right and interest in and to said lands, and in and under the contracts. * * *

The whole framework of the contracts shows that both parties understood that the question whether or not patents would issue was one of uncertainty, and that it was impossible to know in advance when that question would be "finally determined." Defendant, with full knowledge of that fact, contracted to make his payments at all events, and within certain specified times; merely reserving the right to a repayment of the money in case the particular title contracted for should

[33] Parts of the opinion of Van Fleet, J., and the dissenting opinion of Henshaw, J., are omitted.

fail. Under these circumstances, the obtaining of patents could not be a condition precedent to his obligation to make the deferred payments. * * *

The decree gave the defendant the alternative of paying within six months, or suffering foreclosure, and this was in accordance with equity. It may be, in view of the fact that the action was tried after the expiration of the time for the payment of the last installment of the purchase price, that the decree should have required the defendant to pay the balance of the principal, as well as the unpaid installments of interest; but the error, if any, in that particular, is in favor of defendant, and cannot be considered on his appeal. It follows from these considerations that plaintiff is entitled to the relief granted by the court below, and that the judgment must be affirmed. It is so ordered.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.[84]

[84] See Turn Verein Eiche v. Klonka (1912) 255 Ill. 392, 99 N. E. 684, 43 L. R. A. (N. S.) 44, in which the court said: "We think the proof warrants the conclusion that the real reason for the failure of appellant to perform its part of the agreement within the time limited was that it did not have the money. It had some negotiations with an officer of the Pullman Bank and certain officers of a brewing company; and witnesses testified they had received promises of the money, and the president of the brewing company testified he was ready, on 24 hours' notice, to furnish the balance of the money to pay for the property. Nevertheless, the money was not forthcoming during the lifetime of the contract, and, as we have seen, on the 13th of April a committee was appointed to secure an extension of time. Appellee offered to extend the time upon the payment of $2,000 in cash. This sum was not paid, and he was under no obligation to extend the time, and was under no obligation to offer to fulfill his part of the agreement after the time fixed by the written agreement expired. In our view appellant's proof entirely fails to meet the requirement necessary to authorize a decree for the specific performance of a contract to convey real estate. The rule is that specific performance can never be demanded as a matter of absolute right. It rests in sound judicial discretion; but, where all the necessary incidents and conditions are proven by satisfactory evidence, the relief should be decreed as a matter of right, and not as a mere favor. Evans v. Gerry (1898) 174 Ill. 595, 51 N. E. 615. The party seeking to enforce specific performance must prove he has complied with, or that he was able, ready, and willing to comply with, the terms of the contract, but was prevented from doing so by the refusal of the other party to perform it on his part. The proof in such cases must be clear and satisfactory. Ralls v. Ralls (1876) 82 Ill. 243; Rutherford v. Sargent (1874) 71 Ill. 339; Hatch v. Kizer (1892) 140 Ill. 583, 30 N. E. 605, 33 Am. St. Rep. 258. Where the parties have made the time of performance material, a court of equity has no power to enforce performance contrary to the expressed intention of the parties (Skeen v. Patterson, 180 Ill. 289, 54 N. E. 196), and courts will indulge no presumptions in favor of a waiver or abandonment of the contract, nor will they infer waiver or abandonment from slight proof (Evans v. Gerry, supra). It seems very clear that appellant did not make a case entitling it to have the contract specifically performed."

## PEGG v. WISDEN.

(In Chancery, 1852. 16 Beav. 239, 51 E. R. 770.)

On the 21st of April, 1846, the Plaintiff entered into a contract with the Defendant, which was expressed in a letter addressed by the Plaintiff to the Defendant in the following terms:

"Dear Sir: I undertake and agree to hire of you the house and buildings called New England farm, at a rental of £100 per annum, from the 24th June now next ensuing, together with the land, being about five acres, and I agree to pay down to you, on that day, the sum of £650, and it is understood and agreed, that I am to have a purchasing clause of the said estate, at any time within nine years, by giving you three months' notice, for the sum of £2500 in addition to the sum of £650."

The Plaintiff paid the £650, entered into possession, and made alterations and improvements on the property.

On the 14th of May, 1850, the Plaintiff gave the Defendant notice to purchase and required an abstract of title, which was not sent until the 4th of July. The three months expired on the 14th of August, after which, on the 4th of September, the Defendant's solicitor wrote as follows:

"It is now more than three months since Mr. Pegg gave notice of his intention to purchase, and our client is very urgent. We should be very sorry to take any hostile measures, but shall be obliged to do so, if there be any further delay, and hope to hear from you without loss of time."

On the 2d of November the Defendant gave the Plaintiff notice that, unless he completed his purchase on or before the 14th of December, 1850, he should treat the notice of purchase void, and the right of purchase as forfeited. On the 5th of December the Plaintiff's solicitor applied to know where the deeds might be examined, which application was answered on the 6th of December, and disputes then arose as to the costs to be borne by the Defendant, and some profitless correspondence took place on the subject.

The six weeks having expired on the 14th of December, the Defendant refused to complete, and the Plaintiff filed his bill for a specific performance on the 10th of January, 1851. The cause now came on for hearing. * * *

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY].[85] I have no doubt as to some portion of the decree which the Plaintiff is entitled to. I fully concur in the observations as to the law of the Court; but the only question is as to its application.

The first point was, whether under the contract I was to read the following words in this contract:

"I am to have a purchasing clause of the estate, at any time within nine years, by giving you three months' notice, for the sum of £2500 in addition to the sum of £650"

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[85] Part of the opinion is omitted.

to mean this:

"I am to have, &c.; but if, at the expiration or end of three months, the purchase is not completed, the option shall be gone, and you shall not be entitled to purchase the estate at all."

I am of opinion that to introduce such a clause would be not only straining the words of the contract, but be introducing something totally foreign to the intention of the parties.

I concur in this: that this case must be looked at as an ordinary case of a purchase by a tenant from his landlord; and that if a landlord lets property to a tenant, and says, "You shall have the opportunity of purchasing within a given time," the condition is to be construed strictly. Here three months' notice was to be given, and I am of opinion that at the expiration of the three months from the 14th of May, the relation of vendor and purchaser was constituted between the parties, and that the Plaintiff had ceased to be tenant, and in equity, became owner of the estate.

Is time of the essence of the contract? In terms it is not, and it cannot be said, that if the contract be not completed at the end of three months, the contract is determined. But if time had originally been of the essence of the contract, I think it was waived. The vendor was fifty-one days before he delivered the abstract, and after the three months had expired, he insisted on the contract; for on the 4th of September he writes, in effect, "if there be any further delay in completing, I must take hostile measures to compel you." I think, therefore, that the three months did not limit any time, and that if it did, it was waived by that letter.

The argument rested on the notice on the 2d of November, 1850, in which the Defendant said, if you do not complete within six weeks, I shall insist that the contract is at an end. There is a great peculiarity in this case, arising out of the relation of the parties. The purchaser was in possession, interest was paid either in the shape of rent or as interest, and the Defendant peremptorily fixes six weeks for the completion of the purchase. What takes place? The Defendant has never waived the six weeks; but he has given the Plaintiff a shorter time to complete than he himself took for the delivery of the abstract. In the meantime, the purchaser goes on to complete, and during the interval, takes steps to satisfy himself of the title, and proceeds to examine whether the abstract corresponded with the deeds. This goes on down to the 10th of December, 1850, when a foolish squabble arose as to the expenses, which seems to have been settled. This occasioned some delay in the verification of the abstract, and five more days having elapsed, the Defendant says, "I bind you to the six weeks, and will not complete the purchase," and he obliges the Plaintiff to file his bill on the 10th of January, 1851.

In this state of things, I am of opinion that time was not of the essence of the contract, and was not made so, and that the Plaintiff is entitled to have a specific performance of the contract.

I concur with the authorities that where a condition is necessary to be performed by one to entitle him to become a purchaser, it must be strictly performed. I concur also in the decisions, that where time is not originally the essence of the contract, it may, in the case of improper delay, be made so by notice; but I think the relation between these parties was such that six weeks was not a reasonable time within which the Defendant was entitled to insist on having it performed. * * *

Mr. R. Palmer. There is no allegation in the pleadings that the title has been accepted.

THE MASTER OF THE ROLLS. Then as I cannot say that there has been an acceptance of the title, I will, if the Defendant asks it, give him a week to bring his objections into my chambers, and they will then be argued in open Court. I shall not follow the rule as to inquiring when a good title was first shewn, for the Plaintiff having succeeded is entitled to the costs down to the hearing.

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## WRIGHT v. BROOKS et al.

**(Supreme Court of Montana, 1913. 47 Mont. 99, 130 Pac. 968.)**

SANNER, J.[86] The amended complaint alleges, substantially, that in July, 1898, the respondent bought two certain lots in the city of Lewistown at the price of $200 from Henry P. Brooks, who was then the owner; that the respondent immediately went into possession, and has since been in the "actual, quiet, open, notorious, undisturbed, and exclusive possession" of said lots, and has placed valuable improvements thereon; that Henry P. Brooks died leaving a will, under which the appellant, John Brooks, was made residuary legatee, and by judicial decree the said lots have been distributed to John Brooks as residuary legatee; that John Brooks has sold said lots to appellant Kettleson; that prior to the death of Henry P. Brooks, and when the distribution occurred, the appellant John Brooks had actual notice of the rights and claims of respondent and of the existence of said agreement, and that the appellant Kettleson, prior to his purchase, had actual notice of the rights and claims of respondent; that respondent has always been ready and willing to pay for the lots upon conveyance of the same to him; that at divers times he demanded a conveyance of Henry P. Brooks, and also of John Brooks, and offered to pay the purchase price, but acceptance of payment and issuance of deed have been refused; that about August 30, 1911, the appellant Kettleson, without the consent and against the instructions of respondent, went upon the said lots and tore down the fence inclosing the same, and tore down the fence inclosing his poultry yard, and is making preparations to erect

[86] Parts of the opinion are omitted.

a house upon said lots. It is prayed, among other things, that respondent be adjudged the owner of said lots; that a decree be entered requiring appellant to convey upon payment of $200; and that appellants be enjoined from asserting any interest or title in the lots or interfering with the same.

This pleading was attacked by a demurrer on three grounds, two of which are that it does not state facts sufficient to constitute a cause of action, and that there is improperly united therein a cause of action based upon adverse possession for more than 10 years with a cause of action for the specific performance of an alleged contract of sale. * * *

The point of the general demurrer is that the agreement was made in July, 1898, and the suit was commenced in September, 1911, thus disclosing a period of over 13 years in which respondent did nothing in assertion of his rights; that, in the absence of excusatory averments, this is laches appearing upon the face of the pleading by which equity is negatived, and therefore a general demurrer will lie. The argument is plausible, but ineffective. Assuming that, where laches appears on the face of the complaint, advantage thereof may be taken by demurrer for substance, and conceding that, following the maxim, "Equity aids the vigilant," laches may arise from an unexplained delay short of the period fixed by the statute of limitation (American Mining Co. v. Basin & Bay State Min. Co., 39 Mont. 483, 104 Pac. 525, 24 L. R. A. [N. S.] 305; Wolf v. Great Falls W. P. & T. Co., 15 Mont. 49, 38 Pac. 115) still laches will not be presumed from such a delay alone. 16 Cyc. 179; Lux v. Haggin, 69 Cal. 267, 4 Pac. 919, 10 Pac. 674; Marsh v. Lott, 156 Cal. 647, 105 Pac. 968. Now, the statute invoked here is section 6451, Revised Codes, and whether we apply it as in itself a bar, or as a test for laches, the question arises: When, as to this case, did it commence to run? * * *

Much space is devoted in the brief of appellants to the statute of limitations and to the question of laches. We have discussed these matters, so far as raised by the demurrer to the amended complaint, and the question now is whether limitation or laches is disclosed by the evidence. According to the evidence respondent made several demands on Henry P. Brooks for a deed, which was promised, but deferred; in the year of, or the year before, the death of Henry P. Brooks, respondent made a final demand upon him, as well as upon John Brooks, and then occurred the first refusal to complete the agreement; Henry P. Brooks died in February, 1909; the first hostile invasion of respondent's possession occurred August 30, 1911, and this action was commenced on September 9, 1911. We fail to see how this action can be held barred by the provision argued in the brief (Rev. Codes, § 6451), or by any of the statutes pleaded in the answers. And if it is borne in mind that, where payment, which is to be concurrent with the conveyance, is prevented by the vendor's fault, the case is the same as though payment were made, it can be readily seen that the authorities cited in support of the contention of appellants do,

when rightly understood, make for the very opposite conclusion. See Edwards v. Beck, 57 Wash. 80, 106 Pac. 492; Love v. Watkins, supra; Brennan v. Ford, 46 Cal. 14; Gerdes v. Moody, 41 Cal. 350.

As to laches, we have already indicated that the weight of authority denies the application of this doctrine to the vendee in possession prior to challenge of his title or right of possession. But the appellants cite, among others, three decisions of this court: Wolf v. Great Falls W. P. & T. Co., supra, American Min. Co. v. Basin & Bay State Min. Co., supra, and Streicher v. Murray, 36 Mont. 45, 92 Pac. 36, upon which we are asked to decide that laches did, as a matter of fact, appear upon the trial of this case. These citations are not in point; the last two are not even suggestive, except as to certain general statements, to the effect that laches may or may not exist independently of the statute of limitations, but depending upon the circumstances of the individual case.

In Wolf v. Great Falls W. P. & T. Co., however, a case of laches was held established in an action for specific performance, upon the theory that abandonment of his claim by the vendee was shown by the following circumstances: A written agreement was made for the sale of a town lot in Great Falls for the purchase price of $350, payable in installments at fixed times; it was expressly stipulated that "the above premises are sold to said second party for improvement, and the said party of the second part agrees and obligated himself, heirs and assigns, that he or they will on or before the first day of August, 1887, build and construct a frame building of the value not less than $500;" the vendee was also to pay the taxes; the execution and delivery of the deed was made contingent upon the prior performance of the conditions imposed upon the vendee, and the vendee was given possession under the agreement; the vendee did not pay the installments of the purchase price, nor the taxes; nor did he construct to completion the improvement as agreed; the successor in interest of the vendor took possession after default in these matters; later, and on October 22, 1887, the vendee tendered the balance of the purchase price, which was refused; on April 29, 1891, he commenced his action for specific performance, and no explanation was offered in the pleadings or at the trial for the delay. The above not only shows how divergent was the situation from the case at bar, but illuminates the following language of the decision:

"We have confined the consideration to the question as to whether the plaintiff was guilty of inexcusable laches in commencing his suit for specific performance after he was ousted from the possession of the real estate in question, and knew that the defendant would not comply with the contract of sale thereof, unless compelled to do so."

Equally inept, for appellants' purposes, is the decision in Marsh v. Lott, supra, in which the Supreme Court of California said:

"Of course, notwithstanding the delay in moving to enforce the alleged contract, the circumstances may be such as to prevent any presumption of acquiescence or abandonment, as, for instance, where a vendee is in possession

of the property under the alleged contract and continues in such possession, claiming under the contract, notwithstanding the attempted repudiation."

We think that all the findings are sufficiently supported by the evidence, and that the case, taken as a whole, authorizes the decree.

The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.[37]

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## TALMASH v. MUGLESTON.

(In Chancery before Sir John Leach, 1826. 4 Law J. Ch. 200.)

The bill was filed for the specific performance of an agreement, dated in 1806, by which the defendants agreed to sell certain premises to the plaintiff: £100 had been paid as a deposit. Great mutual delays had taken place; and the bill stated a correspondence between the solicitors of the parties, which continued at intervals throughout several years. The last letter was dated in 1815, and was written on the subject of the title, by the solicitor of the plaintiff to the solicitor for the defendants. The bill averred that the contract had not been rescinded or abandoned.[38] * * *

The defendants pleaded the statute of limitations.

Mr. Koe appeared in support of the plea.

The contract was made nearly twenty years ago; and the last transaction, mentioned in the bill, precedes the institution of the suit by much more than six years. If the plaintiff brought an action of damages for non-performance of the contract, the statute would be a bar

[37] "The fourth and last question is, are plaintiffs barred by laches, or lapse of time? Our decisions say no. They hold that the defense of laches will not avail a defendant in a suit for specific performance of a contract, where the vendee, his heirs or assigns, are in possession, acquired under the contract, though many years may have elapsed between the date of the contract and the time of the suit for specific performance." Mills et al. v. McLanahan et al. (1912) 70 W. Va. 288, 73 S. E. 927.

In Redgrave v. Hurd (1881) L. R. 20 Ch. Div. 13, Jessel, M. R., said: "There is another proposition of law of very great importance which I think it is necessary for me to state, because, with great deference to the very learned Judge from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the statute of limitations. That, of course, is quite a different thing. Under the statute delay deprives a man of his right to rescind on the ground of fraud, and the only question to be considered is from what time the delay is to be reckoned. It had been decided, and the rule was adopted by the statute, that the delay counts from the time when by due diligence the fraud might have been discovered."

[38] The statement of facts is abridged.

to him: and, by analogy, it will be a defence to a suit in equity. It is not the practice of the court to decree a specific performance, if the party has lain by for more than six years. * * *

Mr. Shadwell contra.

The plea of the statute of limitations cannot by itself be a good plea: it must always be supported by averments bringing the case within the statute. In this plea there is nothing which meets the allegation in the bill, that the contract has never been abandoned or rescinded.

The only averment in it is, that the bill was filed on a certain day.

VICE-CHANCELLOR. It was not necessary to plead on what day the bill was filed; that is apparent on the record. But what has the statute of limitations to do with the specific performance of a contract? The rule of this court, which refuses to enforce the specific performance of a contract after a certain interval, does not result from the statute of limitations. Suppose the rule to be adopted by analogy to the statute, that would not enable a defendant to plead the statute.

The statute of limitations never can be made available in any court, unless pleaded; for a party may abandon the protection which it throws around him. But this court, like every other, is bound to take notice of every public statute for the purposes of analogy, and of the statute of limitations among the rest. Where a court of equity proceeds by analogy to the statute, it is bound to know the statute, in order to apply the analogy. It is not necessary, therefore, to plead the statute; nor can the rule of the court, and the analogy on which it is founded, enable the party to protect himself by such a plea. If the case stated in the bill is of such a kind, that the Court, according to its known rules, will refuse to decree specific performance, the defendant ought to demur. It can serve no end for him to put in a plea, which only states an act of parliament, to which the Court, in applying its rules by analogy to that statute, would be bound to advert. It is impossible that the statute can be a bar to a species of suit to which it has no reference.

If the case appears sufficiently on the bill to lay a proper foundation for the application of the principle alluded to in the cases which have been cited, the defendant ought to have demurred; and, in support of that demurrer, the argument would have been, that it appears by the plaintiff's own showing, that, if he were to proceed at law, he could not recover damages, and consequently the Court, adopting by analogy the legal rule, will refuse to assist him.

If the circumstances did not appear on the bill so as to warrant the application of the rule, it would then be necessary to plead the facts, which were suppressed by the bill, and which were supposed to bring the case within the range of the equitable principle.

Mr. Koe submitted, that, in Hony v. Hony, 1 S. & S. 568, where that which might have been the subject of an action was made matter of complaint in a bill in equity, it was not even attempted to be argued that the plea, though bad for another reason, was bad on the ground

now suggested; namely, that the statute of limitations, which would have been a bar at law, would not be a bar also to the equitable relief.

VICE-CHANCELLOR. In that case, this court had a concurrent jurisdiction with a court of law; and, consequently what would be a good plea at law would be a good plea in equity. But the jurisdiction of compelling specific performance is not a concurrent jurisdiction; and a suit for specific performance is within neither the words nor the purview of the statute of limitations. In Hony v. Hony, an action might have been sustained for the produce of the timber; but, under the circumstances, this court had a concurrent jurisdiction in the way of account. If the value of the timber had been sought to be recovered in the shape of damages in an action, the statute of limitations would have been a good plea at law; and, consequently, the same plea would be good here: for a man cannot escape from the statute by coming into a court of concurrent jurisdiction. That has nothing to do with a suit for specific performance.

The plea was over-ruled.

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## II. LACK OF MUTUALITY

### LEWIS v. LORD LECHMERE.

(In Chancery before Lord Parker, Chancellor, 1721. 10 Mod. 503, 88 E. R. 828.)

This was a bill brought by the plaintiff for a specific performance of articles, bearing date the thirtieth day of August, 1720, whereby Lord Lechmere had covenanted to purchase such an estate at forty years purchase; provided the plaintiff did, on or before the tenth day of November following, lay such an abstract of the title before Lord Lechmere's counsel, as they should approve.

The bill was dismissed with costs; because the plaintiff had not laid his title before Lord Lechmere's counsel within the time limited by the articles; which time, the Lord Chancellor was pleased to say, was very material; the price of South-Sea stock, from whence the money for the purchase was to be raised, being upon the tenth of November two hundred and sixty per cent. and at the time of the hearing the cause, but ninety-two per cent.

Though this was that, upon which the Chancellor was pleased to found his decree; yet there were several other things in the cause.
* * *

It was said by the counsel for the defendant, that though in case of articles entered into for the purchase of lands, the vendee may undoubtedly exhibit his bill in equity for the specific performance of these articles; yet it might admit of a doubt, whether the vendor might do the same. As to the vendee, though he has an action at law upon the articles, yet that sounds only in damages; and therefore he may

come into equity for the land, which on several accounts may possibly be more desirable to him than any pecuniary compensation. But for the vendor, he only desires to have the money; and that, whether it be recovered at law in damages, or in equity, is but money still. If it be said, that at law the jury may at their own liberty and discretion, give him what damages they upon all the circumstances of the case think reasonable; whereas upon a bill in equity, your Lordship has no power to vary from the sum contracted for in the articles, be the circumstances of the case what they will; this seems to be a very odd reason for coming into a Court of Equity, and the reverse of what generally intitles people to relief in equity.

But to this it was answered, that upon mutual articles there ought to be mutual remedies: that if the vendee had a remedy both in law and equity, the vendor would not be upon a par with him, unless he had so too: that the remedy the vendor had at law, was not a remedy adequate to what he had in this Court; for at law they only could give him the difference in damages, whereas he might for particular reasons stand in need of the whole sum. Besides, by the articles the land is bound, and the vendor is in nature of a trustee for the vendee; and whether a recovery in an action of law upon the articles, may make him cease to be so, is not entirely clear.

The Lord Chancellor was of opinion, that the remedy the vendor had at law upon the articles was not adequate to that of a bill in equity for a specific performance.

However he dismissed the bill, upon the point above mentioned at the beginning of the case.[39]

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## FLIGHT v. BOLLAND.

**(In Chancery before Sir John Leach, 1828. 4 Russ. 298.)**

The bill was filed by the plaintiff, as an adult, for the specific performance of the contract. After the suit was ready for hearing, the defendant, having discovered that the plaintiff was, at the time of the filing of the bill, and still continued, an infant, moved the court, that the bill might be dismissed with costs to be paid by the plaintiff's solicitor. Upon that occasion the Vice-Chancellor made an order, that the plaintiff should be at liberty to amend his bill, by inserting a next friend for the plaintiff; and the bill was amended accordingly.

Upon the opening of the case, a preliminary objection was taken, that a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.

THE MASTER OF THE ROLLS. No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed, that it is a general prin-

[39] **The omitted parts of this case are printed at page 480, infra.**

ciple of courts of equity to interpose only when the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the statute of frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the court, although seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported, first, because the statute of frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion therefore is, that the bill must be dismissed with costs, to be paid by the next friend.

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## HATTON v. GRAY.

(In Chancery, 1684. 2 Ch. Cas. 164.)

Hatton sold houses to Gray for £2000. Note was made by Hatton of the agreement, signed by Gray, but not by Hatton.

Mr. Solicitor. The Note binds not him who signed it not, for the Statute of Frauds and Perjuries etc., and therefore in Equity cannot bind the other party, for both must be bound, or neither of them in Equity.

But decreed contrary.[40]

[40] In Lawrenson v. Butler (Ir. Ch. 1802) 1 Sch. & Lef. 13, the defendant was an equitable tenant for life under a settlement with power to make leases for thirty one years or for their lives and with the further power, subject to the consent of the trustees of the settlement, to make leases with a covenant of perpetual renewal. The defendant contracted to lease to the plaintiff with a perpetual renewal clause representing that he would procure the consent of the trustees. The trustees refusing their consent the plaintiff sought specific performance of such a lease as defendant was able to give. Lord Redesdale, L. C., said in part: "It is conceded now that Lawrenson was not bound, but it is contended that Butler was; now, was that the intention of the parties in the transaction? I think clearly not; and therefore it is an agreement founded on a mistake; an agreement entered into by Mr. Butler under a supposition that he was capable of enforcing it as much as Mr. Lawrenson was. It is said that courts of equity have decreed performance in cases where one party only was bound by the agreement: I believe it would be difficult to find a case where that has been done, particularly a late case. In the case of Hatton v. Gray (1684) 2 Ch. Cas. 164, it was considered as sufficient that the agreement should be signed by the party against whom the performance was sought, because such are the words of the statute of frauds: now, such certainly is the import, that no agreement shall be in force but when it is signed by the party to be charged; but the statute does not say that every agreement so signed shall be enforced; the statute is in the negative. To give it this construction would, as I have heard it urged, make the statute really a statute of frauds, for it would enable any person who had procured another to sign an agreement to make it depend on his own will and pleasure whether it should be an agreement or not. No man signs an agreement but under a sup-

## WESTERN v. RUSSELL.

(In Chancery before Sir William Grant, 1814. 3 Ves. & B. 187, 35 E. R. 450.)

The Object of this Suit was to obtain the specific Performance of a Contract to purchase an Estate, and a Conveyance from the Heir of William Russell, the Vendor. The Bill stated, that Russell in the Course of a Treaty with the Plaintiff, Harvey, informed him, that the Plaintiff Western must have the first Offer; and accordingly sent Western by Harvey a Note in the following Words:

"Mr. Russell presents his Compliments to Mr. Western; begs leave to inform him, Mr. Harvey of Freering has applied to him for the Purchase of the Watering Farm at Kelvedon, for which Mr. Russell is to receive £4700: but if Mr. Western chooses to have the Farm at the Price mentioned, Mr. Harvey will decline the Purchase in his Favour. July 5, 1809."

The Bill farther stated, that Western, having by a Letter to Russell accepted the Terms, received from him the following Letter:

"July 11. Dear Sir: I have just received yours; and am glad you have determined to purchase the Watering Farm, as I think it will be an Accommodation to you. I fear you will find but little Timber upon the Estate; whatever there may be is at your Service included in the Purchase Money. I have written to Mr. Boulton; who will confer with Mr. Arnold respecting the Title; and I will write to Mr. Harvey to inform him you have agreed to purchase the Estate. I remain, &c., William Russell."

Russell died a Year and a Half afterwards. The alleged Letter of the Plaintiff, accepting the Proposal, not being proved, the Defence was the Statute of Frauds, Inadequacy of Consideration, and the Defendant's Inability to make a Title to a considerable Part of the Estate.

THE MASTER OF THE ROLLS.[41] As it is of great Consequence to preserve an Uniformity of Decision upon the Statute of Frauds, I shall consider, how far these Letters can be said in Conformity to the Cases, that have been decided, to constitute an Agreement.

Nov. 21. THE MASTER OF THE ROLLS. The first Question in this Cause, and the only one, on which any Doubt can be entertained, is, whether the Letter of the 11th of July from Russell can be coupled with the Proposal to him of the 5th; so as to enable the Court to say, it was upon the Terms contained in such Proposal that Russell agreed to sell the Estate. I think, his Letter plainly implies, that he had offered to sell upon some Terms, in which he understood the Plaintiff to have acquiesced; for it is evidently not an Assent to any Terms then first proposed to him. It begins, thus: "I am glad, you have deter-

position that the other party is bound as well as himself; and therefore if the other party is not bound, he signs it under a mistake: that mistake might be a ground for relief in equity, but is surely not ground for a specific performance. Under these circumstances, the impression upon my mind is, that I must dismiss this bill. This agreement was signed in mistake: it is manifest that Butler could not have executed a lease in compliance with it, and as he could not, it is manifest that this is not the agreement which he meant to sign."

[41] Part of the opinion is omitted.

mined to purchase the Watering Farm;" and concludes: "I will write to Mr. Harvey to inform him you have agreed to purchase the Estate."

Determination and Agreement upon the Part of the Plaintiff to purchase do seem necessarily to presuppose some Proposal to sell; for it would be absurd to speak of an original Proposal from the plaintiff as a Determination and Agreement, bringing the Business to such a Close, as that it only remained to the Solicitors to confer upon the Title. This Letter therefore clearly implies an antecedent Proposal to which it is an Assent. As to the Nature of the Proposal there is no Controversy. It is in Russell's Handwriting; and, coupling that with the Letter, they amount to an Agreement, signed by the Party to be charged within the 4th Section of the Statute of Frauds.

After the Cases, that have been determined, I should hardly be at liberty, notwithstanding the considerable Doubt, thrown upon that Point by Lord Redesdale (Sch. & Le Froy, 34),[42] to refuse a specific Performance upon the Ground, that there was no Agreement signed by the Party, seeking a Performance; even if that were the Case here; which it is not. Independent of the Admission in the Answer there is an Acknowledgment, signed by the Defendant, that the Plaintiff's Letter to him contained an Agreement for the Purchase. Then can the Defendant contend, that there is no Evidence of the Existence of such an Agreement on the Plaintiff's part? * * *

As to the Lapse of Time, it is clear, the Parties continued to treat long after the Expiration of the Period first fixed upon, and very near up to Russell's Death. That therefore affords no Ground for refusing the Decree, which the Plaintiff prays.

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## CARSKADDON v. KENNEDY.

(Court of Errors and Appeals of New Jersey, 1885. 40 N. J. Eq. 259.)

On appeal from a decree advised by Vice-Chancellor Bird, who filed the following conclusions:

The complainant exhibits a written contract executed by the defendant only, bearing date the 17th of September, 1880, in and by which he agreed, in consideration of $250 in hand paid, and the further sum of $7,250, to be paid by the complainant upon the execution and delivery of a conveyance as thereinafter named, within thirty days from the date of said agreement, to execute and deliver to the complainant, his heirs and assigns, a proper deed of conveyance in fee simple, clear of all encumbrances, to a tract of land in the township of Berkley, in the county of Ocean, containing one hundred and fifty acres or more, not less, bounded on the south by lands of Samuel Shreve, on the east by

[42] For Lord Redesdale's view, see quotation from Lawrenson v. Butler, in the note, p. 449, supra.

the low-water mark of the Atlantic ocean, on the west by the low-water mark of Barnegat bay, and on the north by the remaining lands of defendant. * * *

The answer sets up that a railroad is to be built through these lands, whereby the land has become much more valuable, and that nothing was done by said complainant in regard to said agreement until after the fact that said railroad would be built was established.

The answer insists that there is a want of mutuality because the complainant did not join the execution of the agreement, and that his excuse for not doing so at the time was because of the late hour in the day, but that he promised the defendant that he would sign it; that he, the defendant, would make a copy, and sign a memorandum, at the bottom, acknowledging his obligations, and that this he never did.

I conclude that the complainant made a reasonable effort on his part to effect a performance of the contract within the thirty days. The last day, numerically speaking, for performance, was Sunday; but the law would not notice anything as lawfully done that might be attempted on that day. On Saturday the complainant went to the place of business, and to the house of the defendant, with a deed for the premises in blank, and the balance of the purchase-money, inquired for the defendant, and tendered himself ready and willing to perform the agreement. The defendant was not at home, nor in the city. Being home on Monday, the 18th, a deed was tendered to the defendant for him to execute, and also, were the $7,250 tendered. I think that the law demands nothing more of the complainant. * * *

The opinion of the court was delivered by DIXON, J.[48]

The complainant in this case seeks the specific performance of a contract dated September 7th, 1880, by which the defendant agreed to convey to him, for $50 an acre, about one hundred and fifty acres of land lying in Ocean county between Barnegat bay and the sea.

The defendant resists the prayer of the bill on three grounds: First. Because the contract was not completely made, being signed by the defendant only. Second. Because the contract was obtained by fraudulent representations of the complainant, to the effect that he was acting for wealthy New York capitalists, who would immediately make extensive and expensive improvements upon the property, costing in the neighborhood of $500,000, to the great advantage of adjoining land owned by the defendant. Third. Because the complainant did not offer to perform his own part of the contract.

The first ground is not tenable. The signature of the complainant was not legally necessary. Browne on Stat. of Frauds, §§ 365, 366. The filing of the bill made the contract and the right to specific performance mutual. Richards v. Green, 23 N. J. Eq. 536. And the evidence satisfies us that it was not intended by the parties that signature of the contract by the complainant should be a condition precedent to

[48] The statement of facts is abridged and parts of the opinion are omitted.

its obligation. * * * The complainant is entitled to specific performance of the written contract. * * * Decree unanimously affirmed.

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## WITHY v. COTTLE.

(In Chancery, before Sir John Leach, 1822. 1 Sim. & S. 174.)

This was a bill filed by the vendor of an annuity, payable out of the dividends of stock, standing in the name of the accountant-general of this court, for the specific performance of an agreement for the purchase of this annuity.

The defendant demurred to the bill.

THE VICE-CHANCELLOR. There can be no doubt that the defendant, who is the purchaser of this annuity, might have filed a bill for the specific performance of the agreement for sale to him; because a court of law could not give him the subject of his contract, and the remedy here must be mutual for purchaser and vendor.

Demurrer overruled.[44] * * *

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## WINSLOW v. WHITE.

(Supreme Court of North Carolina, 1913. 163 N. C. 29, 79 S. E. 258.)

Appeal from Superior Court, Perquimans County; Whedbee, Judge.

Action by W. O. Winslow against T. W. White. Judgment for plaintiff, and defendant appeals.

The suit, instituted in 1912, was to enforce the specific performance of an agreement to convey a tract of land; the instrument being in terms as follows:

"State of North Carolina, Perquimans County. February 10th, 1904. This is to certify that, if Oscar Winslow will marry my daughter, Lily, and be good and kind to her, I hereby agree to give him all that strip of land lying between the lane running through the farm and the lead ditch running through the J. P. Winslow farm, known as the middle slipe, beginning at the main road and running parallel lines to the back line, estimated at valuation of 2,000 (two thousand). To have and to hold. Witness my hand.

"T. W. White. [Seal.]"

Plaintiff, a witness in his own behalf, testified as follows:

"That he married the daughter of the defendant in 1904; that the agreement set out in the complaint was made before the marriage in 1904, but that the paper writing was actually written and delivered in the spring of 1912; that the parol bargain was that the defendant would give the plaintiff $1,500 if he would marry his daughter, and later it was changed, plaintiff saying he would give defendant the middle slipe of land and build a house on it. The marriage took place about three or four weeks after the bargain was made, and after the marriage a house was built upon the piece of land. That since the marriage plaintiff and his wife have lived together as man and wife, and that he has always been kind to her."

[44] Part of the case relating to another point is omitted.

Upon this, the evidence chiefly relevant, the court charged the jury, if they believed the evidence, they would answer the first issue, "Yes," and the second issue, "Yes, by marrying the daughter of defendant and living with her and treating her good and kind." Defendant excepted.

Verdict was rendered as follows:

"(1) Did the defendant the ——— day of April, 1912, execute and deliver to plaintiff the paper writing, dated February 10, 1904, marked 'Exhibit A,' in accordance with a parol contract made in 1904, as alleged? Ans. Yes. (2) Has the plaintiff complied with the terms of said contract? Ans. Yes, by marrying the daughter of defendant and living with her and treating her good and kind up to the present date. (3) What damages is plaintiff entitled to recover of defendant for rent of said land? Ans. Nothing, for that plaintiff admits that he is indebted to defendant in a sum equal to the rent of said land for the year 1912."

Judgment on verdict that defendant convey the land subject to condition that plaintiff will support the wife and always be good and kind to her, etc.

HOKE, J. (after stating the facts as above). It is well recognized that marriage is to be regarded and dealt with as a valuable consideration. Gurvin v. Cromartie, 33 N. C. 174, 53 Am. Dec. 406; Page on Contracts, § 299; 1 Bishop on the Law of Married Women, § 775. In this last citation the author quotes from Johnston v. Dilliard, 1 Bay (S. C.) 232, in which marriage was said to be "the highest consideration known in law," and in the case it was further said to be "a consideration good against creditors unless done with fraudulent intent." And also from my Lord Coke as follows:

"If a man had given land to a man with his daughter in frank marriage, generally a fee simple would pass without the word 'heirs,' for there is no consideration so much respected in law as the consideration of marriage in respect of alliance and posterity."

2. The instrument contains an agreement on such a consideration to convey a tract of land sufficiently described.

3. The written agreement though executed long after the contract between the parties, which had been made by parol, is a sufficient memorandum to meet the provisions of our statute of frauds requiring contracts concerning land to be in writing. Magee v. Blankenship, 95 N. C. 563; 29 A. & E. p. 854. On the verdict, therefore, and under our decisions, the record presents a case calling for a decree for specific performance, the judgment entered in the cause. Combes v. Adams, 150 N. C. 64, 63 S. E. 186; Whitted v. Fuquay, 127 N. C. 68, 37 S. E. 141; Price v. Price, 133 N. C. 494, 45 S. E. 855; Boles v. Caudle, 133 N. C. 528, 45 S. E. 835.

It was chiefly objected for defendant that this relief was not open to plaintiff by reason of the stipulation also appearing in the instrument that plaintiff, the obligee, should be good and kind to the daughter. The position being that this stipulation rendered the agreement too indefinite and uncertain to permit the remedy sought in this case and in any court; second, that the same should be construed as a con-

dition precedent covering the entire period of the married life of the parties. We would be most reluctant to adopt either of these views, tending as they do in the one case to invalidate the instrument and in the other to defeat its evident and controlling purpose, and having due regard to the language of this stipulation, the relationship and evident purpose of the obligor, to provide for the support and kind treatment of his daughter in her married life, and the attendant circumstances of the transaction, all of them proper to be considered in arriving at the intent of the parties as expressed in the entire instrument. R. R. v. R. R., 147 N. C. 368-382, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363; Merriam v. U. S., 107 U. S. 441, 2 Sup. Ct. 536, 27 L. Ed. 531. We are of opinion that the learned judge who tried the cause has given the correct construction to the agreement in holding this feature of it to be a condition subsequent, and as such directing that the same be incorporated in the deed to be made by defendant. Such an interpretation sufficiently satisfies the language of the provision, will best effectuate the purpose of the parties, and is in accord with our decisions more directly relevant to the question presented. Helms v. Helms, 137 N. C. 206, 49 S. E. 110.

We find no reversible error in the record, and the judgment as entered is affirmed.[45]

No error.

[45] See Walton v. Coulson (1831) 1 McLean, 120, 29 Fed. Cas. 133, Case No. 17,132. The following is from the opinion of McLean, Circuit Justice: "This controversy arises out of a bond purporting to have been given by Isaac Coulson, the ancestor of the defendant, to Josiah Payne in which he bound himself, his heirs and assigns, to pay to the said Josiah Payne, one hundred pounds, Virginia currency, in payment for a certain horse, twelve months after the date, with lawful interest; otherwise, in lieu thereof, he bound himself to make over all his right and interest of a certain warrant and entry of land of six hundred and forty acres, lying on the north side of Cumberland river, on said river, &c. The bond was dated the 2d January, 1787. As the money was not paid, a bill was filed by the heirs of Payne and Walton, the latter of whom claim to have purchased the land from the heirs of Payne, and they pray that the defendant may be enjoined from prosecuting a judgment in ejectment which he has obtained for the possession of the land, and that he be decreed to convey the legal title to the complainants. * * * But it is objected that there is a want of mutuality in this contract for the land, and consequently a specific execution of it cannot be decreed. The doctrine on this head is admitted, but its application is not perceived. In this case the consideration has been paid, and if it be admitted that by the laches of Coulson, if living, he could not compel Payne to receive a conveyance of the land in discharge of the bond, is that any reason why chancery should refuse a specific execution of the contract when claimed by the vendee? This would enable a vendor to defeat any contract, by taking advantage of his own negligence. And this plea might be urged in, perhaps, a majority of the cases where a specific execution is asked. No matter how much the land may be deteriorated in value—though half of it be sunk by an earthquake—after default has been made by the vendor, and in consequence of which it would be an insuperable objection to a specific execution, if made by the vendee, still he may waive this objection and demand a conveyance. If mutuality exist at the inception of the contract, or at the time the contingency happens on which the condition to convey becomes absolute, no subsequent changes can destroy

## MASTIN v. HALLEY et al.

(Supreme Court of Missouri, 1875. 61 Mo. 196.)

SHERWOOD, Judge,[46] delivered the opinion of the court.

In 1855, one Chester Hubbard, being the owner of lots 6 and 7, in block No. 2, of Hubbard's addition to the town of Kansas, (now Kansas City) in consideration of the sum of $200, the receipt of which was acknowledged, "and in consideration of the agreement of the said party of the second part [one Asa Lawton] to erect or cause to be erected one certain building on the lots," conveyed them to Lawton by an instrument which, but for its lack of seal, would have been a deed, with the usual covenants of warranty, and perfect in all its parts. * * *

The plaintiff was successor in title to Lawton, and the defendants were successors in title to Hubbard.

This proceeding was instituted in 1871, for the purpose of divesting the legal title out of the defendants and vesting it in plaintiff, on the ground of mistake made by Hubbard in failing to affix a seal to the conveyance to Lawton, and that Halley bought with full notice of the mistake and with the desire to cheat and defraud plaintiffs, with whose rights he was well acquainted at the time of his purchase. The chief allegations of the petition, as to notice, etc., were denied in the answer of the defendant (Halley), and the usual answer was made by the guardian ad litem of the minor heir. * * *

It is obvious from previous statements that the plaintiff, as his title at best is but an equitable one, in effect, although not praying for it in direct terms, seeks a decree for specific performance. This being the case, he will be held amenable to those rules which govern when relief of that character is asked. Among those rules are:

That the contract whose specific enforcement is sought, should be certain, mutual, and capable of being performed. Sto. Eq. Jur. §§ 723, 736, 751; Fry, Spef. Perf. 133.

And the certainty requisite in a contract which is the subject of adjudication in a court of equity, is necessarily greater than if in a suit at law damages were demanded for its breach, for in the latter forum it is in general, sufficient for a recovery to establish the negative proposition of non-performance, while in a court of equity it is an indispensable requisite that the contract should possess terms of such reasonable certainty as to enable that court, by having regard to the subject mat-

the contract or prevent the vendee from demanding a specific execution of it, if he has performed the condition of it on his part. Sugd. Vend. 194; Attorney General v. Day, 1 Ves. Sr. 218; 10 Ves. 315, 316; 1 Schoales & L. 19, note 'a.' * * * A decree may be entered to invest the complainants Waltons with the legal title to the interest of the heirs of Payne who are of full age, and to invest the legal title in the infant heirs, subject to any equity which may arise under the contract with Waltons." (Affirmed in 9 Pet. [34 U. S.] 62, 9 L. Ed. 51).

[46] Parts of the opinion are omitted.

ter and attendant circumstances of the contract, to determine the force and effect of the terms employed, in order to decree their specific execution. Now, it is obviously impossible to comprehend the meaning of the agreement incorporated in the deed from Hubbard to Lawton, and in the deed of the latter to Coates. "A certain building" is to be erected upon the lots, but the dimensions, quality and material thereof are altogether conjectural. Nor is that contract mutual; that is, it is not such as might at the time of its formation have been enforced by either of the contracting parties against the others. And it is entirely immaterial what constitutes this lack of mutuality, whether resulting from personal incapacity, the nature of the contract, or any other cause; whenever the absence of the essential element is ascertained to exist on the part of one party, and for that reason is incapable of being enforced against him, that party is equally incapable of enforcing the contract against the other, although no difficulty should attend its execution in the latter way. And this is plainly the state of the case here. Though Lawton or Coates would have no obstacles in their way as to the part Hubbard was to perform, yet he on his part could never have obtained against either of them the equitable relief or specific execution, by reason of the great uncertainty of the terms of agreement on their part. The doctrine here asserted is as thoroughly settled as any in equity jurisprudence. Fry, Spef. Perf. 133, and cases cited.

But the contract before us could not be enforced for another very sufficient reason. A court of equity will not enforce "building contracts," because it is said, "If one will not build another may."

And although in the earlier cases a different view obtained, yet in the later ones that doctrine is expressly denied. Sto. Eq. Jur. §§ 725, 726. And though Mr. Justice Story does not yield assent to what he admits is the current of modern adjudication, and offers much ingenious reasoning in support of his views, still even he insists that the contract to build should possess "sufficient definiteness and certainty." Id. § 728. And Lord Rosslyn, whose views meet Judge Story's cordial approbation, held that where "the contract to build or re-build had a definite certainty as to size, materials, etc., it ought to be decreed in equity to be specifically performed. But if it was loose, general or uncertain, then it ought to be left to a suit for damages at law." Mosley v. Virgin, 3 Ves. Jr. 185 But since, as already seen, the present contract is of such a vague and indefinite nature, it is a matter of no moment, so far as the case at bar is concerned, whether we adhere to the earlier or later authorities; in either event specific enforcement must be denied, and our refusal in this regard will, for the reasons stated, find ample support both in the elder and more recent adjudications. * * *

The judgment is reversed and the cause remanded. Judge HOUGH not sitting. The other judges concur.

## AVERY v. GRIFFIN.

(In Chancery, 1868. L. R. 6 Eq. 606.)

This was a suit for specific performance of a contract for the sale to the plaintiff of the Windmill Hill estate.

The estate was put up for sale by public auction, by the trustees of the will of the Rev. John Griffin, and the question was, whether the contract was invalidated by the fact that one of the trustees had become, since her appointment, a married woman.[47] * * *

SIR G. M. GIFFARD, V. C. I am of opinion that the defendant, Mrs. Hulton, could not, by contract, bind herself to convey the estate devised to her in trust for sale, and therefore the bill must be dismissed, but without costs, and without prejudice to any action.

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## LEE et al. v. CHICAGO LEAGUE BALL CLUB.

(Appellate Court of Illinois, 1912. 169 Ill. App. 525.)

Bill in equity. Appeal from the Circuit Court of Cook County; the Hon. Julian W. Mack, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1910. Affirmed. Opinion filed April 19, 1912. Certiorari denied by Supreme Court (making opinion final).

MR. PRESIDING JUSTICE BALDWIN delivered the opinion of the court.

This appeal brings before us for review a final decree of the Circuit Court of Cook County, dismissing appellants' bill for want of equitable jurisdiction.

The bill alleges that on the 12th of March, 1906, appellee, being then in possession of certain baseball premises in Chicago, under a long term lease, entered into a written contract with one Barrett, granting to him and his assigns the right to place in certain seating space in said premises, certain cushion seats to be equipped with coin or slug operated control boxes, the income from which was to be divided in a fixed porportion between the parties. Barrett was to install 3600 the first year, and thereafter as fast as conditions warranted, was to fix the price of the use of the cushions and was to have free access at all times for the purpose of installing, maintaining and selling said seats and collecting from the coin boxes, etc. Appellee agreed to co-operate in promoting the use of the seats by the public. The agreement was in terms to continue in force for a period of ten years and contained a clause stating "that said seats shall be kept in use and not replaced, removed or in any wise obstructed" by appellee during the period of the agreement. Barrett's interest in the contract subsequently became vested in appellants.

[47] The statement of facts is abridged.

The bill then avers the installation by appellants of about 3000 seats during the first year of the contract at an expense of about $10,000; that the seats were used during the seasons of 1906 and 1907 without any complaint as to being satisfactory, and, in fact were during that period highly commended by the president of appellee; that on Saturday and Sunday June 4th and 5th, 1908, without consent of appellants and without giving them any notice, appellee removed a large part of the seats and threatened the removal of the others, making then for the first time the claim that the seats were not satisfactory, and that under the contract it had the right to remove them and terminate the contract.

The bill alleges that the receipts from the sale of the seats varied greatly, and that it is impossible to accurately ascertain the damages appellants would suffer from the removal of the seats, and that they have no adequate remedy at law. The bill was prayed for an accounting and an injunction against the removal of any more seats.

Upon the issues being made up, the cause was referred to a master, who took proofs, and who found and reported that appellee's conduct was unjustifiable, and that the real reason for its action was to make more money for itself by a new arrangement of the seating system, in which appellants were not to share, and that in removing the seats, appellee committed an unjustifiable breach of the contract. The master, however, reported as conclusions of law:

"(A) Under the decisions of the Supreme Court of Illinois the complainants should be remitted to their remedy at law.

"(B) Complainant's damages, while difficult of ascertainment, are not sufficiently so to warrant the interposition of a court of equity.

"(C) A court of equity cannot grant the complainants the injunctive relief, or any part of it, prayed for, for the following reasons: Said contract relates only to personal property, and requires the continuous rendition by complainants of personal services for a period of years, and there is, under the terms of said contract, no mutuality of remedy.

"I, therefore, recommend that the temporary injunction heretofore issued herein be dissolved, and that the bill of complaint herein be dismissed at complainant's cost."

After hearing the parties upon these conclusions of law only, the court sustained the conclusions and entered a decree in conformity therewith.

There is no substantial controversy between the parties as to the facts. It is not contested that the contract was made between the club and Barrett, and that his rights and obligations thereunder were duly assigned to and assumed by appellants; that pursuant to the terms of the contract, about 3000 of the seats were duly installed and were operated by appellants for two years without complaint on the part of appellee; and that, at the expiration of two years of the life of the contract, which in terms provided that it should be in force for ten years, appellee removed a large part of the seats and threatened the removal of the remainder in apparent disregard of the rights of appellants under the contract; but appellee insists that no relief can be

granted in equity, and that appellants must seek their remedy in a court of law. And this is practically the only question before us.

A proper decision of this question necessitates a careful examination of the rights and duties of the respective parties under the contract. It provides that Barrett shall install 3600 seats, using every endeavor to do so as soon as possible, and thereafter to continue to install such seats as fast as conditions may warrant, equipped with coin-operated or slug-operated control boxes, he to have a percentage of the proceeds from the use of the cushion seats, which vary with the conditions named,—Barrett to have the right to enter upon the premises at all times to install, maintain and inspect the seats, and for the purpose of selling said seats and making collections from the coin boxes, or doing any other work or duty in connection with said seats, Barrett to fix the price for the use of the cushions and to make reports to the club of the sums collected. Both parties agreed to co-operate to promote the use of the seats by the public. The contract further provides that:

"It is further understood that said seats shall be kept in use and not replaced, removed, or in any wise obstructed by the second party, or its agents, during the period of this arrangement, * * * which shall remain in force for a period of ten years."

In the event of the bankruptcy of the club during the period, Barrett shall have and be entitled to the full ownership and control of the seats, with privilege of removal from premises; both parties are to share equally in net proceeds from any advertisements on the backs of cushions or seats furnished by Barrett in the future.

Appellants do not claim that equity would have jurisdiction to enforce this part of the agreement, except that it constitutes a "negative covenant," which, it is said, courts of equity often enforce by injunction. But does the clause constitute a "negative covenant" in the sense in which that expression is used as a basis of equitable relief? It reads as follows:

"It is further understood that said seats shall be kept in use and not replaced, removed or in any wise obstructed by the second party or its agents during the period of this agreement."

We think the words "and not replaced, removed," etc., are but a negative form of expressing the preceding positive averment in the same sentence, "that said seats shall be kept in use," and that, in legal contemplation, they add nothing to the affirmative covenant,—"that said seats shall be kept in use." To entitle one to an injunction upon the ground that it is to enforce merely a "negative covenant," the covenant must be one standing out by itself,—a special stipulation, separated from the rest of the contract, and the enforcement of which would not involve the specific performance of the entire contract.

In this case to enforce the so-called "negative covenant" is to enforce the affirmative statement of it, and, as that is all the relief which would be given by decree for specific performance of the contract, it cannot be done. The court clearly could not decree specific performance of

the covenants of appellant "to continue to install seats as fast as possible, and as fast as conditions may warrant;" to "sell the seats;" to "fix the price;" to make "collections from the coin boxes;" continuously operate and maintain the seats for the remainder of the ten year period of the contract.

Contracts which relate to personal property only and those requiring continuing personal services extending through a series of years, will not be specifically enforced. Harley v. Sanitary District of Chicago, 54 Ill. App. 337; Grape Creek Coal Co. v. Spellman, 39 Ill. App. 630.

Whatever may be the law elsewhere, it is the law in Illinois that before a contract will be specifically enforced, there must be mutuality in the contract so that it may be enforced by either, and as this contract could not have been specifically enforced by appellee, the Chicago League Ball Club, it cannot be so enforced by appellants. Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696; Welty v. Jacobs, 171 Ill. 624, 630, 49 N. E. 723, 40 L. R. A. 98.

Moreover, if an injunction were to be issued in this case, it would necessarily be upon condition that appellants continue to perform their contract, and it would be enforcing a contract concerning only personal property and personal property rights. This is not the proper function of a court of equity.

The decree of the lower court must be affirmed.

Decree affirmed.

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## OGDEN v. FOSSICK.

**(In Chancery, 1862. 4 De Gex, F. & J. 426, 45 E. R. 1249.)**

This was an appeal from a decree of Vice-Chancellor Wood.

The bill was filed by John Maude Ogden against Samuel Fossick and George Fossick for the specific performance of an agreement on the part of the Defendant Samuel Fossick to grant a lease to the Plaintiff of a coal wharf called Ashton's Wharf, and for compelling the Defendant George Fossick, who was a mortgagee of the Defendant Samuel Fossick, to concur in the lease.

The agreement of which specific performance was sought was in the following terms:

**"Memorandum of agreement made and entered into this 13th day of October, 1858, between Samuel Fossick, coal merchant, of Ashton Wharf, Blackwall, and John Maude Ogden of Sunderland. The said Samuel Fossick agrees to let and the said J. M. Ogden agrees to take the wharf and premises known as Ashton's Wharf aforesaid, with the use of the engine, machinery and buildings, at the yearly rent of £230, the said J. M. Ogden to pay all rates, taxes and outgoings in respect of the said premises for the time he so is in possession, under the following restrictions, that is to say, that the said J. M. Ogden may give up possession of the said premises on giving one month's notice during the first year, or at any subsequent year at one month's notice; and if after the first twelve months of the said term the said J. M. Ogden should feel disposed to take a lease of the said premises, he the said Samuel Fossick hereby agrees to grant unto the said J. M. Ogden a lease of the said**

premises at the yearly rental aforesaid for fourteen years, and a further term at the expiration thereof for ten years at the yearly rental of £250 per annum, free of all costs, charges and deductions, the said lease to contain all the usual covenants for repairs and the privilege of abandoning the same after six months' previous notice. And the said Samuel Fossick engages his services to the said J. M. Ogden for the sale of the coals and landing and shipping goods and generally, in consideration of his receiving the sum of £200 per annum, to be paid weekly, for such services, and in addition to such salary a guarantee commission of 10s, per cent on the amount of sales when remitted." * * *

The Plaintiff was let into possession of the wharf under the agreement, and it appeared that he laid out some money in improving it. He had ever since he was let into possession carried on the coal trade at the wharf, and he employed the Defendant Samuel Fossick in the business; but some disputes having arisen between them, he filed his bill for the specific performance of the agreement for the lease.

Upon the hearing of the cause, the Vice-Chancellor decreed specific performance of the agreement for the lease, and directed the lease to be settled in Chambers in case the parties differed. The Defendants appealed from this decree. * * *

LORD JUSTICE TURNER,[48] after stating the facts, proceeded as follows: The first question must of course be whether the appeal is well founded, whether the Plaintiff was entitled to the decree for specific performance which has been made in his favour. It is objected to this decree that the agreement of which the specific performance is decreed, so far as respects the lease, contains other terms and provisions as to the service and employment of the Defendant Samuel Fossick, the specific performance of which cannot be enforced by this Court, and that the Court being unable to carry into effect the whole agreement ought not to have decreed the specific performance of part of it. That there are terms and provisions in this agreement which the Court cannot enforce is clear beyond all doubt. The Court agreement which the Court cannot enforce is clear beyond all doubt. The Court cannot for instance, decree the Plaintiff to carry on the business, the carrying on of which is essential to the complete performance of the entire agreement. It is scarcely less clear, that it is not according to the general course of the Court to decree the specific performance of part of an agreement when there are other terms of the same agreement which it is beyond its power to enforce. The cases cited for the Respondents are decisive upon this point, following the ordinary principle that the aim and object of the Court is to do complete justice. Cases, however, were cited in the course of the argument on the part of the Plaintiff in which the Court has decreed the specific performance of part of an agreement, although the specific performance of other parts of the same agreement, could not be decreed. All those cases, however, were cases in which the parts of the agreement which were enforced were, or at all events were considered by the Court to be, independent

[48] The statement of facts is abridged and the concurring opinion of Lord Justice Knight Bruce is omitted.

of the other parts of the agreement which could not be enforced. The cases of injunctions upon negative covenants in executory agreements were also referred to in the course of the argument on the part of the Plaintiff as instances of the Court enforcing part of an agreement when it had no power to enforce the other parts of the same agreement; but those cases rest upon the jurisdiction of the Court by way of injunction founded in irreparable injury, and it is one thing for the Court to interfere in such a case by way of injunction upon an agreement whether executed or executory, and another thing for the Court to proceed in the same manner or to the same extent when acting in the exercise of a jurisdiction resting on wholly different considerations. The cases therefore which were cited and referred to on the part of the Plaintiff do not seem to me to affect the present case or the cases which were relied on upon the part of the Respondents, except to this extent: that the Court, when called upon specifically to perform part of an agreement the whole of which cannot be specifically performed, is bound to see that the part which cannot be specifically performed is independent of that which it is called upon to perform. It is by this test the case before us must, in my opinion, be tried, and trying it by that test I am of the opinion that a specific performance of the agreement for a lease ought not in this case to have been decreed. I think that by this agreement the lease and the employment of the Defendant Samuel Fossick are and were meant to be wedded together, that the obligations on the one side and on the other are and were meant to be, as expressed by Lord St. Leonards in Lunley v. Wagner, correlative obligations. Both the terms of the agreement and the circumstances of the case seem to me to prove this. It may be said that the purpose of the agreement may be effected by covenants to be contained in the lease for the employment of the Defendant Samuel Fossick according to the agreement and by a general proviso for re-entry; but looking to the terms of the agreement and the facts of the case, I cannot doubt that one purpose of this agreement, as to the employment of the Defendant Samuel Fossick, was this: that he might continue his connection with the business and be in a condition to resume it upon the determination of the lease without being exposed to the peril of its having been in the meantime diverted into other channels; and in this respect at least, if not in other respects, this mode of carrying the agreement into effect would not avail for the benefit of the Defendant Samuel Fossick. He would be driven to his remedy at law for recovering the possession, and in the meantime the business might be broken up or diverted. It was contended for the Plaintiff that the Defendants ought to be left to their remedy at law for breach of the agreement or of the covenants to be contained in the lease, but what has been already said applies also to this view of the case. Reliance was placed on the part of the Plaintiff on the expenditure upon and improvement of the wharf, but we cannot alter the agreement upon those grounds. It is asked by the bill that this Court should award

the damages, but, having regard to the nature of the case and the possibility of there being cross actions, I think this matter had better be left to a Court of law. For these reasons my opinion is that this bill must be dismissed, but I fully agree that it ought to be dismissed without costs.

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## KENNEY v. WEXHAM.

(In Chancery, 1822. 6 Madd. 355, 56 E. R. 1126.)

The Plaintiff being in right of his wife entitled to an annuity for the life of a Mr. McDonald, issuing out of the estate of the Defendant, entered into a written agreement, dated the 18th April, 1818, which was signed by the Plaintiff and Defendant, to sell the said annuity to the Defendant for the sum of £280, which was to be paid on or before the 1st January, 1819; a first instalment of £200 was to be paid in the October preceding: there was no express stipulation as to the time when the purchaser was to become entitled to the annuity.

THE VICE-CHANCELLOR [SIR JOHN LEACH] held the purchaser entitled to the annuity from the time of payment of the last, and not from that of the first, instalment of the price.

It appeared that a difference having arisen upon the point, as to the time when the purchaser would be entitled to the annuity, the performance of the contract was delayed. And in the month of October, 1820, the purchaser wrote a letter to the Plaintiff, stating his claim to the arrears from the time of the agreement, and expressing his readiness immediately to complete upon those terms. Mr. McDonald the annuitant died a few days after the date of this letter.

THE VICE-CHANCELLOR held this letter conclusive evidence of a contract depending, and not abandoned.

It was next urged for the Defendant that there could in this be no decree for specific performance of the contract, because the subject of the contract was gone; that the Plaintiff's claim was for the price only, and that he might have recovered this at law; and therefore no bill in equity would lie for it. And it was said that the Court refused to make a decree in a bill for the specific performance of an agreement for a lease, where the extended term had expired before the cause came to a hearing. * * *

May 14. THE VICE-CHANCELLOR [SIR JOHN LEACH]. It may now be considered as the settled law of the Court, by the cases of Mortimer v. Capper, and Jackson v. Lever, and the reported dicta of Lord Eldon, especially in the case of Coles v. Trecothick, that if the price of property be an annuity for the life of the vendor, his death before the conveyance will form no objection to the specific performance of the contract. The vendor agrees to sell for a contingent price, and those who represent him cannot complain that the contingency has turned out unfavourably. The same principle necessarily applies to a case

where the life annuity is not the price but is the subject of the sale. If the annuitant happens to die before the annuity is legally transferred to the purchaser, the death of the annuitant can form no objection to the specific performance of the contract. The purchaser agrees to buy an interest of uncertain duration, and he cannot complain that the contingency is unfavourable to him. But it is said that, by the death of the annuitant a legal transfer of the annuity is no longer necessary to the Defendant; and the only act to be done is the payment of a sum of money by the Defendant to the Plaintiff; and that the Plaintiff ought therefore to have proceeded at law and not in equity.

A court of Equity entertains a suit for specific performance by a purchaser, in order to give him the very subject of his contract. And although the demand of a vendor be merely for a sum of money, it will entertain a similar suit for him upon the principle that the remedies ought to be mutual. If the death of a life annuitant were to happen at such a time that a purchaser in effect took no benefit under his contract, which might well happen where his title was to commence at a future time; there it might be made a question whether, as at the time of the bill filed a purchaser could file no bill in equity, the principle of mutual remedy could enable the vendor to file such a bill. But that is not this case, here the purchaser has an equitable title to the arrears of the annuity between the time of his purchase and the death of the annuitant, which would, in principle, now support a bill on his part for specific performance, although the facts of the case would not make such a bill advantageous to him. I consider this case, therefore, strictly a case of mutual remedy so as to entitle the vendor to a bill for specific performance. And it appears to me to make no difference in principle, that the annuity being charged upon the estate of the purchaser himself, he could practically satisfy his demand for arrears by retainer without the necessity of a legal grant.

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## IRON AGE PUB. CO. v. WESTERN UNION TELEGRAPH CO.

**(Supreme Court of Alabama, 1887. 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758.)**

Bill for specific performance and for injunction. The opinion states the facts.

SOMERVILLE, J.[49] The bill is one in the nature of specific performance, seeking, by the auxiliary force of an injunction, to prevent the breach of an alleged contract by the New York Associated Press, selling, as is insisted, to the complainant, the Iron Age Publishing Company, an exclusive right to receive and publish, at Birmingham, Ala-

[49] Part of the opinion is omitted.

bama, all of the Associated Press dispatches gathered and prepared for the press by the New York company, and transmitted over the lines of the Western Union Telegraph Company, which body corporate is also made a party defendant to the bill. The breach complained of is averred to be the delivery of these dispatches for publication to the Morning Herald Publishing Company and the News Publishing Company, whcih companies publish a daily paper in the city of Birmingham, and are also made parties defendant to the present suit. The chancellor sustained a demurrer to the bill, and the complainant brings this appeal. * * *

There seems to us to be one feature about the present contract, however, which renders it impracticable to be specifically enforced with justice to both parties. This is its want of mutuality, both as to the obligation and the remedy, as to one of its features. From the averments of the bill it is made to appear that the contract in question is to remain in force only so long as the complainant shall continue to act as agent and correspondent of the Associated Press at Birmingham. It is not shown whether this duty was assumed forever, for any definite period, or might terminate at will. In either contingency, we are unable to see how the court is to compel performance on the part of complainant. The general rule, to which, it is true, there are many exceptions, seems to be that contracts, in order to be enforced by specific performance, must be mutual in obligation as well as in remedy. Mr. Pomeroy says, and such, we think, is the general rule, that:

"It is a familiar doctrine that if the right to the specific performance of a contract exists at all it must be mutual; the remedy must be alike attainable by both parties to the agreement." Pom. Cont. §§ 162–165.

With some established exceptions, it may be stated that equity will decline to enforce a contract against a defendant when the case is of such a nature that the court has no power to compel the complainant to perform this part of it. Moon v. Crowder, 72 Ala. 79; Irwin v. Bailey, 72 Ala. 467; 3 Brick. Dig. p. 361, §§ 421, 422; Fry, Spec. Perf. 286; Cooper v. Pena, 21 Cal. 404; Duvall v. Myers, 2 Md. Ch. 401; Richmond v. Railroad Co., 33 Iowa, 423; Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; Meason v. Kaine, 63 Pa. 335; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635. There are many unilateral contracts which constitute an exception to this rule, including the right to exercise options, and cases affected by the statute of frauds, to say nothing of others which stand on peculiar principles. This case is not of that class. Richards v. Green, 23 N. J. Eq. 536; Heflin v. Milton, 69 Ala. 354; Pom. Cont. §§ 167, 174; 2 Lead. Cas. Eq. 1077. How, it may be asked, is it practicable for the court to compel the complainant to perform personal services as agent and correspondent of the Associated Press at Birmingham, which it has contracted to perform from year to year under this agreement? We have seen that the duty involves the exercise of special skill, judgment, and discretion, being

intellectual as well as mechanical in its character. These duties are also continuous in their nature, and of indefinite duration. There can be, as we have shown, no specific performance affirmatively of such duties by a court of equity. The most that could be done is to negatively enforce them by injunction, by prohibiting their breach; and this, only, on bill filed praying such particular relief. It is clear that but one of two decrees can be rendered in this case: (1) We can tie the hands of the Associated Press and the other defendants by injunction, forbidding the delivery of the press dispatches to any one else than the complainant, as prayed for, and leave the complainant free to terminate the contract at its will, without limitation of time or circumstances, or to perform its duties as correspondent as negligently or diligently as discretion may dictate; or (2) to keep the injunction in force so long as the duties imposed by the contract shall be faithfully performed by complainant, which may be for all time to come, in view of the possible perpetuity of complainant's corporate existence.

The first decree suggested would be entirely opposed to all equity precedents and practice; the settled rule being that the courts will not interfere by injunction in cases of this kind, if, indeed, in any case, where defendant cannot be made secure in his rights and remedies for violation of the duties imposed on the complainant by the contract sought to be enforced. Bromley v. Jefferies, 2 Vern. 415; Richmond v. Railroad Co., 33 Iowa, 422, and cases cited on page 486.

The second decree above suggested would also be impracticable, not only for the reason that the court cannot compel the performance of the personal services assumed to be undertaken by the complainant, involving, as they do, the exercise of special skill, judgment, and discretion, but it would be out of the question for the chancery court to keep this case open for all time, or even for an indefinite term of years, to superintend the continuous performance of these duties by the complainant. This might invite the frequent necessity on the part of the court of hearing complaints from the defendant charging the complainant with a breach of its duties, or from the complainant arraigning the defendant for contempt, for a violation of the injunction. There would thus be no end to the number of occasions when the court might be called on from year to year to say whether the complainant has performed the duties in question faithfully and efficiently, so as to have kept the injunction in force; or negligently and unskillfully, so as to justify its breach. For these reasons the rule is that equity will not enforce the performance of continuous duties involving personal labor and care of a particular kind, which the court cannot superintend. Wat. Spec. Perf. § 49; Richmond v. Railroad Co., 33 Iowa, 422; Caswell v. Gibbs, 33 Mich. 331; Railroad Co. v. Railroad Co., 13 Ohio St. 544; Railroad Co. v. Speer, 32 Ga. 550, 79 Am. Dec. 305; Blanchard v. Railroad Co., 31 Mich. 43, 18 Am. Rep. 142; Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955.

The contract being one which cannot be specifically enforced in a court of equity against the complainant, we deem it inequitable to enforce it against the defendants. The demurrer to the bill was properly sustained, and the decree is affirmed.

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## LEAR v. CHOUTEAU et al.

(Supreme Court of Illinois, 1859. 23 Ill. 37.)

Error to Circuit Court, St. Clair County; W. H. Underwood, Judge.

This was a bill in chancery, by Pierre Chouteau, Jr., James Harrison and Felix Valle against Ferdinand Lear, to compel a conveyance to the complainants of certain coal and coal lands, and privileges connected therewith, purchased by the defendant, as was alleged, in trust for the complainants.

The attorney for the complainants testified that he took down the notes from which the exhibit was drawn from the directions of Charles P. Chouteau and the defendant, when together in his office; that he read the same to the defendant, and said he believed it embodied the whole agreement, and all that was necessary; that the defendant replied, he believed it did; that the defendant was slightly deaf; that when the agreement was drawn, the—

"defendant expressly desired that some time should be limited in it, in which he should be required to commence operations, and they fixed upon a month, that is to say, this is what I understood Lear's wish at the time."

The agreement or exhibit contained the following clause: That it—

"should not take effect until after one month's notice given to said Lear, by Chouteau, Harrison and Valle, to that effect, unless the parties should mutually consent to a shorter time for the commencement of operations."

Lear never signed this agreement. The opinion states the other material facts.

MR. CHIEF JUSTICE CATON delivered the opinion of the Court:

There is no pretense for a resulting trust in this case. The interests in the lands in controversy were purchased by Lear not for cash down, but on time, to be paid for as the coal should be taken out, and Lear gave his personal obligations for the payment of the purchase money, and took whatever title was taken to himself. The agreement under which these purchases were made could not create a resulting trust, which can alone arise from the fact, that a purchase is made in the name of one, while the purchase money belongs to another. Here no part of the purchase money has been paid, and hence it is impossible that a resulting trust could arise.

The subject matter of this controversy is coal in lands, with the right to take and remove it therefrom. This is an interest in lands, and by the statute of frauds all contracts concerning it are required to be in writing, in order to be binding on the parties, yet the well settled rules

of both law and equity require that those who would avoid the obligations of such parol contracts by reason of the statute, must set up the statute by way of defense, or rely upon it by pleading in some way, and if they will not do this, they thereby impliedly waive the objection, that the contract was not in writing. Here the defendant has not relied upon the statute in his answer, and it is now too late for him to say that it was not in writing. We must now consider this case as if no such statute existed.

We shall assume, for the purposes of this decision, that the testimony of Mr. Hill shows that Lear assented to the paper exhibit A, as containing the terms of the agreement between the parties under which these lands were purchased, and for which he agreed to assign the contracts to the complainants, while we confess that we are by no means satisfied that such admission was understandingly made, or that Mr. Lear fully understood the effect of the paper. But we shall place our decision upon the terms and provisions of the paper as exhibited. It shows such an agreement as no court of chancery ever ought to enforce specifically, even though the defendant agreed to all its terms. It is not every contract, although fairly and even understandingly made, which a court of chancery will decree to be specifically performed. Shall we compel Lear to assign these purchases for the consideration of the covenants and obligations which the complainants propose to assume by the execution of this paper? It is a paper by which Lear agrees to superintend the opening and working these mines and to devote all his time thereto, for which services the complainants are to pay him seventy dollars per month till the mines are open, and after that, two mills per bushel for the coal which shall be taken out and marketed. Even if the contract stopped here, we cannot say that it should be specifically performed. This contract makes no provision for the payment of the purchase money. By the original contracts to be assigned by Lear to the complainants, Lear had bound himself in personal covenants to pay fifteen dollars per acre for all the coal in all these lands, and this paper leaves him still obliged to pay this rent or purchase money. Was such the intention of the parties? Did Lear intend to bind himself still to pay this money? Probably not, although such is the effect of the papers which we are called upon to compel him to execute. But the last clause in this exhibit A leaves it without the least particle of value to Lear, and places him entirely at the mercy of the complainants. It is this:

"This agreement is not to take effect until after one month's notice given to said Lear by Chouteau, Harrison & Valle to that effect, unless the parties hereto shall mutually consent to a shorter time for the beginning of operations."

Here then the contract which constitutes the sole consideration for these assignments is to remain a dead letter, till the complainants choose to impart to it vitality by giving the notice specified. Till then, it is not to take effect; it is to have no existence; it is as if it had

never been written, except that Lear is forever bound to hold himself in readiness on one month's notice to enter into the service of the complainants on the terms specified. Of what worth is such a paper to Lear—what consideration is it for the assignment of these purchases, which had cost him, no doubt, considerable labor and scientific skill as a collier, as the case shows, and also for which he had executed his obligations amounting in the aggregate to a very large sum? Nothing; absolutely nothing, and even worse than nothing, for by it his hands would be tied up so that he could not engage in other enterprises of a permanent character, but must ever stand with his hands folded, awaiting the pleasure of these gentlemen. In such a contract as this there is neither reciprocity, fairness nor good conscience, and if the defendant was simple enough to consent to such an agreement, a court of equity will not compel him to execute it specifically, but leave the parties to their remedies at law, which has no conscience and knows no mercy.

In order to induce a court of equity to enforce specifically a contract, it must be founded on a good consideration, it must be reasonable, fair and just. If its terms are such as our sense of justice revolts at, this court will not enforce it, though admitted to be binding at law. Such is the character of this agreement—there is not one reciprocal feature in it. Lear is required to perform everything on his part, and binds himself to the performance of future acts unconditionally, while the complainants are absolutely bound to nothing. Some men delight in holding all the strings in their own hands—holding others entirely at their mercy, that they may make a merit of justice and call it generosity, or crush down their victim with a heavy hand and plead the letter of the bond for a justification. Such traits of character and such transactions are as abhorrent to equity as they are detestable to the common appreciation of mankind, and will look in vain for favor at the hands of this court. We will not say that these complainants are fully obnoxious to this censure, but this transaction looks very like it if they fully comprehend the scope of the agreement which they propose to give the defendant, and the position in which they are seeking to place him.

The decree is reversed and the bill dismissed. Decree reversed.

## SCHROEDER et al. v. GEMEINDER.

(Supreme Court of Nevada, 1875. 10 Nev. 355.)

Appeal from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

By the Court, HAWLEY, C. J.[50] On the 6th day of March, 1871, respondent leased to appellants—

"all that certain brick building numbered one hundred and thirty-six South C street, in the city of Virginia, and State of Nevada, said building being forty-four feet in depth westwardly, with the appurtenances, for the term of two years, with privilege of two more, from the first day of April, A. D. 1871, at the monthly rent or sum of fifty dollars."

It was agreed that the lessees might make any improvements upon said premises which they might choose, the same to be made at their own expense. The lessor also covenanted that the lessees should have—

"the first privilege of buying the said premises at any time they may wish to do so, at the price of one thousand dollars, gold coin."

The lessees entered into the possession of said premises, under said lease, on the first day of April, 1871, and regularly paid the monthly rent therefor, up to the second day of April, 1874, when they tendered to the lessor the sum of one thousand dollars, gold coin, and presented a draft of a deed for the property, and demanded its execution. Respondent refused to accept the money or to execute the deed. No reason was given for the refusal. * * *

During the time appellants were in possession, under the lease, they erected at their own expense a frame building twenty-eight feet in length, in the rear of the brick, at a cost of over one thousand dollars; built a furnace therein and made other improvements in order to carry on the brewery business. No additional rent was ever demanded for the use of the premises upon which the frame building was erected, and none was ever paid by the appellants.

The brick building, with the land upon which it stood, was worth at the time of the execution of the lease one thousand dollars; at the time of the tender of the money its value, as testified by witnesses, was from fifteen hundred to two thousand dollars.

This action was commenced to compel a specific performance of the covenant in said lease giving the first privilege of purchasing to appellants. In the complaint the premises are described substantially the same as in the deed tendered to respondent for execution.

The first question in this case involves a construction of the covenant giving appellants the first privilege of purchasing the leased premises. What does this covenant mean? It must be so construed as to carry out the real intention of the parties at the time of signing the lease. We think that, from the language used, it is susceptible of but one con-

[50] Parts of the opinion are omitted.

struction. If respondent wished to sell said premises he must first give appellants the privilege of buying the same at the stated price of one thousand dollars, and if they refused to purchase at that price then respondent might sell to others at any price he saw fit. The privilege was not absolute; that is, it was not a privilege binding upon respondent not to sell to anybody but appellants; but he was bound to give them the first privilege, and could not sell to others without appellants refused to purchase. Upon the other side, until such notice was given it would be at the option of the appellants at any time during the existence of the lease to purchase the property for the sum of one thousand dollars, and whenever the money was tendered by them, respondent was bound to execute a deed therefor. Is this covenant, thus construed, such a one as can be enforced in a court of equity?

It is argued by respondent that the covenant is void because the time within which the purchase might be made is not stated. The language of the covenant is, "at any time they may wish to do so." Whatever construction might be placed upon these words in a general sense, it seems to us that from the peculiar wording of the entire clause in question, they mean that appellants could at any time purchase when respondent gave them the first privilege, as he was bound to do, before selling to others, and if he did not give them notice of his intention to sell to others then they could, at any time they wished to do so. certainly during the existence of the lease, elect to make the purchase. The time was thus indefinitely stated so as to give effect to the covenant and to carry out the real intention of the parties. But counsel argue that the lease was only for two years, and therefore claim that the tender was not made during the term of the lease. The answer to this is too plain to admit of any doubt. After the expiration of the two years mentioned as the term of the lease, appellants continued to pay, and respondent continued to receive, the rent; no extension of privilege was asked for by appellants, and no objections were made by respondent to their remaining in possession of the premises. By an express covenant in the lease, appellants had the privilege of leasing the premises for two years more, and under this covenant the payment of rent upon the part of appellants and acceptance of it upon the part of respondent amounted to a renewal of the lease. Moreover, it is well settled that in such covenants time is not of the essence of the contract, unless the parties themselves in agreeing upon the terms have clearly considered time an important part thereof, or unless it necessarily follows from the nature and circumstances of the contract. 1 Story, Eq. Jur. § 776, and authorities there cited.

In Maughlin v. Perry and Warren, the lessor covenanted to sell certain property to his lessee for a stated sum, "at any time during the existence of the lease," and the court held that:

"This was a continued obligation running with the lease on the part of the lessor, with the option in the tenant to accept the same or not, within that time." 35 Md. 357. * * *

It is next insisted that a court of equity should not decree a specific performance, because the obligation of the parties is not mutual, and several authorities have been cited to the effect that when the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other. The case of Parkhurst v. Van Cortland was reversed on appeal in the court of errors. 14 Johns. [N. Y.] 15, 7 Am. Dec. 427. Some of the other cases have but little applicability to the facts of this case, and several of them have been reviewed and expressly overruled by the decisions in other States. There are many exceptions to the general rule stated in said cases, and without attempting to review the authorities relied upon by respondent, we think it may now be considered as well settled by all, or nearly all the modern authorities, that a court of equity, in actions for the specific performance of optional contracts and covenants to lease or convey lands, will enforce the covenant, although the remedy is not mutual, provided it is shown to have been made upon a fair consideration, and where it forms part of a contract, lease or agreement that may be the true consideration for it. * * *

It may be well to state in this connection, that Chancellor Kent, who delivered the opinions in Parkhurst v. Van Cortlant, 1 Johns. Ch. [N. Y.] 275, in 1814, and in Benedict v. Lynch, 1 Johns. Ch. [N. Y.] 370, 7 Am. Dec. 484, in 1815 (both cited and relied upon by respondent's counsel), afterwards, in 1817, in Clawson v. Bailey, in passing upon this question, after referring to the observations of Lord Ch. Redesdale, in Lawrenson v. Butler, 1 Sch. & Lef. 13 (also cited by respondent), who thought that the contract ought to be mutual to be binding, and that if one party could not enforce it the other ought not, said:

"I have thought, and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. * * * But, notwithstanding this objection, it appears, from the review of the cases, that the point is too well settled to be now questioned." * * *

The price stated was a fair one for the property at the time of the contract, and it is certainly reasonable to presume that both parties, in making the contract, took into consideration the probabilities of its increasing in value within the term of the lease. The fact that the brick building is not large enough to enable appellants to carry on the brewery business, does not justify the refusal of the decree.

If appellants are willing to take the property and pay the price agreed upon, it surely does not lie in the mouth of respondent to say that they ought not to have it because it is of but little value to them in the business in which they are engaged, and that it would be of more value to him as a homestead. In this connection, it is proper to state that the complaint contains an allegation that by mistake the premises in the rear of the brick, upon which appellants erected the frame

building, was omitted from the description of the premises in the lease, and it also prays to have the lease reformed so as to include said premises. This presents a question of fact to be determined upon a new trial.

The judgment of the district court is reversed, and cause remanded for a new trial.

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## COPPLE v. AIGELTINGER et al.

(Court of Appeal, First District, California, 1913. 17 Cal. App. 469.)

RICHARDS, J. This is in substance and effect an appeal from a judgment in favor of plaintiff in an action for the specific performance of an agreement for the sale of real estate.

The lower court, upon the trial of the cause, first made its findings and entered its judgment in favor of the defendants; but later, and upon motion of the plaintiff for amendments to the conclusions of law and for a judgment based thereon in his favor, the court made an order granting such motion, vacating the prior judgment, and directing a new judgment in plaintiff's favor, which was accordingly entered. From this order the defendants appeal.

No point is made upon the propriety in point of procedure of the order appealed from and hence the case stands as though the appeal had been taken from an original judgment in plaintiff's favor.

The facts of the case are presented in the findings of the court, and are in substance as follows: On the 17th day of September, 1910, the defendant E. H. Aigeltinger was the owner of an undivided one-half interest in a tract of land near Hopland, and on that day made, executed and delivered to one A. H. Pape, acting as an agent for the plaintiff, an option to purchase said real estate in the following words:

"San Francisco, September 17, 1910.

"Rec'd from A. H. Pape as deposit of $10 for William Copple on sale of ½ piece of land known as Lowe place at Hopland. Balance of five hundred and ninety ($590) dollars to be paid on delivery of deed.

"[Signed] E. H. Aigeltinger."

The purchase price of the land named in this option was reasonable, and the sum of ten dollars was actually received by said Aigeltinger upon the date thereof. On September 23, 1910, said Aigeltinger requested William Copple, the principal of said Pape and plaintiff herein, to return said writing, and offered to repay to him the ten dollars which he had received thereunder. The option was not returned nor the offer of repayment accepted; but on the 28th of September, 1910, Aigeltinger, for a valuable and sufficient consideration, conveyed the property to his co-defendants Spencer Beasley and Isaphene Beasley, his wife, who took such conveyance with full knowledge of the execu-

tion and terms of said option. On October 25, 1910, the plaintiff notified the defendant Aigeltinger that he was ready, able and willing to take said property under the terms of said option, and offered to pay the balance of the purchase price, which offer Aigeltinger refused, but on his part offered to return the ten dollars which he had theretofore received. The plaintiff then brought this action for specific performance.

It has been settled beyond further question by several recent decisions of the supreme court that a writing in the form and terms of the foregoing option is such an agreement as, under the provisions of sections 3386 and 3388 of the Civil Code, may be specifically enforced against the party signing the same although such writing has not been signed by the other party beneficially interested therein, and although it cannot be specifically enforced against such other party who has not signed it. Harper v. Goldschmidt, 156 Cal. 245, 104 Pac. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124; Bird v. Potter, 146 Cal. 286, 79 Pac. 970; Hay v. Mason, 141 Cal. 722, 75 Pac. 300.

It is equally well settled by the foregoing authorities that the holder of such an option is only entitled to insist upon the specific performance thereof when, within the time mentioned therein, or within a reasonable time when no specified time is fixed, he offers full performance of its terms in accordance with section 3388 of the Civil Code.

It has also been held in the case of Harper v. Goldschmidt, supra, that the payment of a small sum of money by the non-signing vendee, and the acceptance of a receipt therefor, is not sufficient part performance to take the transaction out of the statute of frauds.

The sole question, therefore, presented in this case is whether the party signing such an option has the right, between the date of its execution and the time when the offer of performance is made, to withdraw and revoke such option so as to cut off the right of the holder to enforce its specific performance upon an offer of full performance on his part.

This question would seem to be settled adversely to the contention of the respondent here in Leuschner v. Duff, 7 Cal. App. 721, 95 Pac. 914, where, in a case in every material respect identical with the case at bar, the court says:

"We are not aware of any rule which requires the signer of a unilateral agreement to maintain the status of the property affected in order that the other party thereto may offer to perform at his pleasure, and thereby compel specific performance. A construction of section 3388 which would bring about this result would work a repeal of section 3386, and neither mutuality of remedy nor mutuality of obligation be a prerequisite to the specific performance of a contract. The offer having been withdrawn by the defendant before the offer of performance by plaintiff, the latter was not entitled to a decree compelling defendant to execute the contract, and was left to his action at law for any relief to which he was entitled." Leuschner v. Duff, supra; Brown v. San Francisco Savings Union, 134 Cal. 448, 452, 66 Pac. 592.

The order is reversed and the cause remanded, with instructions to the trial court to vacate said order and the judgment in favor of the

plaintiff based thereon, and to make and enter its judgment in favor of the defendants in accordance with the views of this court as expressed in this opinion.

We concur: LENNON, P. J.; KERRIGAN, J.

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## COPPLE v. AIGELTINGER.

(Supreme Court of California, 1914. 167 Cal. 706, 140 Pac. 1073.)

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by William Copple against E. H. Aigeltinger and others. A judgment in favor of the defendants was vacated by the trial court, and a new judgment rendered in favor of plaintiff, and defendants appeal.

ANGELLOTTI, J. This is an action for the specific performance of an agreement for the sale of real estate. The lower court first made its findings and entered its judgment in favor of defendants. Later, upon motion of plaintiff for amendments to the conclusions of law and for a judgment based thereon in his favor, the court made an order granting such motion, vacating the prior judgment, and directing a new judgment in plaintiff's favor, which was accordingly entered. From this order the defendants appeal.

The statute expressly provides for an appeal from such an order. Code Civ. Proc. § 663a.

The facts of the case are presented in the findings of the court, and are, in substance, as follows: On the 17th day of September, 1910, the defendant E. H. Aigeltinger was the owner of an undivided one-half interest in a tract of land near Hopland, and on that day made, executed, and delivered to one A. H. Pape, acting as agent for the plaintiff, an instrument in writing relative to the purchase of said real estate by plaintiff in the following words:

"San Francisco, September 17, 1910.

"Rec'd. from A. H. Pape as deposit of $10 for William Copple on sale of ½ piece of land known as Lowe place at Hopland. Balance of five hundred and ninety ($590) dollars to be paid on delivery of deed.

"[Signed] E. H. Aigeltinger."

The purchase price of the land named in this instrument was reasonable, and the sum of $10 was actually received by said Aigeltinger upon the date thereof. On September 23, 1910, said Aigeltinger requested William Copple, the principal of said Pape and plaintiff herein, to return said writing, and offered to repay to him the $10 which he had received thereunder. The instrument was not returned nor the offer of repayment accepted; but on the 28th of September,

1910, Aigeltinger, for a valuable and sufficient consideration conveyed the property to his co-defendants Spencer Beasley and Isaphene Beasley, his wife, who took such conveyance with full knowledge of the execution and terms of said instrument. On October 25, 1910, the plaintiff notified the defendant Aigeltinger that he was ready, able, and willing to take said property under the terms of said instrument, and offered to pay the balance of the purchase price, which offer Aigeltinger refused, but on his part offered to return the $10 which he had theretofore received. The plaintiff then brought this action for specific performance.

By the instrument above set forth, Mr. Aigeltinger, in consideration of the payment to him of a part of the purchase price, bound himself in writing to convey the land involved to plaintiff, upon payment of the further sum of $590, the same being the balance of the purchase price agreed on. No time being specified therein within which plaintiff must make such payment, he certainly had the right, in the absence of any tender of a deed by Aigeltinger and demand for payment, to defer such payment for a reasonable time. In view of the language used, it may well be held that his right to take the land upon payment of $590 would continue until a demand by Aigeltinger of payment and a tender of deed, but, as there never was any such demand or tender of deed, it is unnecessary to determine this question, for it could hardly be contended, upon the facts found, that plaintiff did not make his tender within a reasonable time. Clearly there was no default on his part. While, owing to the fact that plaintiff had not signed this writing, the agreement could not originally have been specifically enforced against him (Harper v. Goldschmidt, 156 Cal. 251, 104 Pac. 451, 28 L. R. A. [N. S.] 689, 134 Am. St. Rep. 124), it was nevertheless binding upon Aigeltinger and those acquiring from him with notice of plaintiff's right, so long as it remained unrevoked, and there was no failure on the part of plaintiff to comply with its terms, for the simple reason that it was based upon a valuable consideration moving from plaintiff to him, the payment of a portion of the purchase price, and thus constituted a contract binding on him. So far as Aigeltinger was concerned, in the absence of default by plaintiff, it was a binding, irrevocable contract for the sale of the property; something which was, of course, entirely different from a mere offer, unsupported by any consideration, which might be revoked at any time before acceptance.

It is settled in this state, as to a mere option for the purchase of real estate, that, where there is a consideration therefor, the option cannot be withdrawn during the time agreed upon for its duration, and that, when accepted according to its terms, it vests in the vendee the right of acquiring the land, which right, when exercised, relates back to the time of giving the option, so as to cut off intervening rights acquired with knowledge of the existence of the option. See Smith v. Bang-

ham, 156 Cal. 359, 364, 104 Pac. 689, 28 L. R. A. (N. S.) 522; Reese Co. v. House, 162 Cal. 740, 745, 124 Pac. 442. This rule is necessarily equally applicable in favor of the vendee under such a contract of sale as we have here, notwithstanding he has not signed the contract.

It is settled that such an agreement of sale as the one here involved may be specifically enforced by the vendee against the vendor, although the former has not signed the same, and although it could not originally have been specifically enforced against him by reason of the fact that he had not signed. Section 3388, Civ. Code; Harper v. Goldschmidt, 156 Cal. 251, 104 Pac. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124; Bird v. Potter, 146 Cal. 286, 79 Pac. 970.

Where there is no written acceptance by the vendee of the proposition of the vendor prior to suit, as said in Harper v. Goldschmidt, supra:

"In equitable theory the requirement of mutuality of remedy is satisfied when the nonsigning plaintiff enters suit, since by the very bringing of his action he binds himself to abide by the decree of the court in chancery, and so empowers that court to decree specific performance against him."

Not being in default, plaintiff was therefore entitled to specific performance of the contract.

The conveyance by the vendor to the Beasleys, who took with full notice of his rights, could not operate to preclude him from this relief. As said in Smith v. Bangham, supra, as to an option:

"A subsequent purchaser with notice of a valid and irrevocable option would certainly take subject to the right of the option holder to complete his purchase."

See, also, Reese Co. v. House, supra.

This is necessarily true as to such a contract as we have here.

In so far as Leuschner v. Duff, 7 Cal. App. 721, 95 Pac. 914, may be held to express views contrary to what we have said, we cannot follow it, in view of our decisions. The case of Nason v. Lingle, 143 Cal. 363, 77 Pac. 71, is clearly not in point. There was in that case no consideration for Lingle's proposition, and he effectually revoked such proposition prior to the action on the part of the plaintiffs, which, in the absence of such revocation, would have created a binding contract.

It is the absence of any consideration that distinguishes that case from this.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

MELVIN, J. I concur; but in approving the quotation from Smith v. Bangham I am not indorsing all of the doctrines of that case. The rule with reference to "subsequent purchasers with notice," was correctly expressed in the opinion, but I do not think Mrs. Bangham was properly classified as such a subsequent purchaser or as a person subject to the same rule. I adhere to the convictions expressed in the dis-

senting opinion in that case of which Mr. Chief Justice Beatty was the author, and in the one written by me, in which Mr. Justice Lorigan concurred.[51]

[51] It is held in some jurisdictions that when the defendant is the vendee in a contract for the sale of lands, it is not necessary for him to have signed a written contract; that the words "party to be charged" refer only to the vendor. Thus in Wren v. Cooksey (1912) 147 Ky. 825, 145 S. W. 1117, the court said in part: "According to the evidence for defendant, the only contract she made with plaintiffs was that she was to pay $100 for an option on the property until November 1st, and that she was to take the property only on the condition that she could dispose of her Edmonton property at a price satisfactory to her. She did not authorize her son to make any other contract. The contract was never signed by her, or by her son for her; nor was it ever delivered to or accepted by her, although she admits that the contract was sent to and retained by her for several weeks. Her son testifies that, although he stated the terms of the contract to Mr. Ellis, Ellis did not draw up the contract in accordance with the terms so stated. Mrs. Wren tried repeatedly to sell her property at Edmonton, but was unable to do so. Among the defenses interposed by the defendant is that her son was not authorized to make the contract in question. The evidence shows that the initiative in the matter was taken by the son. He advised his mother that the property could be bought. She came to Glasgow and agreed to buy the property. She left the matter in her son's hands. While she says that she authorized him only to take an option on the property, we have no doubt, after considering the entire record, that he had full authority to act for her in the matter. He made the first payment recited in the contract by check on his mother's bank account. This check was paid. The contract was delivered to him. He then turned it over to his mother. She not only accepted it, but retained it in her possession. Moreover, even though he did not have authority to make the contract, her acceptance and the retention of the contract constituted a ratification of what he had done. There is no merit in defendant's contention that the contract in question is not binding on her, because not signed by her, or by her son as her lawful agent. Under the uniform decisions of this court, the 'party to be charged,' under our statute of frauds (Ky. St. § 470), in the case of real estate, is the vendor. In order to charge the purchaser, or vendee, no writing is necessary. City of Murray v. Crawford (1910) 138 Ky. 25, 127 S. W. 494, 28 L. R. A. (N. S.) 680. Delivery to and acceptance by the purchaser is all that is necessary. In this case, the contract was delivered to and accepted by Mrs. Wren. From that moment, she could have enforced specific performance on the part of the plaintiffs, while they had the same rights, so far as she was concerned."

In Pollock v. Brookover (1906) 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403, Sanders, J., discussing an option contract, said: "The relief sought being the specific execution of a contract, it is important to determine the true character of the writing sought to be enforced, as it forms the basis of the plaintiff's suit. A writing of this character, based upon a valid consideration, falls within one of the various classes of a unilateral contract. It is not a contract to sell, nor an agreement to sell, real estate, because there is no mutuality of obligation and remedy; but it is a contract by which the owner agrees with another person that he shall have the right to buy, within a certain time, at a stipulated price. It is a continuing offer to sell, which may, or may not, within the time specified, at the election of the optionee, be accepted. The owner parts with his right to sell to another for such time, and gives to the optionee this exclusive privilege. It is the right of election to purchase, which has been bought and paid for, and which forms the basis of the contract between the parties. Upon the payment of the consideration, and the signing of the option, it becomes an executed contract—not, however, an executed contract selling the land, but the sale of the option, which is irrevocable by the optionor, and which is capable of being converted into a valid executory contract for the sale of land by the tender of the purchase money, or his performance of its conditions, whatever they may be, within the time to which such offer has been limited. When such option is thus accepted, it becomes an executory contract for the sale of the land, with mu-

## III. INADEQUACY OF CONSIDERATION

### LEWIS v. LORD LECHMERE.

(In Chancery, 1721. 10 Mod. 503, 88 E. R. 828.)

LORD PARKER, Chancellor.[52] * * * It was insisted for the defendant, that the greatness of the price, double the value of the land, was reason enough for a Court of Equity not to interpose, so as to inforce a specific performance; that being entirely a discretionary power, and what the Court ex debito justitiæ is not bound to do. It was acknowledged, that no decree had been made purely upon this point; but it was said, there were several cases where this circumstance had great weight with the Court. In the case of Hanger v. Eyles, 2 Eq. Abr. 20, 689, of the last term, where the vendor brought his bill for the money, though the decree was founded upon the vendor's not being able to convey a manor, according to his covenant; yet it being acknowledged, that this manor was of little or no value, it is evident, that the other circumstance in the cause, the unreasonableness of the price, was that which really inclined the Court to lay hold upon a point, too inconsiderable otherwise to have been taken notice of. In the case likewise of Hick v. Phillips, Prec. ch. 575, 2 Eq. Abr. 18, 688, of the last term, which was a bill brought by the vendor for a specific performance of articles, the bill was dismissed: because the vendor had covenanted to convey freehold, and one acre or two proved copyhold; even though the vendor offered to procure an enfranchisement of this land, or make any compensation in the price; which shews the regard had by the Court to this other circumstance attending the case, viz. the unreasonableness of the price.

As to this point it was answered by the counsel for the plaintiff, that if a Court of Equity were to set aside agreements upon this account, it would make all transactions precarious and uncertain, and invest a Court of Equity with a very arbitrary power; the value of money and land being always various and uncertain. That if any measure was to be laid down in this case, the point to be considered

tuality of obligation and remedy. Rease v. Kittle (1904) 56 W. Va. 269, 49 S. E. 150; Ide v. Leiser (1890) 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; Gordon v. Darnell (1880) 5 Colo. 304; De Rutte v. Muldrow (1860) 16 Cal. 505; Goodpaster v. Porter (1860) 11 Iowa, 161; Woodruff v. Woodruff (1888) 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; Perkins v. Hadsell (1869) 50 Ill. 216; Warren v. Costello (1891) 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; Corson v. Mulvany (1865) 49 Pa. 88, 88 Am. Dec. 485. The offer must have been fully and completely accepted, in all its parts, and its provisions strictly complied with, before it became an executory contract. It is the complete acceptance of the option, by complying with all its provisions in that respect, that concludes the contract between the parties."

[52] Parts of the case are omitted. For statement of facts and the rest of the opinion, see same case under Lack of Mutuality, page 447, supra, where it appears that the bill was dismissed because of plaintiff's laches.

must be, whether the contract was an unreasonable one at the time it was made. And accordingly upon this ground, it was lately determined in the Court of Exchequer, in this case of Keen v. Stuckley, Gilb. E. R. 155, that they would inforce a specific performance of these contracts, if the price was reasonable at the time the contract was made, how disproportionable soever after accidents might make it.[53] * * *

[53] Falcke v. Gray (1859) 29 L. J. Ch. 28, contains a valuable opinion by Vice Chancellor Kindersley. The facts of this case, as well as a part of the opinion, are printed on page 91, supra. On the matter of inadequacy of consideration the Vice Chancellor said (pages 30-32): "The next ground of defence is, that this was, in fact, a hard bargain, on the ground of the inadequacy of the price, between the plaintiff and Mrs. Gray, and that if she still had the article the court would not enforce the agreement, as between the plaintiff and Mrs. Gray. The price was £40—now what was the value? These are articles of a very peculiar kind. Their value is not only fluctuating, but very capricious, depending on the whims and wishes of a luxurious community. For any real use they might be capable of affording to the possessor, possibly 40s. might be a fair price; but their rarity gives them extreme value. The value of such things is known to the trade, and there are persons who deal in such articles. The plaintiff admits that they are worth £100 to the trade, and as between persons not dealers £125. That is his estimate. But it is of no use to go into this question, because a dealer has actually given £200 for them. Therefore, the smallest price must be taken to be £200. I by no means assume, however, that that is the whole value; and I cannot help thinking that Messrs. Watson mean to get a great deal more. But assuming the value to be £200, £40 was one-fifth—two-fifths according to the plaintiff's view. That that was a hard bargain, so far as the price is concerned, nobody can question; but the plaintiff's counsel, admitting it to be a hard bargain, still contended that inadequacy of price was not a sufficient ground for the court to refuse specific performance; and that is the question I have now to consider. The general rule as to hard bargains is, that the court will not decree specific performance in such cases, on the ground that, after all, specific performance is a matter of discretion, and is to be used to advance justice, not to gratify caprice. Lord Eldon, in White v. Damon (1800) 7 Ves. 30, observed that this discretion must not be capriciously used; but only upon settled rules of justice and equity. * * * The cases are not very numerous where inadequacy of price alone has come into consideration. But I refer to those in which specific performance has been refused on the ground of inadequacy of price. * * * There is a wide difference between the cases where the court is called upon to set aside an agreement, and those where it is called upon to enforce an agreement. I do not say that these are all the authorities on the simple question of inadequacy of price. [His Honour then referred to Southwell v. Nicholas (1732) 1 Madd. 9, note; How v. Weldon (1754) 2 Ves. 516; Heathcote v. Paignon (1786) 2 Bro. C. C. 167, and Day v. Newman (1788) 2 Cox 77, the latter of which was the converse of the present case, and was decided upon exorbitancy of price, instead of inadequacy.] In Heathcote v. Paignon the contract was set aside for inadequacy. The case of White v. Damon was a distinct authority upon the principle. There Lord Rosslyn refused specific performance on the ground of inadequacy; but Lord Eldon, not differing upon that ground, put the case upon the fact of there being a sale by auction; where the party was not insisting upon a fair price, but held out his intention to all the world to sell the article for whatever it would fetch. These cases appear to be conclusive upon the subject; but if the matter were res integra, and there were no authority to guide me but those principles which ought to govern a court of equity, it appears to me that I ought to refuse specific performance. * * * On the whole case, therefore, the bill must be dismissed, without costs against Mrs. Gray; but with costs against Messrs. Watson."

## BOWER v. COOPER.

(In Chancery before Sir James Wigram, 1843. 2 Hare, 408, 67 E. R. 168.)

The bill was brought for the specific performance of the following agreement:

"Memorandum of an agreement made this 22nd day of January, 1841, between Reuben Cooper, of Hinton, of the one part, and Charles Bower, of High Cliff, both in the parish of Christchurch, in the county of Southampton, of the other part. The said R. Cooper hereby agrees to sell to the said Charles Bower the following: A certain cottage and land recently purchased by the said R. Cooper of J. Lane; two cottages and land purchased of W. Lane: both in the parish of Christchurch,—the cottage and garden purchased by the said R. Cooper of T. Burt, in the parish of Milton, in the said county, which premises were lately in the respective occupations of J. Davy, the said R. Cooper, T. Cratchley, and W. Church, and one of the said cottages purchased of W. Lane, being now or lately void,—together with the crop in the ground thereof, for an annuity of £30, payable during the life of the said R. Cooper; and the said C. Bower hereby agrees to purchase the said premises for the annuity: and it is hereby agreed that the said annuity shall be charged on the said premises by an instrument giving the said R. Cooper power, upon non-payment of the same, to sell such premises for the purpose of raising the arrears thereof; and it is further agreed that the said annuity shall be payable quarterly from the 5th day of January, and that the first payment thereof shall be made in advance, and that the said C. Bower shall be entitled to the possession and rents and profits of the same premises from the said 5th day of January, and that all expenses incurred in or about the said sale shall be borne by the said C. Bower, and that the deeds of the said premises shall be deposited with M. Drutt of Christchurch, solicitor, on behalf of both parties. [Signed] Reuben Cooper, Charles Bower."

The first quarterly payment of the annuity was made in advance on the execution of agreement.

The performance was resisted on four grounds. * * *

THE VICE-CHANCELLOR.[54] * * * On the fourth ground,—the inadequacy of the price,—after adverting to the effect which the Court formerly gave to evidence of inadequacy of price in contracts generally, independently of uncertainty of consideration; Underwood v. Hitchcox, 1 Ves. 279, Day v. Newman, 2 Cox, 77, Young v. Clark, Prec. in Cha. 528; and also adverting to the fact, that, in all the cases cited as authorities with reference to the inadequacy of the amount of a life annuity as a consideration, the life had dropped before the bill was filed,—and that all these cases had been decided before the modern rule, of treating inadequacy of price in contracts for the purchase of interests in possession as nothing more than an ingredient in evidence, was perfectly established, Lowther v. Lowther, T. & R. 366; the Vice-Chancellor said that there did not appear, upon the evidence, to be in fact any inadequacy of price; but if the Defendant required it, he would direct a reference on that question. Parken v. Whitby, 13 Ves. 103; Mortimer v. Capper, 1 Bro. C. C. 156.

This Court doth order and decree, that it be referred to the Master to inquire and state to the Court what was the value to sell of the prop-

[54] The statement of facts is abridged and part of the opinion is omitted.

erty in the contract, dated the 22nd day of January, 1841, in the &c., and therein described as &c., at the date of the said contract, and what was the value of an annuity of £30. per annum on the life of a party of the age of the Defendant at the same time, and for the better &c. And this Court doth declare, that the Plaintiff is entitled to so much of the costs of this suit as were occasioned by the defence set up by the said Defendant, that he was intoxicated at the time of making the said contract. Reserve the consideration of all further directions, and of the payment of the costs above mentioned, and all the other costs of this suit. Liberty to apply.

The Master found that the value to sell of the premises and crop, at the date of the contract, was £302. 10s.; and that the value at the same time of an annuity of £30 per annum, on the life of a party of the age of the Defendant, was £278. 18s. 2d.

Decree for specific performance, with costs.

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## ERWIN v. PARHAM.

(Supreme Court of the United States, 1851. 12 How. [53 U. S.] 197, 13 L. Ed. 952.)

Mr. JUSTICE CATRON [55] delivered the opinion of the Court. * * *

And as the bill stands on demurrer, and nothing beyond its allegations can be considered, it is not possible for us to say that the complainant is entitled to no relief at all, and therefore dismiss his bill. He paid only six hundred dollars for these thirteen notes, calling, in the aggregate, for $260,000; but this was paid on an execution sale, admitted by the demurrer to have been open to competition, regular, and fair. The payer, Parham, may have been insolvent, and the mortgage of no value for want of title in the mortgagor. In such event no startling inadequacy of price could be predicated of the enormous disparity between the nominal amount of the notes, and the price paid for them. Complainant is entitled to relief as the case now stands, certainly to the extent of the six hundred dollars, and interest on it; and he having a right of possession, and owning the judgment, it is not perceived how he could be deprived of the notes until his whole judgment was satisfied. Or, his rights may extend to an enforcement of the mortgage and all the notes. We deem it useless further to speculate on these matters at present.

On the other hand, the execution sale may be void for reasons that can be brought out in evidence, but which are not now open to controversy, because the bill alleges that the proceeding under which complainant purchased was regular and bonâ fide. Or again, because of want of title in Wall to the notes and mortgaged property at the date of the levy and sale. These matters, or any others set up in defense,

[55] Parts of the opinions are omitted.

respondents may bring forth by their answer if they think proper to do so.

All we mean now to say is, that complainant has made a prima facie case for answer and for relief; and it is the duty of respondents, if they mean to defend, to meet that case by answer, and to show, if they can, that no relief should be granted; or, if any, to what modified extent compared with the entire relief prayed. We therefore feel ourselves bound to reverse the decree, and to overrule the demurrer, with leave to respondents to answer in the Circuit Court, when this cause is returned there on our mandate.

MR. JUSTICE NELSON dissented.

I am unable to assent to the decision of a majority of the court in this case.

The complainant has purchased, at sheriff's sale, thirteen promissory notes, given as part of the purchase money upon a sale of a large plantation and slaves; and secured by mortgage on the same to an amount exceeding $260,000 for the small sum of $600; and asks the interposition of the extraordinary powers of this court on the equity side to aid him in realizing this enormous speculation.

I think he should be left to his remedy at law, and this, upon the established course of proceeding of a court of chancery in these cases.

* * *

The strong ground against enforcing a contract, where the consideration is so inadequate as to render it a hard bargain, and an unequal and unreasonable bargain, is that, if a court of equity acts at all, it must act ex vigore, and carry the contract into execution with unmitigated severity; whereas, if the party be sent to law, to submit his case to a jury, relief can be afforded in damages, with a moderation agreeable to equity and good conscience, and when the claims and pretensions of each party can be duly attended to, and be permitted to govern the assessment.

In the case before us, if the court undertakes to give relief, it would seem, from the established rules of proceeding in equity, that it will be bound to award to the complainant the full amount of the notes in question; and thus enable him to realize upwards of $260,000 upon a purchase at the price of $600; in other words, virtually awarding to him, for this small consideration, an estate, which Wall, one of the defendants, had sold for a sum exceeding $260,000, as the notes in question constitute part of the purchase-money and the payment secured upon this estate.

The inadequacy of the consideration is far beyond that of any case that has come under my observation in the course of this examination, and is such as to shock the common sense of mankind.

In many of the cases in which the court has refused to interfere, mainly on the ground of inadequacy of price, only half the value had been agreed to be given. That was considered as sufficient evidence of a hard and unconscionable bargain, to induce the court to pause, when

its extraordinary powers were invoked to the aid of the party seeking to realize the advantage of the contract, and turn him over to a court of law.

The complainant in this case is not without a remedy. If he has got a legal right, he can go into a court of law and enforce it. But I do not think it a fit case for the interposition of a court of equity. * * *

For these reasons, thus briefly given, I am obliged to dissent from the decision in this case.[56]

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to overrule the demurrer of the defendants with leave to them to answer, and for such further proceedings, in conformity to the opinion of this court, as to law and justice may appertain.

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## WORTH v. WATTS.

(Court of Chancery of New Jersey, 1908. 74 N. J. Eq. 609, 70 Atl. 357.)

Bill for specific performance by Nathan Worth against Ernest Watts, executor, etc., of Firman Dubel, deceased. Decree advised pursuant to prayer of the bill.

The bill is filed by complainant to procure the specific performance of an agreement for the sale of land, made by Firman Dubel in his lifetime. The following is a copy of a receipt embodying the agreement which complainant seeks to enforce:

[56] In Columbus & Xenia Ry. Co. et al. v. Ohio Southern Ry. Co. (1885) 1 O. C. D. 275, specific performance was refused on the ground of mere inadequacy of consideration as evidence of an inequitable bargain. The court said: "Another equally safe ground of decision is found in the unconscionable character of this contract. While we have sought to abstain from the expression of an opinion as to whether anything passes to the junior company by this agreement, it is determined by the Supreme Court in 30 Ohio State, that the senior company had nothing to give except what, according to that case, was found to be worth only $60, and what in this case would certainly be worth but little, if any more. We are asked to decree, as compensation for this, the payment and expenditure of the one-half of from $1,200 to $1,500, in the first year, and thereafter of the one-half of from $650 to $1,000, annually during the joint use of the crossing. We are not advised of any other case in which a court has been asked to decree the specific performance of so unjust and inequitable a contract. * * * There are other reasons why the relief prayed for should be denied, but those stated are sufficient. The petition will be dismissed and defendant will have judgment for costs."

"Burlington, N. J., February 2, 1904.
"Received from Nathan Worth two thousand five hundred dollars ($2,500) on account of purchase price for house and lots 303, 305 High street, and 20 and 22 Union street, Burlington, N. J., which I agreed to sell to him clear of all incumbrances for four thousand ($4,000), deed to be delivered on the payment of the balance of the money, but to continue paying rent as before, until balance is paid. Firman Dubel."

The body of this paper is in the handwriting of complainant, and the signature is that of defendant's testator.

Six additional receipts for payments, on account of the purchase price of the property, were received in evidence. These receipts are dated, respectively, June 17, 1904, July 11, 1904, August 15, 1904, September 19, 1904, October 18, 1904, and November 1, 1904, and aggregate in amount $1,300. The same language is used in each receipt, and the body of each receipt is in the handwriting of complainant, and each is signed by defendant's testator. These receipts, omitting dates and amounts, are as follows:

"Received of Nathan Worth ——— dollars as a payment for properties 303-305 High street and 20 and 22 Union street, Burlington, N. J., agreed to be sold by me to him as per receipt of February 2, 1904.
"Firman Dubel."

Firman Dubel died December 28, 1904, and upon the refusal of defendant, as his executor, to accept $200, which was tendered to him by complainant as the balance of the purchase price, this suit for specific performance of the contract was brought.

At the date of the agreement (February 2, 1904) complainant was occupying the premises referred to as 303 and 305 High street, under a lease from Dubel made June 10, 1902, at a rental of $40 per month for the first year, and $45 per month for the two subsequent years. At the end of the first year the increased rental provided for in the lease was waived by Dubel, and complainant thereafter continued to occupy the premises at $40 per month.

Defendant has undertaken to establish such fraud, in connection with the agreement of sale which complainant seeks to enforce, as will operate to deny the relief sought.

LEAMING, V. C. (after stating the facts as above). Defendant urges that the consideration named in the agreement is so grossly inadequate that it affords conclusive evidence of fraud. The law of this state touching inadequacy of consideration, as a defense to a suit for specific performance of a contract for the sale of land, may, I think, be said to be well settled. A court of equity will not refuse to decree the specific performance of a private contract for the sale of land because the price for which the land is to be sold is less than the market value of the land. Inadequacy of price, however, is a feature which may be considered in determining the existence of fraud. It may, in connection with other evidence, establish the existence of fraud, or the inadequacy of price may be so gross as to shock the conscience of the court, and thus furnish satisfactory and decisive evidence of fraud. In either case it may be said to be the fraud so ascertained, and not the in-

adequacy of price, which operates as the bar to relief. Rodman v. Zilley, 1 N. J. Eq. 320; Executors of Wintermute v. Executors of Snyder, 3 N. J. Eq. 489; Ready v. Noakes, 29 N. J. Eq. 497; Shaddle v. Disborough, 30 N. J. Eq. 370, 384; Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9.

In the present case the difference between the market value of the land in question and the price named in the agreement for its sale closely approaches that which some eminent judges have defined as "gross inadequacy." Ten witnesses testified, in behalf of defendant, touching the value of the premises described in the contract of sale. From their testimony it is apparent that the value of the premises was about $10,000 at the date of the contract. Assuming that amount to have been the value of the premises named in the contract of sale, it will be observed that the consideration specified in the contract was something less than one-half of the value of the property. Any extended review of the adjudicated cases, with a view of ascertaining when the difference between the value and contract price may be said to become so great as to amount to gross inadequacy, and shock the conscience of the court, and in itself operate to deny relief, would, I think, be of little assistance. Most of the authorities touching that subject will be found collected in a footnote to 26 Amer. & Eng. Encyc. of Law (2d Ed.) 28. Any considerable inadequacy of price naturally suggests unfair dealing on the part of the one favored by the terms of the contract, when the engagement is considered, as it must be, as a contract, and not as a gratuity; but it is difficult to conceive any case in which some circumstance may not exist which will operate to either repel or to accentuate such suggestion of unfair dealing. Even in a case where there exists such gross inadequacy of price as may be appropriately said to shock the conscience of the court, and afford in itself satisfactory and convincing evidence of unfair dealing, other circumstances may exist which, if considered, would tend to destroy the conclusion which might be otherwise reached. Such circumstances should, I think, be given due consideration. I am convinced that where it is established (as I understand it to be, both in this state and by the weight of authority elsewhere), that it is the ascertained fraud, and not the inadequacy of price, which operates as the bar to specific performance, such fraud must be ascertained by a consideration of all the circumstances of the individual case; and that it is quite impracticable to define any exact ratio between values and price as a boundary line, which, when crossed, affords, in itself, conclusive evidence of fraud. One feature of the present case well illustrates the thought here suggested. While the inadequacy of price in the present contract of sale may suggest that complainant in some improper way obtained an unjust advantage over defendant's testator when the original agreement was made, yet the mind cannot close itself from the knowledge that, on June 17, 1904, over three months after the original receipt which embodied the terms of the agreement was signed, defendant's testator signed a receipt for

another portion of the purchase price, and in that receipt specifically referred to the receipt of February 2, 1904, as embodying the terms of the agreement of sale. If this second transaction was fairly conducted, it was a reaffirmance, by defendant's testator, of the terms of the original agreement. Again, in the following July, August, September, and October, respectively, additional receipts for portions of the purchase price were signed by defendant's testator, and in each receipt the original contract was, in like manner, referred to. Thus on six several occasions, extending over a period of 18 months, defendant's testator reaffirmed the original contract, and received, in the aggregate, all but $200 of the purchase price. His death occurred in the month following the payment last referred to. Assuming that these payments were actually made at the times stated, and that the contents of the several receipts were fully understood by defendant's testator, it seems clear that such repeated affirmances of the original contract would have operated as a serious bar to any claim which might have been thereafter made by defendant's testator for a rescission of the contract, based upon fraud in the original transaction. Surely such affirmances of the contract cannot be properly disregarded, when presented to repel an assumption of fraud arising from an inadequacy of price of a degree which, standing alone, might be sufficient to lead the mind to a conviction of fraud. It is my opinion that specific performance of this contract cannot be properly denied upon the theory that the inadequacy of price, in itself, furnishes conclusive evidence of fraud.

But it is earnestly urged, in behalf of defendant, that other circumstances of the case, when considered in connection with the evidence touching inadequacy of price, justify the conclusion of fraud, or disclose a contract of such unfairness and hardship that a court of equity should deny relief. While a court of equity will not decree specific performance of a contract which is unfair, unreasonable or unjust, any inadequacy of price (standing alone, and unaccompanied by other evidence of fraud or imposition), which is not so gross as to be, of itself, what some courts call conclusive evidence of fraud, cannot be treated as such an instance of unfairness or hardship as will bar the equitable relief sought; but such inadequacy may be considered in connection with other circumstances tending to show undue advantage, or other elements of fraud. As already stated, I understand that to be the rule established in this state, and also by the more modern authorities elsewhere. See Pomeroy on Contracts, § 194, and cases there collected. A number of circumstances, other than inadequacy of consideration, are urged by defendant as evidence of fraud upon the part of complainant. It has been shown that defendant's testator was 84 years of age; that he was a man with careless methods of doing business; that he was of a trustful nature, and habitually signed receipts without first reading them, and usually received money without counting it; that he drank to excess, and was more or less drunk almost every day; and it is also urged that complaint did not have sufficient

money to enable him to make the payments evidenced by the receipts, to which reference has already been made. It was also shown that defendant's testator made some permanent improvements to one of the buildings covered by the contract, at a date subsequent to the date of the contract. I have undertaken to give adequate consideration to all of these circumstances, in connection with the low price at which the property was sold, with a view of reaching the conclusion that some improper conduct upon the part of the complainant may have existed; but I have been unable to reach that conclusion of fact. Any suggestions of improper conduct upon the part of complainant, emanating from the circumstances referred to, fail to impress upon my mind a conviction of fact; and especially is this true when all the evidence in the case is given due consideration. The suggestion arising from the advanced age and intemperate habits of defendant's testator, and from his custom to sign receipts without reading them, is that the signature to the contract may have been procured by complainant through some subterfuge, or that defendant's testator may have been incapable of fully comprehending his acts. But defendant's testator was a man who owned a considerable number of properties in that vicinity, and these properties were successfully handled by him, and his ability to intelligently transact his own business does not appear to have been materially impaired by either his age or intoxication. The impression of the man, as I have received it from the evidence, is that of a man who was quite as capable of making a bargain when under the influence of liquor as at other times. While he appears to have been in the habit of signing rent receipts for various tenants without reading the receipts he was keenly aware of the times when the rent was due, and it cannot be inferred that he could have been induced to sign papers when nothing was due him, as he must have done if the contract now in question and the several receipts for payments on account of the contract price were signed by him when the payments called for in the receipts were not in fact made; for it must not be overlooked that if it be assumed that the original receipt, which embodies the terms of the contract, was signed by defendant's testator without an intelligent knowledge of its contents and force, or through any subterfuge upon the part of complainant, a like assumption must be indulged touching the several subsequent receipts, and it is impossible for me to believe that complainant has procured the signature to these seven papers without defendant's testator having comprehended the nature of any of them. Each month a rent receipt was signed in a book kept by complainant for that purpose. As to the claim that complainant was not able to raise the money which the receipts disclose that he paid for the property, it is my opinion that the claim is not supported by the evidence. While I have referred to the value of the premises in question as $10,000 ($9,000 for the property which complainant occupied as a tenant, and $1,000 for the property in the rear, which was occupied by the Salvation Army), it also appears that the rental paid by

complainant was $40 per month, and by the other tenants $15 per month; and, according to the testimony, this rental, when used as a guide to determine valuation, indicates a total value of about $7,000. It is, of course, impossible to determine what may have impelled defendant's testator to agree to part with his property for the amount named. The diversified considerations which control human conduct are too complex to warrant the effort of affirmative ascertainment. The evidence discloses that the relation of the contracting parties was, to say the least, friendly. That fact alone renders it natural and reasonable that the terms of payment should be made easy rather than otherwise. As the case has been tried upon the theory, on the part of counsel on both sides, that our statute forbids testimony, by either of the present parties to the record, touching statements made by or transactions with the deceased, we are denied the benefit of their testimony in that field. But the evidence discloses that the contract was in fact made, and I find nothing in the case to lead my mind to the conclusion that the contract was not the intelligent and deliberate act of defendant's testator.

I will advise a decree pursuant to the prayer of the bill.

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## IV. Mistake

### NEAP v. ABBOTT.

(In Chancery, 1838. Cooper, 333, 47 E. R. 531.)

The bill in this cause prayed a specific performance of the following agreement:

Memorandum of an agreement made this 16th day of March, 1835, between Mr. George Abbott of Southwell, Westgate, of the one part, and William Neep of Southwell, Westgate, of the other part, as follows: That the said George Abbott agrees to sell to the said William Neep all that garden which belongs to and is in the occupation of the said George Abbott, situated in Southwell, adjoining to Mr. Richard Thompson on the west side, and north and east to the said George Abbott, and to the town street on the other side: and the said George Abbott agrees to deliver up to the said William Neep, or to whom he may appoint, all that garden thirteen yards in width and eighteen in length, or thereabouts, to be measured: and the said William Neep agrees to pay to the said George Abbott, or whom he shall appoint at the rate of 7s. per square yard; the land being copyhold, it shall be delivered up by the said George Abbott to the said William Neep, or whom he shall appoint at some Court day hereafter to be mentioned by the said parties: and the said George Abbott agrees to let the said William Neep or his workmen set up scaffolding to build or repair the building which is about to be erected on the said land, and have the use of the water: and the said George Abbott agrees to deliver up the aforesaid land in six months from the date hereof, or sooner, if agreed on. Witness our hands the day and year aforesaid. George Abbott, William Neep.

The ground actually used as a garden was thirteen yards wide in the centre only, there being at the two extremities small buildings erected upon part of it about ten years previously. The Plaintiff, who had entered into the contract with the view of building a Methodist

chapel, the width of which was to be about forty feet, and the length about fifty feet, alleged that it was the understanding that the buildings should be removed. The Defendant, on the other hand, swore that he never meant that the sites of the buildings should be comprised in the contract—that the buildings were indispensable to him in his trade, which was that of an innkeeper, and that to pull the same down and rebuild them elsewhere would cost two-thirds of the purchase money. Parol evidence was gone into both on the part of the Plaintiff and of the Defendant; from which, upon the whole, mutual misapprehension might be inferred. A plan of the garden and the adjoining premises, which was one of the Defendant's exhibits, shewed the importance of the buildings to the occupier of the inn.

The cause was heard by the Master of the Rolls on the 24th March, 1838, who dismissed the bill, and this was an appeal from his Lordship's decision.

Mr. Wigram, Mr. Cooper and Mr. Bethell, for the Appellant, insisted that the memorandum being upon the face of it a contract for land for building, the thirteen yards by eighteen plainly meant a rectangular area of that extent—that such construction was so obvious, that the respondent could not be permitted to allege that his understanding was different—that the buildings were such as mostly form part of the garden of an inn—and that the Respondent having the ground required, must abide by the agreement he had signed.

Mr. Wakefield, and Mr. Girdlestone, for the Respondent, said, the Court need not determine whether in a document like that before it, "thirteen yards in width and eighteen in length, or thereabouts, to be measured," necessarily meant a superficies of that width throughout the entire length—as, conceding that point (which was however one upon which the Court, under the circumstances, would probably entertain an opinion adverse to the Appellant), it was clear the Respondent had contracted in error—that it plainly appeared that the business of the inn could not be carried on without buildings of the description of those in question, and the Respondent therefore never could have contemplated that the same would be embraced by the description of garden. The case then was brought within the authorities, which lay down that the Court will not decree a specific performance against a party who mistakes a material fact in the agreement.

They cited Calverley v. Williams, 1 Vesey, Jun. 210; Stapylton v. Scott, 13 Vesey, 425, 427, and Malins v. Freeman, 2 Keen, 25.

THE LORD CHANCELLOR [COTTENHAM] adopted this view of the case, and dismissed the appeal with costs.

## MASON v. ARMITAGE.

(In Chancery before Lord Erskine, 1806. 13 Ves. 25.)

The bill stated, that the defendant Armitage put up to sale by auction at Norwich, on the 7th of August, 1802, a freehold and copyhold estate; that there were several bidders; and the plaintiff, being the highest bidder, at the sum of £8,000 the estate was knocked down to him at that sum; and he was declared the purchaser. The plaintiff, after the sale was concluded, tendered the deposit, and a moiety of the auction duty to the auctioneer, according to the conditions of sale: but the auctioneer declined to take the money; as the vendor seemed dissatisfied with the sale; and, as auctioneer and agent for the defendant, made and signed the following memorandum on the printed particulars and conditions of sale:

"Memorandum: Saturday the 7th of August, 1802; attended at the Blue Bell on Hoghil, Norwich. Mr. Robert Mason was the highest bidder at the sum of £8,000: the deposit being 10 per cent. upon the purchase money. Mr. Mason offered me £800 for the same, as well £100 for his moiety of the auction duty: but the owner nor his attorney being present, I did not think proper to receive the same. R. Bacon, Auctioneer."

Then, after the names of persons who were present,

"N. B. There was a misunderstanding between the vendor and the person appointed by him to bid for the estate."

The bill prayed a specific performance of the agreement, and a conveyance, &c. * * *

The circumstances upon which the bill was resisted, according to the evidence of the auctioneer, and other persons present at the sale, were these:

Armitage in the usual way, by writing, appointed William Rising to make one bidding for him; there was an interval of 17 minutes between the time of Mason's last bidding, and the time when the estate was knocked down to him. After that bidding, the auctioneer laid a watch upon the table; and said, if no farther bidding was made, it would be necessary for him to call on the person appointed to bid for the owner, to make his bidding if he thought proper. After waiting about seven minutes, the auctioneer inquired of the persons present, if they were inclined to make any farther offer, addressing himself to each individual; to those who were known to him by name; and particularly to Rising, by pointedly looking at him: he being the person who was authorised to make the reserved bidding, and to bid once on the part of the owner; and the auctioneer said:

"It is with your free will and consent that the estate shall be knocked down at £8,000 to Mr. Mason."

And Rising, who sat upon the same seat with Armitage, making no motion whatsoever, the auctioneer asked the company at large, whether any one of them chose to make any farther advance on the last bidding; observing at the same time, that the seller had made no bidding:

but no farther offer being made by any person present, and Rising still taking no notice, after some farther pause the estate was knocked down. Immediately after the auction was finished, Rising remonstrated with the auctioneer; insisting, that he had no right to knock the estate down to the plaintiff, as he (Rising) expected to have been called upon by name; and said to the plaintiff, that as he (Rising) had made this mistake, he would give the plaintiff £100 out of his own pocket to relinquish the estate, rather than the vendor should be a sufferer on his account. In the course of the sale, the auctioneer being asked, whether there were any setters in the room, answered, not that he knew of; but that the vendor had reserved one bidding for himself; and that the company should know, when he made that bidding; and after that bidding, any person making an advance of £10 should be the purchaser. The auctioneer, being farther asked, who was to bid for the vendor, said, he was not at liberty to give up the name.

Rising, by his deposition stated, that great intimacy subsisted between the plaintiff and the defendant Armitage; and previously to the sale, on the same day, Armitage told the plaintiff he had appointed Rising to buy the estate in for him at £9,000 and would not take less; and that the plaintiff had better take the estate for his friend. The plaintiff replied that he had no money; and would have nothing to do with it either for himself or his friend. Rising also stated, that he expected to be called upon by name; and did not conceive the general call upon the company to be addressed to him; otherwise he would have bid £9,000.

THE LORD CHANCELLOR.[57] * * * I admit there is nothing in this contract, shewing, that any thing was fraudulently obtained by the plaintiff; and if he had been declared the purchaser, and had got into possession, so that the defendant had been obliged to come into this Court upon the head of fraud, there would not be sufficient ground to deprive the plaintiff of the benefit of his legal contract. But that is not this case. This plaintiff has got all the law can give him; and applies here desiring more; and the question is, whether, under all the circumstances, and upon the authorities and principles, this is a case for a specific performance.

As to the cases that were cited, independent of the authority of Lord Kenyon, I find a more ancient authority. The same rule is laid down by Lord Hardwicke, particularly in the case of Underwood v. Hitchcox, 1 Ves. 279. A specific performance is so much matter of discretion, that it is very rarely, at least, granted in the case of personal chattels. In the case of a bill, filed for the performance of an agreement to transfer stock at a given day and price, in consideration of two guineas, the decree was made: but it was upon appeal reversed by Lord Parker, who said the plaintiff should go to law for damages, one man's stock being the same as another's. It is not necessary that fraud

[57] The statement of facts is abridged and part of the opinion is omitted.

should be made out. Though from want of attention, misrepresentation, and mistake, a party may have acquired a right at law, this Court will not, especially if upon other circumstances the case is hard, decree a specific performance: but the law is open to him. Joynes v. Statham, 3 Atk. 388. Upon this subject the Court is governed by a sound, not a capricious and arbitrary discretion.

In this case I cannot say the plaintiff has acted so as to be an example; though his conduct does not come up to fraud, so that I could have dealt with it as such if he had obtained possession. It is plain he had talked of purchasing it for his friend; and his answer to the offer made to him, that he would have nothing to do with it, is rather against him; the defendant on that account not looking to him as a purchaser. Having thus put the defendant off his guard, the plaintiff went into the room, and was considered by every one as a puffer. This is not a damp upon the sale by a circumstance, over which the man had no control; as in Twining v. Morrice, 2 Bro. C. C. 326. This arises from his own act. Upon the suspicion that the plaintiff was a puffer, the question was put whether any puffers were present; and then a fair account is given by the auctioneer, that the defendant had reserved one bidding, and any one who would advance £10 upon that should have the estate. This was not private, but a public conventional option not to let the estate go at a particular bidding. The result of the evidence is plain misapprehension and mistake; not an after-thought by the defendant, satisfied at the moment with the sum of £8,000. There is no difficulty as to the evidence, which is embodied upon the written memorandum, stating clearly that there was a misunderstanding. If, however, the plaintiff thinks he has a case which the statute will not meet, upon which I do not give any opinion, he is not injured by this decision. There is nothing to shew that this land is of any peculiar value to him; as if it was contiguous to his own estate, or purchased with a view to set up a manufacture. Therefore Lord Parker's observation as to stock is applicable; and as the plaintiff declared he did not intend to make this purchase, and he has obtained an advantage through a mistake, a Court of Equity will not give him any assistance in that.

Dismiss the bill without costs.

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## WOOD v. SCARTH.

**(In Chancery, 1855. 19 Jur. [N. S.] 1107.)**

The plaintiffs in this suit sought to compel the defendant to grant them a lease according to the agreement alleged in the bill. The defendant was in July, 1853, seised in fee of a newly-built house near Putney, intended to be used as a public-house, and to be called "The Quill." The plaintiffs were brewers, and had applied to know the

terms on which the defendant would let the same. On the 8th July, 1853, the plaintiffs received the following letter from the defendant:

"The terms for the intended new public-house at Putney are £30 yearly rent till Lady-day, and £63 yearly rent from that time, on a lease of twenty-five years, to commence from the quarter-day next after obtaining the license. Pray let me know if it suits you at your earliest convenience, as I am giving all the brewers who left cards the offer in rotation, and I am going to my place in Hants next week."

The defendant now alleged that a premium of £500, which he intended to have asked in addition to the above terms, was accidentally omitted. In consequence of this letter, the defendant and Mr. Shedlock, a confidential clerk of the plaintiffs, met by appointment to view the property on the 30th July, and then and there had a conversation, without witnesses, as to the terms of the lease. The evidence of the only two persons present at this conversation was in direct conflict. Shedlock swore positively that no premium of £500, or any other amount, was mentioned concerning "The Quill," although the defendant mentioned having lately let a neighbouring house, "The Arab Boy," at £50 per annum, in addition to a premium of £400, and that he, Shedlock, had made, at the time of such conversation, and in the presence of the defendant, a memorandum as to the terms for "The Quill," and also for "The Arab Boy," as above mentioned. The pocket-book, which was produced, bore out Shedlock's statement in all respects. The defendant swore, both in his answer and before the examiner, that he had at such conversation mentioned £500 premium as part of the terms of letting "The Quill," and that Shedlock wrote down the terms in his pocket-book, the expressions used by the defendant in the answer being—"I personally and distinctly saw him note down the premium of £500 and the other terms so proposed by me;" and before the examiner—"I saw the words and figures, and read them." The plaintiffs intimated in July that they would accept the defendant's terms, and entered and commenced some additions and alterations. In September a draft lease was sent to the plaintiffs by the defendant's solicitor, in which, for the first time, as they alleged, they saw the mention of the £500 premium, to be paid within two months after obtaining a license. They immediately wrote to the defendant to state that the £500 premium formed no part of their agreement; but as he refused to complete without it, the plaintiffs filed the present bill for a specific performance. The defendant resisted on the ground of accident and mistake, insisting that the premium had been by an oversight omitted in the letter of the 8th July; and it was proved that the premises had been, immediately previous to the offer made to the plaintiffs on the 8th July, offered to and refused by Messrs. Elliott & Watney, another brewing firm, at the rent of £63 for twenty-five years, and with the premium of £500. * * *

SIR W. P. WOOD, V. C.[58] I do not think that that last point need

[58] Parts of the opinion are omitted.

be the subject of inquiry. The case stands thus: The defendant sends on the 8th July a letter containing certain terms on which he is willing to let the premises. The plaintiffs say, "We accept your terms." Unless the defendant can shew some other terms to have been made, the terms referred to must be those in the letter of the 8th July. Then has the defendant made out that there were other terms made at the interview on the 13th July with Shedlock? The defendant's case is, that he made an entire mistake in that first letter of the 8th July; that he always intended to introduce the premium of £500 in addition to the rent, and that he had the firmest impression of having done so. Has he brought any evidence to shew that he did make this mistake in the original transaction, or is there anything to prevent him from now taking advantage of that mistake if he can shew that he fell into it? I find in the same original letter of the 8th July, the following expression, which is very material:

"I am making the offer in rotation to all the brewers who left cards."

It would be of the utmost danger to allow a person, thinking he has made a bargain, to vary by verbal testimony the terms of a written agreement; that I would not allow even if supported by the oath of the defendant, swearing that he had always intended to ask for that premium; nor even, although supported by his agent's evidence; that the vendor had uniformly instructed him to insist upon such a premium. Here, however, I consider that I have some written evidence of a mistake. In the same letter of the 8th July in which the defendant makes the offer to the plaintiffs he says that he is making "the offer" to all the brewers in rotation. Now I think I am justified in thinking that this offer so made to the other brewers must be taken to mean the identical offer which he thought he was making to the plaintiffs; and I find that he had actually just before offered the premises to Messrs. Elliott & Watney at the same terms, including the £500 premium, which offer they had declined. I cannot, on the other hand, assume that the defendant had thereupon at once come to the determination to leave out the £500 premium. It is not consistent with sense or with the dealings of mankind that he should cut down his offer by £500 because the first comer, to whom he had given the refusal, had declined it. It becomes almost as if he had said in his letter, "I have made Messrs. Elliott & Watney an offer; I repeat that offer to you, viz.," and then stated the terms as in the letter of the 8th July, without mentioning the premium. That would, perhaps, be a clearer case, but really what he has said brings it almost to the same thing. Then the question is, whether the defendant has, by any statements put forward by him, prevented himself from being relieved from this mistake. The Duke of Beaufort v. Neeld, 9 Jur. 813, would not prevent the relief now sought. That a person is not to be brought here to perform a contract which he never intended to enter into is clear. * * *

But here the question is, what is the effect of the defendant having

said, not that the whole contract was a mistake throughout, but that before the purchaser entered on the land, he (the vendor) told the purchaser's agent what the real terms intended by him were, and that the latter agreed to them, when that turns out not to have been the fact. How is that to affect the question? I do not find it necessary to rely in the least upon the defendant's personal testimony. I rely upon what I find in the letter signed by him, and upon what Elliott & Watney state to have been the offer made to them. * * *

So here, it seems probable that at the time of the interview the defendant was convinced that he had already mentioned the £500 premium, as he saw Shedlock write down something about a premium of some hundreds of pounds, which turns out to have related solely to the £400 premium for "The Arab Boy," and he has not hesitated to swear that Shedlock's memorandum related to the subject of the present controversy. The defendant has already shewn himself, by the omission complained of, to be careless in matters of business; and in a contest of credibility between Shedlock and him, I should have no hesitation in believing Shedlock. But to say that because the defendant has set up a double proposition, "I made a mistake, and you knew it," and has failed in the latter branch, he is therefore to be prevented from having the benefit of the first branch of his defence, is, I think, going too far. On the other hand, I conceive that the plaintiffs had every reason to believe, and did believe, that they were proceeding bona fide—that they had entered into a valid contract for a lease without any premium. But notwithstanding that, feeling bound to dismiss the bill, I cannot give them any costs; but I dismiss it without costs, without any prejudice to any action which the plaintiffs may be advised to bring for damages, and without prejudice to any right they may have to have their costs of this suit included in that action. It would be only reasonable, after the defence set up, that the plaintiffs should have their costs, but I cannot give them now.

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## MANSER v. BACK.

(In Chancery before Sir James Wigram, 1848. 6 Hare, 443.)

The vendors were owners of copyhold premises at Hoddesden, bounded on the west by the road from London to Ware, on the south by a lane called Conduit-lane, and on the north by premises called Whitley's. Part of these premises consisted of the Fox Inn, which adjoined the London and Ware road and Whitley's premises, and formed the north-western part of the premises belonging to the vendor. There was a right of way from Whitley's premises, along the back of the Fox Inn, to Conduit-lane, passing through the lot, the subject of this suit. The vendors gave directions for the sale of the above premises,

with the exception of the Fox public-house and a small house adjoining it, and particulars were prepared by the auctioneer, describing the lot (being lot 11) and reserving Whitley's right of way. At the auction, on the 30th of May, 1844, the plaintiff, and one Warner, became the purchasers; and on the evening of the same day, memoranda of this purchase, written on two copies of the particulars of sale, were signed, one by the plaintiff, for himself and Warner, and the other by the auctioneer. On the 7th of June, two other memoranda of the contract were signed, on similar copies of the particulars, the name of Warner being omitted, and the plaintiff becoming the sole purchaser. The title was afterwards investigated, the purchase-money was paid, and the plaintiff was let into possession. But when the surrenders were prepared, the vendors insisted on the right of reserving a right of carriage-way to the back yard of the Fox Inn. Upon this the plaintiff filed his bill to enforce a surrender of the premises, without a reservation of such right of carriageway.

It appeared from the evidence, that, after the original particulars and conditions of sale had been prepared and distributed, it was discovered that the reservation of a right of way to the back yard of the Fox Inn where there were stables and a coach or cart house, had not been made, and that there was no other access for carriages to those premises. The information of this fact was received in London, by the vendor's solicitor, on the evening before the day of sale, and he immediately altered a copy of the particulars of sale, by introducing a reservation of the right of way to the Fox Inn after the reservation of the right of way to Whitley's premises. Fourteen or fifteen copies of the original particulars were altered in the same manner by his clerks. These copies were brought to the auction room; some were distributed, without observation, and the others placed together on the table, and, after the sale, the greater part of the altered particulars were taken away. The vendor's solicitor directed the auctioneer to sell according to the altered particulars. It was proved by the evidence of the vendor's solicitor and the auctioneer, that the auctioneer, before the sale took place, read aloud the altered particulars; and, on the part of the plaintiff, it was proved that several persons in the room did not hear or notice the reading of the alteration. The particulars of sale, on which the memoranda as to the purchase were signed, were the original copies of the particulars, not containing the alteration. The auctioneer, in his evidence, stated that he had signed these particulars through inadvertence.

VICE-CHANCELLOR [59] (after stating the facts to the foregoing effect): * * * It is indisputable, that, at the time the auctioneer knocked down Lot 11, he had (as between himself and the vendors) no authority to sell except according to the altered particulars, provided the vendors' solicitor had authority to make the alteration.

[59] Parts of the opinion are omitted.

The evidence of the witnesses as to what was said in the auction-room is of little value when given a long time after the sale, unless something very material occurred at the time to fix their attention. Where parties supposed that they already knew what was in the particulars, their attention was not likely to be very closely directed to what the auctioneer read, even if they intended to be bidders. If these observations should not be deemed satisfactory, it must be remembered how much greater force is to be given to the testimony of two credible witnesses, one of whom says he did read, and the other says he heard him read (both swearing to an affirmative,) than to the negative evidence of those who only say they did not hear him read a particular passage or clause. But I must give the plaintiff the benefit he claims of not having heard the auctioneer read the reservation of the right of the way to the Fox. Nothing but the most conclusive evidence could induce me to fix him with having heard it read. Not meaning to lay down any general rule, I say that, in a case like this,—after the circulation of the original particulars, and, looking at the manner in which the altered copies were dealt with, I must suppose the plaintiff came into the auction-room believing the sale was to take place without other reservation than was specified in the original particulars. No care was taken to correct that belief. The auctioneer should not have satisfied himself with merely reading the altered particulars; he should pointedly have called attention to the fact that they had been altered, and in what way. The onus of proving this distinct notice is wholly upon the vendors, and they have not discharged it. I shall therefore apply myself to the further consideration of this case, upon the hypothesis that the auctioneer read, but that the plaintiff did not hear him read, the new reservation. * * *

It is, however, a well-established principle of equity, that the Court will not enforce the specific performance of an agreement in writing, where, from fraud, mistake, or surprise, injustice would be done to the defendant by a decree for that purpose. * * * As the principle, however, is general, where the fraud, mistake, or surprise cannot be established without evidence, equity will allow a defendant, to a bill for specific performance, to support a defence founded upon any of those grounds by evidence dehors the agreement. * * *

Bill dismissed without costs.

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## LESLIE v. TOMPSON.

**(In Chancery, 1851. 9 Hare, 268.)**

A special case.

In August, 1850, certain hereditaments, situated at Iver, belonging to the plaintiffs, were put up for sale by auction in several lots, subject to certain particulars and conditions of sale, with a plan annexed thereto, denoting the several lots by different colors; printed copies

of which particulars were delivered to the defendant and others a few days before the sale. The defendant was declared the purchaser of Lot 1 at the auction, at the price of £2,800. He also afterwards became the purchaser of Lots 2, 3, and 4.

Lot 1 was thus described by the particulars:

"A country residence, park, and grounds, called 'Dromenagh Lodge.' The well-timbered park is enclosed by thriving plantations and strong oak palings. There is a neat lodge-entrance, containing a neat sitting-room, three bedrooms, with good garden, and strong entrance-gate. The long coppice is a gradually sloping wood to a pure running stream abundantly supplied with fish, and is studded with numerous rustic lodges and seats. This lot comprises about 70 A. 24 P., divided in the following manner:

| No. on Plan. | Quantity A. | R. | P. |
|---|---|---|---|
| 1. Residence, office, garden, lawn, and fishpond, | 3 | 0 | 30 |
| 2. Stabling, yards, and kitchen-garden | 2 | 0 | 30 |
| 3. Lodge and park | 18 | 0 | 4 |
| 4. Long coppice | 46 | 3 | 0 |
| Total acres more or less | 70 | 0 | 24" |

The Lots 2, 3, and 4, were described in the particulars as comprising certain messuages, out-buildings, &c., together with certain quantities of arable, pasture, meadow, and wood lands, amounting in the aggregate to 321 A. 2 R. 30 P., more or less.

The 11th condition of sale provided, that, if any mistake or error should appear in the description of the property, or any error whatever appear in the annexed particulars, such mistake or error should not annul the sale; but, except where otherwise provided for by the conditions, a compensation or equivalent should be given or taken, as the case might require, to be settled by two referees, or an umpire to be nominated by them before entering on the business; one referee to be nominated by each party within seven days after the discovery of the error and notice thereof given to the other party; and, in case either party should refuse or neglect to name a referee within the time appointed, the referee of the other party should alone make a final decision.

Some time after the sale had taken place, it was found that Lot 1 comprised 89 A. 29 P., instead of 70 A. 24 P.; and that the Lots 2, 3, and 4, comprised in the aggregate 310 A. 3 R. 18 P., instead of 321 A. 2 R. 30 P.

The whole of Lot 1, with the exception of the stabling and kitchen-garden, which were separated by a road from the residue of the lot, was in a ring fence, bounded on the south, south-west, and south-east sides by roads and wooden palings, on the western side by a hedge or fence, and on the north and north-east by the stream or brook.

The quantities of the lands assigned to the different lots were inserted in the particulars under a mistake. In the preparation of such particulars, and for the purpose of describing the property therein, the plaintiffs' solicitor had referred to and taken the several descriptions

from printed particulars of the estate, prepared by another solicitor on a former occasion, and from a surveyor's report made on such occasion, which he believed to be correct, and therefore relied upon.

The plaintiffs claimed an increased amount of purchase-money, to be paid to them by way of compensation for the extra quantity of land comprised in Lot 1; and offered to allow compensation to the defendant for the deficiency on the other lots; and the question submitted for the judgment of the court was, whether the plaintiffs were entitled to any compensation for such excess of acreage in Lot 1, above the quantity stated in the particulars, they (in the event of being so entitled) allowing compensation to the defendant for the deficiency existing in the acreage of Lots 2, 3, and 4.

THE VICE-CHANCELLOR [SIR G. J. TURNER]. In this case there has been a sale of property in four lots. In the particulars of Lot 1, there has been an under-statement of about twenty acres in the quantity of the property which it comprised; and in Lots 2, 3, and 4, there has been an over-statement by about ten acres. The question which I have to consider is, whether the purchaser is bound to pay compensation for the surplus in Lot 1, and to receive compensation for the deficiency in the other lots.

The conditions of sale contain, amongst others, a provision that mistake or error in the description of the property in the particulars shall be made the subject of compensation. [His Honor read the 11th condition (supra).] I think the mistake or error meant to be referred to by that condition is such a mistake or error as, on the part of the vendors, would vitiate or annul the contract for sale. The question, then, to be considered, is whether, in this state of circumstances, the vendors could on bill filed have been relieved from their contract on the ground of the mistake they have made in the particulars, or whether the purchaser could have enforced the contract against the vendors. I entertain some doubt whether, under the circumstances of this case, the vendors could have been relieved, if they had filed their bill to have the contract delivered up to be cancelled. I am rather disposed to think that, under the circumstances stated on the special case, they might have been relieved; for it appears upon the special case, that the particulars of sale were prepared from some previous conditions and particulars of sale, and from the report of a surveyor prepared on a former occasion, and which particulars and report were erroneous. I am disposed to think, therefore, that, as the vendors have, in preparing the particulars in this case, proceeded on former conditions of sale drawn up on the report of a surveyor, which is incorrect, and have, therefore, entered into the contract under a mistaken conception of the amount of property comprised in the particulars, they would be entitled to relief. But whether that would be so or not, I am strongly of opinion that the purchaser could not enforce the contract in the face of that mistake, which is proved to have existed, unless, indeed, he were will-

ing to adopt the condition by which compensation is prescribed for any excess in the quantity of land taken.

One argument put by Mr. Prendergast appeared to me at first to be entitled to weight. It was, that the vendors did not intend to sell the lot by measurement, but that they meant to sell the lot in the mass or lump. It was upon that point that I felt some hesitation during the discussion before me. The conclusion, however, to which I have arrived is this, that the actual designation of the number of acres contained in the lot negatives the presumption of any intention on the part of the vendors to sell in the lump.

Another argument urged on behalf of the purchaser was that, even if the court should be of opinion that this is a case in which, under the contract, the purchaser is bound to make compensation; yet that, in the circumstances which appear, there are no means of estimating the amount of such compensation. That, however, is pointed out by the condition of sale, which provides that the amount of compensation shall be settled by arbitration; and, if the parties are unable to procure the amount of the compensation to be settled by arbitration according to the provisions of the contract, this court will ascertain it by a reference to the Master.

Declare, that the purchaser is bound to make compensation for the extra quantity of land comprised in Lot 1, and is entitled to receive compensation in respect of the deficiency of the quantity in Lots 2, 3, and 4. No costs on either side.

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## RICHARDS v. NORTH LONDON RY. CO.

(In Chancery, 1872. 20 Wkly. Rep. 194.)

This was a bill to enforce specific performance of a contract alleged to have been entered into by the defendant company to grant a lease of a house in Great College-Street, Camden Town. By the terms of the agreement the plaintiff, who is a butcher, was to have a lease of a certain house called in the lease No. 1, and that part of a house called No. 2 which the company did not require for the purposes of their railway. The defendant company eventually refused to grant a lease of more than about a moiety of the house No. 1, and the plaintiff insisted that he was entitled to compensation, or otherwise to a specific performance of the original contract.

Sir R. Baggallay, Q. C., and Berkeley, for the plaintiff, contended that there was no ambiguity about the agreement, which was in plain and intelligible terms, and that as there had been a part performance, the plaintiff was entitled to insist that it should be carried out.

Southgate, Q. C., and Rodwell, for the defendant company. It is plain that the contract could never have been intended to include the whole of No. 1 house, and such a construction is incompatible with the fact that a moiety of the premises forms part of the land occupied by

the buildings of the railway. There was a map to which the plaintiffs referred at the time of making the agreement, and it is the house No. 1, as coloured in that map, to which the agreement was intended to extend, and not absolutely to the whole of the premises.

Sir R. Baggallay, in reply.

LORD ROMILLY, M. R. There is no contract here that the bill can be supported upon. I am of the opinion that the parties were at cross purposes when they entered into the agreement, and that the company never intended to grant more than that part of the house and premises which is coloured in the map produced. It is evident that the whole house, with the ground behind, could never have been intended to be included, for this land was always meant to be used for the purposes of the railway. It is marked on the map as the site for a flight of steps, and the steps were actually being laid down when the agreement was entered into. Then, as the meaning of the words, "whole house," is to be restricted, I think it should be restricted to that part of the house which I have mentioned, and of which the lease has been granted. The doctrine of part performance does not apply here. That can apply only where there has been a definite and well understood agreement. If after that the parties enter such entry constitutes a part performance. But here there was no conventio. If a contract such as the plaintiff contends to have existed was ever entered into, it was entered into by mistake, and the entry is not a part performance of anything. I must dismiss the bill.

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## In re HARE AND O'MORE'S CONTRACT.

(Chancery Division. [1901] 1 Ch. 93.)

Vendor and purchaser summons.

This was a summons by the purchaser under the above contract asking for a declaration that he was entitled to compensation for misdescription of the property therein comprised.

A number of leasehold houses were sold in lots by auction on March 23, 1900. The particulars of sale described lots 4 and 5 as follows:

"Lot 4. Highfield Road, Saltley.—Four Capital Private Houses, each with hall entrance, garden and outbuildings in the rear, adjoining lot 3, and called 'Eastbourne,' and producing at low rents £72. 16s. per annum. Term eighty-five years from Midsummer next. Ground rent £12.

"Lot 5. Highfield Road, Saltley.—Four similar houses, called 'Somerville,' situate in the Highfield Road, adjoining the last lot; let to tenants of long standing, at old-fashioned rents producing £67. 12s. a year. Leasehold for eighty-five years from Midsummer next. Ground rent £12."

Condition 14 provided as follows:

"Any error, misstatement, or omission in the particulars shall not annul the sale, but if pointed out before the completion of the purchase, and not otherwise, shall form the subject of compensation, which shall be allowed by the

vendor or purchaser as the case may require. The amount of such compensation in cases of dispute shall be settled by the auctioneer, whose decision shall be final."

The purchaser inspected lot 4 before the sale, and found that the houses had entrance-halls and water-closets.

He attended the sale, and purchased lot 5 for £580 in reliance, as he asserted, on the statement in the particulars that the houses were similar houses to those of lot 4, whereas it was found that the houses of lot 5 had no entrance-halls, and had privies in lieu of water-closets, the rent being less in consequence than that of the houses in lot 4. He thereupon claimed £77 compensation for the misdescription.

The vendor alleged that, before putting up lot 5 for sale, the auctioneer made a verbal statement correcting the misdescription, which the purchaser must have heard, and one of the requisitions made on behalf of the purchaser asked for a written statement by the auctioneer of what he had said at the sale. This was furnished; but at the trial the purchaser denied that any such statement was made, or, if made, that he heard it.

The evidence on the point being conflicting, the summons was ordered to be set down as a witness action, the purchaser to be treated as plaintiff in an action for specific performance with compensation.

On hearing the evidence, the Court found that the statement had been made clearly and distinctly, but that it was not proved that the purchaser had heard it.

The question was, therefore, whether on that finding the purchaser was entitled to specific performance with compensation. * * *

JOYCE, J. The question is whether, when a statement correcting a material misdescription in the particulars has been made clearly and distinctly by the auctioneer at the time of sale, but the purchaser is not shewn to have heard that statement, the circumstances are such as to render it inequitable to grant the purchaser specific performance with compensation for the misdescription. The vendor relied on Manser v. Back, 6 Hare, 433, and I reserved judgment in order to consider that case, which, it was suggested, had not been followed in any subsequent authority.

I think that Manser v. Back, 6 Hare, 433, if good law, is a clear authority for relieving the vendor from the contract in such a case as this. In Manser v. Back, 6 Hare, 433, there was a distinct verbal statement by the auctioneer in the auction room, which the purchaser did not hear, and it was held that it was inequitable to enforce specific performance of the contract on the vendor without the verbal modification introduced by the statement. I do not find that Manser v. Back, 6 Hare, 433, has ever been questioned, or disapproved. On the contrary, it was cited with approval by Baggallay, L. J., sitting for Malins V.-C., in Tamplin v. James (1880) 15 Ch. D. 215, 217, 218, 219. It is treated as good law in all the text-books, and, if I may say so, I entirely agree with the decision.

That being so, I have come to the conclusion that the vendor cannot be compelled to specifically perform this contract with compensation.

Lett v. Randall, 49 L. T. 71, on which the purchaser relied, does not affect the present case, the only point decided being that the mere fact that the purchaser knew of a misdescription in the particulars did not preclude him from enforcing specific performance with compensation; while In re Edwards to Daniel Sykes & Co., Limited, 62 L. T. 445, there was no evidence that the purchaser did not hear the verbal statement, and Chitty, J., held as a fact that he must be taken to have heard it. In this case, therefore, I cannot enforce specific performance with compensation against the vendor; and, as the purchaser does not wish to complete without compensation, I will rescind the contract, order the return of the deposit with interest, and give the purchaser the costs of investigating the title down to the time he was furnished with the written statement of the auctioneer. Subject to this, I dismiss the summons without costs.

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## VAN PRAAGH v. EVERIDGE.

(Chancery Division. [1902] 2 Ch. 266. Court of Appeal. [1903] 1 Ch. 434.)

The plaintiff, Mrs. Edith Sarah Van Praagh, widow, was the owner of a freehold house situate at Frognal, Hampstead, and known as Saradith. In September, 1901, this property was put up for sale by auction, but it was bought in at £4500. On November 18, 1901, this property was again put up for sale by auction by Messrs. Farebrother, Ellis & Co. They also offered for sale at the same time two other properties, namely, an estate known as Parson's Mead, Ashtead, and No. 24, Cullum Street, in the City of London. The defendant, who was a builder of Surbiton, frequently purchased properties by auction with a view to develop them. His attention had been called to the particulars of Parson's Mead, Ashtead, and, after going to Ashtead to inspect the property, he resolved to bid for it. On November 18 he came up to London for this purpose and attended the auction. He was present in the auction-room at the commencement of the sale, and took a seat in the second or third row from the front. He was somewhat deaf. Affixed to the auctioneer's rostrum was a large notice stating the order of sale to be as follows:

"1. Saradith, Hampstead; 2. Parson's Mead, Ashtead; 3. 24, Cullum Street."

There were also distributed about the saleroom a number of smaller printed notices to the same effect. The auctioneer, Mr. Breach, on entering the rostrum began by stating the order in which he would offer the properties, and he then proceeded to offer the Hampstead property, which he fully described. The defendant bid three or four

times for this property, and it was ultimately knocked down to him at £4500. Mr. Breach then sent his clerk to the defendant to obtain his name and address for the purpose of filling up the necessary contract; but the defendant objected that he had not purchased the Hampstead property, but had purchased the Ashtead property. The clerk then informed Mr. Breach that the defendant denied having bought the Hampstead property; but Mr. Breach, who had proceeded some way with the description of the Ashtead property, declined to interrupt the sale of that property, which was ultimately bought in at £16,000. Before Lot 3 was offered the defendant had an interview with Mr. Breach, and told him that he had made a mistake and believed that he was bidding for the Ashtead property. Mr. Breach replied that he must hold him to his bargain, and requested him to sign the contract. This the defendant refused to do. Accordingly Mr. Breach, before leaving the rostrum, signed the contract as agent for the defendant.

The contract so signed contained two small mistakes. In the first place, it was dated October 17, 1901, instead of November 18, 1901. This mistake was due to the circumstance that the particulars and conditions of sale had been printed with a view to a sale on October 17, 1901, which was eventually postponed till November 18, and, although the date was altered in the particulars, the original date had by inadvertence been allowed to remain in the conditions and in the printed form of contract annexed thereto. Secondly, the Christian names of the vendor were filled in by the auctioneer in the wrong order.

The defendant having repudiated the contract, the plaintiff commenced this action for specific performance and damages.

The defendant by his defence resisted the action on the ground of mistake, and alleged that he never agreed to purchase the Hampstead property; he also pleaded that there was no memorandum of the alleged contract sufficient to satisfy the Statute of Frauds. * * *

KEKEWICH, J., after discussing the evidence and saying that he had no reason to doubt the honesty and veracity of the defendant, and after referring to the precautions taken by the auctioneer to prevent any mistake as to the order of sale, continued as follows:

The defendant made an extraordinary blunder, which can only be explained upon the theory that the idea of Ashtead was so fixed in his mind that he could not think of anything else; but he did in fact bid for the Hampstead property, and it was eventually knocked down to him. From that moment there was a contract. I cannot understand the argument that there was no contract. The case of Raffles v. Wichelhaus, 2 H. & C. 906 was relied on as establishing that there might be a case of no contract for want of consensus ad idem. The ground of the decision in that case, as explained by Sir F. Pollock in his book on Contracts, was that the contract which was made was not the contract which was sued on, and therefore was not a contract which the

defendant could be called upon to perform. There was nevertheless a contract.

There being then a contract here, can there be any doubt upon the authorities that the auctioneer was authorized to sign the necessary memorandum on behalf of the purchaser? It would be a waste of time to go into the cases. The only suggestion is that the authority having been given, and referring necessarily to the time when the highest bid was given, that could be revoked at any time afterwards. But it is from that moment that the authority comes into operation, and it would be opening a wide door to fraud if the purchaser could be allowed to say to the auctioneer half an hour or an hour after the sale, "I revoke my authority; you must not sign the contract." That is entirely contrary to principle. Then it is said that there is no sufficient memorandum within the Statute of Frauds. The particulars and conditions were prepared for a sale to take place in October, and the sale was deferred, and by a slip the wrong date was left in the contract. That is not a substantial error, and cannot prevent this from being a good memorandum. Then by another slip the Christian names of the vendor were transposed. That cannot be regarded as having any importance.

The only substantial question is whether this defendant is to be let off on payment of damages, or whether a decree of specific performance ought to be made against him. That to my mind is a very difficult question. According to the view expressed by Lord Langdale in Malins v. Freeman, 2 Keen, 25, 35, 44 R. R. 178, it seems to me that the defendant would clearly be entitled to escape specific performance. The language applied by the learned judge to the defendant in that case fits this defendant admirably. He says:

"I am of opinion that the defendant never did intend to bid for the estate. He was hurried and inconsiderate, and when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it."

That, of course, cannot be said here, because the defendant pointed out the mistake immediately; but the words "hurried and inconsiderate" seem to cover this case exactly. There are, however, a great many subsequent cases in which a somewhat different view of the law has been expressed, and there are one or two to which I think it necessary to refer. The first is the case of Tamplin v. James, 15 Ch. D. 215, 217, 221, 222, which came before several judges whose views are entitled to very great respect. It came in the first instance before Baggallay, L. J., sitting for Malins, V. C., and it went from him to the Court of Appeal, consisting of James, L. J., Brett, L. J., and Cotton, L. J. In that case there was clearly a mistake on the part of the defendant as to the amount of the property contracted to be sold, and the question was whether there should be specific performance or damages. How the Lords Justices applied the law to the facts of that particular case is immaterial, but I cite it for the general observations which were made. Baggallay, L. J., says:

"It is doubtless well established that a Court of Equity will refuse specific performance of an agreement when the defendant has entered into it under a mistake, and where injustice would be done to him were performance to be enforced."

With great respect to the learned judge, those words appear to me to raise almost more questions than they solve, because it is extremely hard to know what would be doing injustice to the defendant. Cotton, L. J., says:

"I will not attempt to define the cases in which the Court will refuse specific performance on the ground of mistake. The circumstances of each case have to be considered."

And James, L. J., says:

"Perhaps some of the cases on this subject go too far," i. e., too far in the defendant's favour, "but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it."

There we get a little comment on what Baggallay, L. J., meant by injustice being done to the defendant. Suppose this gentleman had been saddled with a residential estate requiring considerable expenditure, and one incapable of being used for the purpose for which he wanted it, and suppose that he could not reside there himself and might find it difficult to let it. That might be a case of hardship. It is very difficult to say whether it would be so or not.

The next case to which I desire to refer is the case of Goddard v. Jeffreys, 30 W. R. 269, 270, which was before Kay, J. There the learned judge lays down the law as follows:

"Speaking generally, I understand the rule to be this, that the purchaser may escape from his bargain on the ground of mistake, if it was a mistake to which the vendors contributed; that is, in other words, if he was misled by any act of the vendors; but if he was not misled by any act of the vendors, if the mistake was entirely his own, then the Court ought not to let him off his bargain on the ground of mistake made by himself solely, unless the case is one of considerable harshness and hardship."

That is putting in different language what was said by James, L. J., in Tamplin v. James, 15 Ch. D. 215. I now turn to the last edition of Fry on Specific Performance. The learned author refers to many of the cases on this subject, and quotes at considerable length the judgments in Tamplin v. James, 15 Ch. D. 215, and then he adds this (pl. 765):

"Indeed, it seems on general principles clear that one party to a contract can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract, or any of the terms in which it is expressed. To permit such a defence would be to open the door to perjury and to destroy the security of contracts."

Now, in this case the evidence shews that the blunder was entirely the defendant's own; there was nothing whatever on the part of the vendor to induce the blunder. Therefore we get rid of that objection to specific performance. There was no contributory negligence by

the vendor. Then is there any hardship amounting to injustice in keeping the defendant to his contract? I do not think there is. I have evidence that this property may be used in the way in which the defendant intended to use the Ashtead property. It is his business to buy and develop estates, and there is no reason why having bought this he should not develop it. He has bought it at a price which it is true had not been reached before, and perhaps would not have been reached on this occasion but for the amount which he himself bid for it. Still it was not an extravagant price. I do not see any hardship. I do not doubt the honesty of this gentleman in saying that he made a blunder, yet, on the general principles referred to by Sir Edward Fry, to permit such a defence would be to open the door to perjury and destroy the security of contracts. If the Court relieves this gentleman who honestly confesses his blunder from performing his contract, that would be inviting some one else to come here dishonestly to get off his bargain. It seems to me that the defendant has entered into a contract from which he is not entitled to be relieved, and that there must be judgment for specific performance.

But if specific performance were refused, the defendant would be liable in damages. While, therefore, I have the materials before me and the evidence is fresh in my mind, I think it best, in case the defendant should be advised to take the opinion of another Court, that I should say what I think about the damages. One thing the defendant must certainly pay, and that is the expenses of another auction. Besides that, there is the depreciation of the property. That is extremely difficult to calculate, because the defendant was the only bidder at this sale who went up to near the price at which the property was knocked down. There had been a failure before, and, although the price ran up to £4500, I think I must take it that that price would not have been reached in any other way. Having regard to the previous failure to sell this property, I must take it that the property was not worth that sum. The difficulty is to estimate by how much the value of the property is decreased by the defendant's repudiation. The only real way to ascertain that is by putting up the property for sale by auction again. I can only arrive at the amount in the roughest possible way. I think that if I say that the defendant's repudiation has prejudiced the vendor to the extent of £250, I shall be giving her quite as much as she is entitled to on that head. Upon the evidence before me, I assess the costs of a fresh auction at £150. Therefore, if I were to refuse specific performance I should give the plaintiff £400 damages. In either case the plaintiff will have the costs of the action.

*In the Court of Appeal, [1903] 1 ch. 434*

Appeal from Kekewich, J.

The action was by a vendor against a purchaser for specific performance of a contract alleged to have been entered into upon the sale by auction of a freehold house, the defendant having repudiated the con-

tract on the ground that he had bid for the property by mistake. The facts are stated in the report of the case below.

Kekewich, J., held that there was a binding contract, and gave judgment for specific performance. The defendant appealed. Having regard to the course the case took on appeal, it should be stated that the contract, which was in printed form, contained several mistakes in date. In the first place it bore the printed date "October 17, 1901," which was not altered to "November 18, 1901," the actual date of sale. This mistake was due to the circumstance that the particulars and conditions of sale had been printed with a view to a sale on October 17, 1901, which was eventually postponed till November 18, and, although the date was altered in the particulars, the original date had by inadvertence been allowed to remain in the conditions and in the printed form of contract annexed thereto. Also the original date for completion, "November 21, 1901," was left in the conditions, with the requirement that the engrossment of the conveyance should be sent to the vendor's solicitors four days before that date.

The appeal was heard on February 5, 1903. * * *

COLLINS, M. R. The point now raised disposes of the case. The plaintiff cannot succeed without a contract. That contract must be evidenced by some memorandum in writing within the statute of frauds; and here there is no memorandum of that character.

Upon the supplemental point, as to whether the parties were ad idem, it is not clear to my mind that the parties ever were ad idem; I do not think they were, but it is unnecessary to say anything further about that, as the plaintiff's case fails on the other point. The appeal must, therefore, be allowed.

ROMER, L. J. I agree.

COZENS-HARDY, L. J. I agree. Kekewich, J., says that the date appearing on the face of the printed form of contract was "not a substantial error." With that I cannot agree. The contract so dated purported to impose very substantial conditions; and, moreover, some of the conditions are impossible of performance.

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## CHUTE v. QUINCY et al.

**(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 189, 30 N. E. 550.)**

Report from supreme judicial court, Norfolk county; John Lathrop, Judge.

Bill by J. N. Chute against Josiah Quincy and others for the specific performance of a contract by defendants to convey land to plaintiff. Defendants filed a cross-bill, asking that the contract be reformed, or surrendered and canceled.

KNOWLTON, J. The plaintiff in the first case entered into a contract in writing for the purchase from the defendants of a lot of land which

was one of a large number of lots held by them as trustees. The property was described in the contract as "a certain lot of land, being lot No. 23 on the plan of Charles S. Miller, dated April 10, 1890," and recorded, etc. This plan showed a great number of building lots, about 800 in all, designated by numbers, with the lengths of their boundary lines given, and the number of square feet contained in each marked in plain figures. Lot No. 23 contained 9,230 square feet, but by a mistake of the surveyor, the number marked on the plan was 3,230 square feet. The defendants' agent, in negotiating with the plaintiff, agreed to sell the lot for $430.66, determining the price by computing the value of 3,230 square feet, at 131⅓ cents per foot. It is found as a fact that the defendants made the contract under a mistake as to the contents of the lot, and in the belief that it contained only 3,230 square feet. The defendants' agent did not inform the plaintiff how he fixed the price. The plaintiff "admitted that when he examined the lot he had a copy of the above-mentioned plan, and that he noticed at the time of his negotiations with the agent that lot 23 was larger than lot 22 or lot 24, the adjacent lots on either side, and that he knew that lot 23 contained more square feet than the plan stated." The dimensions of lots 22 and 24 were plainly marked on the plan, and it is hard to believe that one buying a lot apparently for his own use, to be paid for in small installments, as the contract shows, would not so far investigate the subject, when the boundaries were pointed out to him, and when he had a copy of the plan before him, and "knew that it [the lot] contained more square feet than the plan stated," as to find out the nature and extent of the mistake, especially when the shape of the lot and the lengths of its boundary lines, and the sizes and shapes of other lots in the vicinity, were all correctly given on the plan. It is fair to presume that, before making his purchase, he had some knowledge of the prices at which the defendants were accustomed to sell lands in the vicinity. Whatever his knowledge or ignorance on this subject, he concealed from the defendants' agent his discovery of the mistake in the plan, and took a contract which described the lot merely by a reference to the plan. It may be that the plaintiff was free from fraud in the transaction,—the findings certainly do not go far enough to show that he was guilty of it. The parties were not acting under a mutual mistake, and, in the absence of proof of fraud, the cross-bill brought by the defendants in the first case, asking to have the contract reformed or delivered up and canceled, must be dismissed.

The remaining question is whether the plaintiff should have a decree for specific performance of the contract. If we assume that the contract is good at law, it does not follow that it will be specifically enforced in equity. It is a universally recognized principle that a court of equity will not decree specific performance of a contract when it would be inequitable so to do. Specific performance may be refused when a contract is hard and unreasonable, so that enforcement of it would be oppressive to the defendant, or where there has been misrep-

resentation by the plaintiff on a material point, or other unfair conduct, although it may not be sufficient to invalidate the contract, or where the defendant has by mistake not originating in mere carelessness entered into a contract different from that intended by him, notwithstanding that there was no unfairness on the plaintiff's part. Adams, Eq. (5th Amer. Ed.) 195, 199; 2 Story, Eq. Jur. § 769. Says Chief Justice Shaw, in Railroad Corp. v. Babcock, 6 Metc. 346, 352:

"A defendant, therefore, may not only show that the agreement is void by proof of fraud or duress which would avoid it at law, but he may also show that, without any gross laches of his own, he was led into a mistake, by any uncertainty or obscurity in the descriptive part of the agreement, by which he, in fact, mistook one line or one monument for another, though not misled by any misrepresentation of the other party, so that the agreement applied to a different subject from that which he understood at the time; or that the bargain was hard, unequal, and oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed. In either of these cases equity will refuse to interfere, and will leave the claimant to his remedy at law."

This principle was applied in Boynton v. Hazelboom, 14 Allen, 107, 92 Am. Dec. 738, and the rule prevails generally in the state and federal courts of the United States as well as in England. Malins v. Freeman, 2 Keen, 25; Webster v. Cecil, 30 Beav. 62; Manser v. Back, 6 Hare, 443; Leslie v. Tompson, 9 Hare, 268; Wood v. Scarth, 2 Kay & J. 33; King v. Hamilton, 4 Pet. 311, 328, 7 L. Ed. 869; Willard v. Tayloe, 8 Wall. 557, 565, 19 L. Ed. 501; Perkins v. Wright, 3 Har. & McH. (Md.) 324; Leigh v. Crump, 36 N. C. 299; Cannady v. Shepard, 55 N. C. 224; Eastland v. Vanarsdel, 3 Bibb (Ky.) 274; Bowen v. Waters, 2 Paine, 1, Fed. Cas. No. 1725; Veth v. Gierth, 92 Mo. 97, 4 S. W. 432; Burkhalter v. Jones, 32 Kan. 5, 3 Pac. 559. The recently decided case of Mansfield v. Sherman, 81 Me. 365, 17 Atl. 300, is identical in principle with the one at bar. There the defendant, in New York, offered for sale, through an agent in Maine, lot No. 12 on a certain plan of lands in Bar Harbor for $2,500, in ignorance of the fact that the lot, as delineated on the plan, contained a valuable building site which he supposed to be upon another lot, and specific performance of the agreement was denied, though the plaintiff had in no way contributed to the defendant's mistake, and was entirely ignorant of it. On broad grounds of morality, it may be said to be inequitable for a plaintiff to enforce a contract against a defendant who shows that, by mistake and without fault, he entered into an agreement very different from that which he thought he was making, and engaged to do something far more onerous than what he supposed he was undertaking. In some English cases that is stated to be the ground on which relief is refused to a plaintiff who innocently entered into a contract which the defendant signed under a mistake. This principle must be adhered to unless specific performance of a contract for a sale of lands is to be decreed as a matter of right, wherever a plaintiff shows that he has a contract enforceable at common law. We see no reason for introducing such an innovation in equity practice, or

for disregarding the rule that courts of equity will grant relief only when the plaintiff asks for that which, in equity and good conscience, ought to be granted. In the present case it is admitted that, through a mistake, the defendants agreed to sell their land for about one-third of the price which they supposed they were getting for it; and that, while the plaintiff knew that there was a mistake in the plan which might naturally mislead the defendants in making their bargain, he did not disclose it. Under these circumstances, a majority of the court are of opinion that the plaintiff must be left to his remedy at law upon his contract.

Bill and cross-bill dismissed.

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## DIFFENDERFFER v. KNOCHE.

**(Court of Appeals of Maryland, 1912. 118 Md. 189, 84 Atl. 416.)**

Appeal from Circuit Court of Baltimore City; Carroll T. Bond, Judge.

Suit by William Stewart Diffenderffer against Fritz Knoche. Bill dismissed, and complainant appeals.

BOYD, C. J.[60] This is an appeal from a decree dismissing a bill filed by the appellant against the appellee for the specific performance of a contract of sale of a property in Baltimore city. The contract sought to be enforced is as follows:

"Balto., Nov. 14/11.

"I have this day purchased from W. Stewart Diffenderffer the stable in fee, 1801 Lovegrove alley for the sum of four thousand dollars ($4000.00) and agree to pay said sum of four thousand dollars in cash, when deed is passed by my lawyer. Fritz Knoche."

"Baltimore, November 14, 1911.

"Received of Mr. Fritz Knoche five dollars on account of purchase price of four thousand dollars ($4000) for stable 1801 Lovegrove alley, Baltimore, Maryland, all taxes and other expenses adjusted to date of transfer of deed. W. Stewart Diffenderffer. The above-named property is in fee, and the deed to that effect must be given. W. Stewart Diffenderffer."

The defense relied upon by the appellee was that he was acting for and on behalf of George Doebreiner who is engaged in business on North avenue in the city of Baltimore, and it was the intention and desire of Mr. Doebreiner and himself to purchase the stable, which was at the corner of an alley in the rear of Mr. Doebreiner's establishment, and that at the time the defendant signed the agreement he thought it was for that stable. The evidence shows that there were on Lovegrove alley, situated between two other alleys, three two-story brick houses adjoining each other; one being the stable of Charles R. Diffenderffer, another the garage of James Caldwell, and the third the stable of the appellant. The stable nearest North avenue, where Mr. Doebrein-

[60] Parts of the opinion are omitted.

er's establishment was, belonged to Charles R. Diffenderffer, who is a brother of the appellant, and a member of the same firm—Charles H. Ross & Co. They are in the wholesale liquor business, and the appellee, who is a "jobber of liquor," sometimes dealt with that firm, but testified that he only knew the appellant, and had never seen Charles R. Diffenderffer. * * *

The testimony shows conclusively that the appellee was buying the property for Mr. Doebreiner, and that the latter, the appellee, and a Mr. Max Miller went to see the stable, which now turns out to belong to Charles R. Diffenderffer, before this contract was made, and thought that was the one for sale. There can be no doubt from the evidence that the appellee did believe that he was buying the one which is now shown to belong to the brother, and he signed the contract under that belief. It is true that the stable of the brother was No. 1805 Lovegrove alley, while that of the appellant was No. 1801, but the appellant admitted that the glass on which his number was fixed was broken, and the evidence is conflicting as to whether the number on the brother's stable was easily seen. There was a sign on each of the stables; the one reading, "For sale or rent. Apply to W. S. Diffenderffer, 109 Commerce Street," and the other was larger, but had the same thing on it, except the initials were "C. R.," instead of "W. S." * * *

Convinced as we are that the purchase by the appellee of the appellant's stable was undoubtedly the result of a mistake as to what he was buying, it would not only be "highly unreasonable" to grant the appellant affirmative relief by the enforcement of this contract, but it would not reflect credit upon the administration of justice to hold that a court of equity was compelled, by reason of principles of law which govern it, to give its aid in the enforcement of a contract made under such circumstances as we have detailed. As will be seen from the above-cited cases, this court has held that in suits for specific performance the defendant can rely on the mistake "of both or either of the parties" in order to prevent a court of equity from giving affirmative relief to a plaintiff seeking to compel a defendant "to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood." There is not the slightest suggestion in this record that the appellee was merely endeavoring to free himself from a contract deliberately entered into and afterwards regretted, but it is a clear case of such a mistake as a court of equity will permit a defendant to set up to prevent a plaintiff from compelling him to do what he never intended to do or knowingly contracted to do. Of course, in such cases the defendant should be required to prove the mistake by clear and thoroughly satisfactory evidence, and, when that is done, there is far less danger of injury and injustice being done by the recognition of the rule we have announced than would result from aiding the plaintiff in the enforcement of what the chancellor is satisfied only bears the evidence of a contract by reason of the mistake of the defendant.

It may be that a defendant has been guilty of such "inexcusable carelessness," as it is called in the above citation from Cyc. [see 36 Cyc. 605], as to deprive him of such a defense, especially if by his act he has caused the plaintiff to sustain loss. But it cannot be said that this appellee was guilty of "inexcusable carelessness." According to the evidence, he knew that a Mr. Diffenderffer owned the stable which he had examined, and which he intended to purchase. He also knew that it was on Lovegrove alley, and that the owner was a member of the firm of Charles H. Ross & Co. He only knew one Mr. Diffenderffer in that firm, and that was the appellant, and he did not know that each of two persons by that name owned stables in the block on Lovegrove alley. When Mr. Freeman told him that Mr. Diffenderffer had a stable on Lovegrove alley, he told Mr. Freeman he knew more about the stable than he did, showing that he then had in mind the one which Mr. Doebreiner wanted, and which they had under consideration in May. When the only Mr. Diffenderffer whom he knew came to see him about the purchase of it, he naturally supposed that it was the same stable he had examined. The numbers would not make any impression on his mind, especially if there was no number on 1801 and the one on 1805 was indistinct. He made just such a mistake as any one might make, and he was not guilty of such negligence as could deprive him of the defense he relies on.

We will not discuss the exceptions to the testimony filed by the appellant. They are very general, and we have no doubt that much of the evidence which would be included in the exceptions was relevant, competent, and material. It tends to explain how the mistake was made, and reflects upon the bona fides of the defense.

So, without further prolonging this opinion by discussing other questions, we will affirm the decree.

Decree affirmed, the appellant to pay the costs, above and below.

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## GOLDSBROUGH, MORT & CO., Ltd., v. QUINN.

(Supreme Court of New South Wales, Equity Division, 1909. 10 State Reports, 170. On Appeal, 1910. 11 State Reports, 7.)

On the 8th February, 1909, the defendant, John Thomas Quinn, in consideration of five shillings, gave the plaintiff company an option to purchase—

"the whole of my freehold and conditional purchase and conditional lease lands, situate near Canonbar, and known as Benabilla, comprising about two thousand five hundred and ninety acres, within one week from this date, at the price of one pound ten shillings per acre calculated on a freehold basis."

On the 11th February, 1909, the plaintiff company wrote to the defendant notifying him that it thereby exercised the option and accepted the offer.

The defendant refused to carry out the contract on the ground that he had been under a mistake as to the meaning of "calculated on a freehold basis." The plaintiff company sued for specific performance. * * *

On December 1st the following written judgment was delivered by A. H. SIMPSON, C. J. in Eq.:[61] * * *

The first interview of any importance was on the 8th February, 1909. The accounts given by McLeod, the defendant, and Flashman are somewhat conflicting, but the principal part of the conversation took place in Mr. Flashman's office. The words "calculated on a freehold basis" seem to me ambiguous. They might mean that the money required to make the whole land freehold was to come out of the purchase money, which is the meaning put on them by the plaintiff company, or they might mean that the whole land is to be regarded as freehold and paid for on that basis, which is the meaning the defendant swears he attached to the words.

The meeting at Flashman's office only lasted from fifteen to twenty minutes, and the defendant had no separate solicitor. Almost immediately after leaving Flashman's office the defendant met a friend named Herrick, and had a conversation with him, and then, he says, he discovered his mistake. He then went to see Mr. Hogg, the acting manager of the Commercial Bank, where Quinn had an account. Hogg at once went to see Flashman. Hogg says:

"I told him the defendant was under a misapprehension with regard to the amount he was receiving for his property, that he did not understand what freehold basis meant, that he thought he was to get 30s. an acre; I asked him if he expected the defendant to make the land freehold. He said it was on a freehold basis, the amount would have to be deducted. That was substantially all." * * *

The question arises whether the amount of damages should be referred to the Master, or the parties left to their remedy at law. Here a difficulty arises, a voluntary offer may be revoked at any time before acceptance, though it is made irrevocable by acceptance. Anson, Law of Contracts (10th Ed.) p. 37. If an option is given for valuable consideration it cannot be revoked, and then the point arises whether five shillings is valuable consideration, or a mere nominal consideration which the court will disregard.

There is certainly some evidence that Quinn revoked the offer the day it was made, the 8th February, and if he could and did do this, there was never any contract between the parties. This point was not taken in the pleadings, and to allow it to be taken by amendment after the evidence is closed would mean practically reopening the whole suit. I do not think I ought to do this, nor can I deal with it on the pleadings as they stand. Consequently the only course is to leave the plaintiff to bring an action for damages at law, if so advised.

I think there should be no order as to costs. The defendant admits

[61] The statement of facts is abridged and parts of the opinion are omitted.

that he thought he was getting a very high price, and in his eagerness to get this he never said that he didn't understand the bargain, nor ask to have the words "freehold basis" explained, nor say he wished to consult anyone before signing.

The suit will be dismissed without costs, without prejudice to any action the plaintiff company may bring at law for damages.

*On Appeal.*

Appeal by the plaintiffs from the decision of A. H. Simpson, Chief Judge in Equity, dismissing the plaintiffs' suit for specific performance.

The facts are sufficiently stated in the report in the court below.

GRIFFITH, C. J.[62] The respondent contends that there never was any complete contract for the sale of the land, that the only agreement evidenced by the document of 8th February was an agreement to make another agreement, which if made might have been specifically enforced, and that the only remedy for breach of the actual agreement is in damages. This question was not discussed before the learned Chief Judge. I think there was a contract for valuable consideration to sell the property upon condition that the other party should within the stipulated time bind himself to perform the terms of the offer embodied in the contract. I therefore think that this point fails. * * *

The appeal will therefore be allowed.

O'CONNOR, J., concurred in a separate judgment.

ISAACS, J., concurred. * * *

Appeal allowed.

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## HAYES v. STIGER.

**(Court of Chancery of New Jersey, 1878. 29 N. J. Eq. 196.)**

On petition of purchaser to be relieved from his bid at a sale made under a decree for sale of mortgaged premises.

THE VICE-CHANCELLOR [VAN FLEET]. The petitioner, William A. Sweeney, seeks to be relieved from his contract to purchase certain mortgaged premises, sold pursuant to a decree of this court, on the ground that he entered into it under a misapprehension. He says he made the purchase under the belief that the proceedings in foreclosure were full and perfect, and that the title he would acquire under them would be valid against all persons acquiring rights subsequent to the mortgage on which the decree of sale was founded, but that he has since discovered he was mistaken in both particulars. It is admitted that the wife of the owner of the equity of redemption of one moiety of the mortgaged premises was not made a party to the foreclosure suit, and that, if the petitioner is held to his contract, his title will be burdened with her inchoate right of dower.

[62] Part of the opinion of Griffith, C. J., and opinion of Isaacs, J., are omitted.

The petitioner was represented at the sale by a member of the New York bar. The sale was fairly and regularly conducted, and no imputation is made against the officer who made it, nor against any other person. If the petitioner acted under a mistake, he alone was responsible for it. He neither sought information by examination nor inquiry. His misapprehension was entirely the result of his own carelessness and inattention to his interests.

The power of this court to set aside a sale made under its authority, and thus relieve the purchaser from his bid, is unquestionable, but its exercise, like all other judicial action, must always rest upon some consideration of justice. Fraud will always justify its exercise. Cummins v. Little, 16 N. J. Eq. 48. It may be exercised in case of accident. Seaman v. Riggins, 2 N. J. Eq. 214, 34 Am. Dec. 200. So, also, where surprise or misapprehension is occasioned by the conduct of the purchaser, or the the officer making the sale, to the injury of a person interested, the court will interfere. Woodward v. Bullock, 27 N. J. Eq. 507; and in Campbell v. Gardner, 11 N. J. Eq. 423, 69 Am. Dec. 598, Chancellor Williamson set aside a sale because it appeared that the defendant, who was an aged female, had been misled, by her brother, as to the contents of a subpœna served upon her. But this power will not be exercised in behalf of a suitor who seeks to escape from the consequences of his own act induced by mistake of law (Wakeman v. Duchess of Rutland, 3 Ves. 233; Dillett v. Kemble, 25 N. J. Eq. 66; Mott v. Shreve, 25 N. J. Eq. 438)—ignorantia juris non excusat—nor will the court exert it in favor of a purchaser who seeks to escape from a contract on the ground of misapprehension or mistake of fact when it appears his error resulted entirely from his own negligence, and that he would have avoided it by the use of ordinary prudence (Parkhurst v. Cory, 11 N. J. Eq. 233; Campbell v. Gardner, supra; Smith v. Duncan, 16 N. J. Eq. 240; Haggerty v. McCanna, 25 N. J. Eq. 48). In the absence of fraud, the negligence of counsel will be esteemed the fault of the client. Wakeman v. Duchess of Rutland, Dillett v. Kemble, and Mott v. Shreve, supra. The legal effect of a decree of this court directing land to be sold, and the character and extent of the title to be acquired by virtue of it, are purely matters of law. A purchaser at a judicial sale who voluntarily abstains from all effort to get correct information, and deliberately assumes the hazard of making a purchase ignorantly, must, as a general rule, bear the consequences of his own negligence. Cool's Ex'rs v. Higgins, 23 N. J. Eq. 308; s. c., 25 N. J. Eq. 117. It would be difficult to imagine a case of grosser negligence than that admitted by the petitioner.

No attempt has been made to show that the title the petitioner will get, if his contract is enforced, is worth less than the sum he agreed to pay; it cannot, therefore, be assumed that he will be required to pay more than the title he will acquire is worth. As the case stands, the highest equity he can claim is, that he has not made as good a bargain as he expected to make. This can hardly be esteemed an equity suffi-

cient to justify the abrogation of a contract. While contracts of this description are, very properly, said to be made with the court, and therefore the court may exercise a greater power over them than it can over any other class of contracts (McCahill v. Equitable Life Assurance Society, 26 N. J. Eq. 531), still, it cannot rescind them, without an equitable or legal reason sufficient to justify its action. In my judgment the case made by the petitioner does not entitle him to the relief he asks. His petition, therefore, must be dismissed, with costs.

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## In re RHOADES.

**(Court of Appeal. [1899] 2 Q. B. Div. 347.)**

This was an appeal by the official receiver and trustee in bankruptcy from the decision of Wright, J.

June 9. The judgment of the court (LINDLEY, M. R., SIR F. H. JEUNE, P., and ROMER, L. J.) was delivered by LINDLEY, M. R.,[62] who, after stating the facts, continued:

Two questions arise. The first and most important is whether the executrix had a right to retain her debt as against the trustee in bankruptcy. The second is whether, if she had, she lost this right by paying the whole £1100 over to the trustee and by afterwards proving for her debt. * * *

In the present case, when the order for the administration of the testator's estate was made, his executrix had assets in her hands to the value of £1100. This sum was standing to her credit at her bankers. We attach no importance to the fact that the account was not in form opened in her name as executrix. The £1100 represented the assets of the testator, and, if the executrix had herself become bankrupt, the whole of this sum would not have passed to her trustee and been distributable as her property amongst her creditors. She was, however, a creditor of the deceased for £600. This is admitted. She had a right to retain this sum out of the £1100 as against the other creditors of the deceased. This is quite clear. * * *

The second question presents no real difficulty. The executrix, not knowing her rights, paid the whole £1100 over to the trustee. He, however, has not distributed the assets, and no injustice will be done to him or to any one if he is ordered to repay to her the amount which she was entitled to retain. Ex parte James (1874) L. R. 9 Ch. 609, and Ex parte Simmonds (1885) 16 Q. B. D. 308, are distinct authorities to shew that mistakes of this kind, although attributable to ignorance of law, can and will be set right by the court so long as the officer of the court still has the money in his hands. Still less can the proof by the executrix in the bankruptcy, withdrawn, as it was, when she discovered her error, deprive her of her right to have her money back.

[62] Parts of the opinion are omitted.

The judgment appealed from is right on all points, and the appeal, therefore, must be dismissed with costs.

Appeal dismissed.

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## ERKENS v. NICOLIN.

(Supreme Court of Minnesota, 1888. 39 Minn. 461, 40 N. W. 567.)

Appeal from district court, Scott county; Edson, Judge.

Action by Fred Erkens against Frank Nicolin to recover back money paid for a quitclaim deed. Judgment for plaintiff, and defendant appeals.

MITCHELL, J. Action to recover back the money paid by plaintiff to defendant for a quitclaim deed of a piece of land in the village of Jordan. The facts, as disclosed by the evidence, are that defendant platted into lots a tract of land, of which he was the owner, lying between Water street and Sand creek. As shown upon the plat, the north and south lines of the lots extend from Water street to the creek. The distance marked on the plat gave the length of these lines as 80 feet, but the actual distance from Water street to the creek was 110 feet. One of these lots, and the adjoining 35 feet of another, had been conveyed by defendant, according to the plat, to plaintiff or plaintiff's grantor. Subsequently defendant claimed and stated to plaintiff, in substance, that the lots only extended back 80 feet, according to the distance indicated on the plat, and hence that he still owned the strip of 30 feet next to the creek. Plaintiff knew that defendant's claim was based wholly upon the theory that the distance given on the plat would control, and hence that his claim of title was in fact but expressions of opinion as to the legal effect and construction to be given to the plat. So far as the evidence shows, defendant made this claim in good faith, and honestly supposed that his deeds of the lots only conveyed 80 feet. Plaintiff took the matter under consideration for nearly a month, and went to the register's office and examined the plat for himself. He then obtained from defendant and wife a quitclaim deed of all the land down to the creek, and paid therefor the money which he now seeks to recover. When he paid the money he knew all the facts, and had the same means of knowledge of them which defendant had. The transaction was unaffected by any fraud, trust, confidence, or the like. The parties dealt with each other at arm's length. Plaintiff was not laboring under any mistake of facts. He took the deed, and paid his money under a mistake of law as to his antecedent existing legal rights in the property, supposing that, according to the proper legal construction of the plat, the lots were only 80 feet deep.

However, under the doctrine of Nicolin v. Schneiderhan, 37 Minn. 63, 33 N. W. 33, since decided by this court, it is now settled that a deed of lots according to this plat would cover all the land down to the creek, under the rule that distances must yield to natural boundaries

called for in a deed. We are unable to see that this case differs in principle from Perkins v. Trinka, 30 Minn. 241, 15 N. W. 115, and Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377. It is unnecessary to enter into any discussion of the question (left in great confusion in the books) when, if ever, relief will be granted on the ground of mistake in law alone, or whether there is any difference between mistake of law and ignorance of law, or between ignorance or mistake as to a general rule of law and ignorance or mistake of law as to existing individual rights in the property which is the subject matter of the contract. We hold that money paid under mistake of law cannot be recovered back where the transaction is unaffected by any fraud, trust, confidence, or the like, but both parties acted in good faith, knew all the facts, and had equal means of knowing them, especially where, as was evidently the fact in this case, the transaction was intended to remove or settle a question of doubt as to title. It would be impossible to foresee all the consequences which would result from allowing parties to avoid their contracts in such cases on the mere plea of ignorance or mistake of law affecting their rights. It would be difficult to tell what titles would stand, or what contracts would be binding, if grantors and grantees were at liberty to set up such a plea. This may seem to work inequitably in the present case, but more mischief will always result from attempting to mould the law to what seems natural justice in a particular case than from a steady adherence to general principles. Order reversed.

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## WATSON v. MARSTON.

(In Chancery, 1853. 4 De Gex, M. & G. 230.)

This was the appeal of the defendant, a mortgagee, who had contracted to sell freehold property comprised in her security, and against whom Vice-Chancellor Stuart had made a decree in a suit instituted by the purchaser, directing the specific performance of the contract, and also directing that the conveyance should be made by the defendant under a power of sale contained in the mortgage.

The question was whether the plaintiff was entitled to a conveyance in that form or must take the title under a decree for foreclosure. * * *

THE LORD JUSTICE TURNER.[64] The plaintiff has filed this bill to enforce the specific performance of an agreement entered into under these circumstances: The defendant was originally a mortgagee of the estate, and had obtained in 1850 a decree for foreclosure. Whether the equity of redemption was regularly or completely foreclosed may be open to question. It may be that the title under the decree could not be enforced upon a purchaser.

[64] The statement of facts is abridged and part of the opinion is omitted.

The contract for purchase, however, contained this clause:

"The vendor being a mortgagee with power of sale will only enter into the usual covenant that she has not incumbered."

That, no doubt, imported that the defendant did contract, in the character of mortgagee with a power of sale. The question which we have to consider is, whether the agreement containing these words is to be enforced against her by directing a conveyance under the power. It is clear, if the evidence is correct, that the agreement was entered into by the defendant under the impression that the surplus after payment of her debt was to be her property, for which she was to be under no liability to account. And I do not see that there is any evidence to displace that view, or to show that Mr. Fisher was in any way aware that the effect of the insertion in the contract of the clause in question would place the defendant in the position of being liable to account to the parties interested in the equity of redemption for the surplus.

Now relief by way of specific performance is always within the discretion of the Court. This discretion is of course to be exercised carefully. Specific performance is not to be withheld merely upon a vague idea as to the true effect of the contract not having been known. But, upon the evidence in this case, I think that, although there may have been an intention to complete under the mortgage title, there was no impression on Mr. Fisher's part that the effect would be to convert the defendant into a trustee of the surplus for the mortgagors. He may have intended that the purchase should be completed under the power; but it clearly was not his intention to deprive the defendant of the benefit of the foreclosure. * * *

It was insisted that the foreclosure was as much opened by the agreement to sell under the power as it would be by a conveyance. I am by no means satisfied that this was the case. I do not think that by reason of the inadvertent introduction of the clause relied upon, it would be competent to the mortgagors to insist that the foreclosure was opened. To dispose of that question, it would be necessary to see under what circumstances that stipulation found its way into the agreement. Now, it appears upon the evidence that the clause was copied from the draft of another contract which had been prepared before the decree for foreclosure had been made, and that, being thus transcribed from one draft into the other, it was overlooked and allowed to remain, although the vendor had between the preparation of the two acquired the absolute fee. It is stated in the evidence that no discussion took place till after the engrossment of the agreement; and that at the time of the preparation of the draft, the defendant believed that she was the absolute owner of the property, and was prepared to sell, and intended to sell, as the absolute owner, having obtained the decree with that object. It appears that she did not consider that she was any longer liable to account. Under these circumstances, I think we should

not be justified in depriving her of the benefit of any right she may have against the mortgagors.

Our refusal to direct a specific performance is not the exercise of an arbitrary discretion; but being satisfied that the circumstances of the case bring it within the rule to be deduced from former decisions, we think that the bill must be dismissed, unless the plaintiff will accept the conveyance which the defendant is ready to execute.

THE LORD JUSTICE KNIGHT BRUCE concurred.

June 4. The case stood over for the plaintiff to consider whether he would take the title under the foreclosure, and it is believed that ultimately terms were arranged for the completion.

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## STONE v. GODFREY.

(In Chancery, 1854. 5 De Gex, M. & G. 76.)

This was the appeal of the plaintiff from a decree of Vice-Chancellor Stuart, dismissing a bill whereby the plaintiff sought to be relieved against a settlement on the ground of mistake. The case is reported by Messrs. Smale and Giffard, volume 1, p. 590, where the facts are fully stated.[65] * * *

THE LORD JUSTICE TURNER. The plaintiff in this case, in effect, asks of the Court to raise a trust for his benefit upon the legal estate vested in the defendant; and he asks this relief upon the footing of an equitable title, which accrued to him in the year 1824.

The ground on which he founds his title to this relief is, that in the year 1826 he was erroneously advised that his equitable title could not be maintained; and I assume that the advice so given to him was erroneous; and that this Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact. When, however, parties come to this Court to be relieved against the consequences of mistakes in law, it is, I think, the duty of the Court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done. Parties may be erroneously advised as to the law, but they may be told on what circumstances the question of law depends, and in what mode it may be tried, and they may determine that (whether the advice which they have received be well or ill founded) they will give up the question in favour of the party with whom it arises. Cases of this nature, therefore, require the most careful examination, and particularly when they arise between parent and child.

These considerations have led me to look very carefully into the facts of this case, and upon examining them I am satisfied that this plaintiff, having been made aware of the question on which his title depended, determined to waive it in favour of the defendant, his child.

[65] The statement of facts is abridged.

In the first place, the opinion on which he acted was thus expressed: [His Lordship read it.] So that opinion (although it advises him he has not the estate by the curtesy) tells him that it depends on the question whether the possession of the tenants or of the trustee is to be considered as the possession of the wife; and in a farther part of the opinion it is intimated that, if he persists in his claim, he must be made a defendant to the suit. In that state of circumstances, and having been so advised, he became the next friend of his daughter in a suit instituted by her for the purpose of asserting her title, to the prejudice of his own title; and in the year 1830 a decree was made declaring the rights of the plaintiff, and that she was entitled in fee, as from the death of the mother; displacing, therefore, the estate by the curtesy in him. In the year 1833 he presented a petition, and upon the hearing of that petition, and of the cause on further directions, he obtained an order for the payment of the rents to him for the daughter's maintenance during her minority. The original decree had directed a partition of the estates. A partition was made, and was to be carried into effect by a conveyance to be executed by the trustee. That conveyance was thus framed: A term of years was limited to him during the minority of the daughter in trust to dispose of the rents as the Court of Chancery should think fit, or otherwise for the maintenance and benefit of the daughter. In the course of preparing that conveyance, the gentleman who was instructed to prepare it, an eminent conveyancer (Master Senior, then at the bar), intimated an opinion that Mr. Stone was entitled to an estate by the curtesy, and that opinion was communicated to him. It is said, however, that there was communicated to him a retractation of that opinion. The allegation in the bill appears to me to be that the communication which was made to him was the communication of the written opinion given by Mr. Senior. But, whether the further opinion was or not communicated to him, beyond all doubt the fact of the opinion having been given, and the fact of the retractation of the opinion (if he knew it), distinctly brought to his mind the question of his title. He entered into possession, nevertheless, under these trusts, and, acquiring possession under a trust created for the benefit of the daughter, he thinks it right, after the determination of the term under which alone he has acquired the possession, to retain it. It is impossible for a person who has acquired possession of an estate under a trust for the benefit of another to be permitted to set upon that possession as adverse to the other. It was his duty, if he meant to claim adversely to the daughter, to have given up possession of the estate, and to have then set up his claim after he had redelivered possession. In the year 1843 the daughter attained twenty-one. No step was taken by the plaintiff to disturb the title of the daughter; no allegation was set up of any mistake having been made by him; no intimation that he in any way disputed her title. In the year 1847 she married. No question was then raised by him, that I can find, upon her title to this estate. On the contrary, I find it dis-

tinctly stated in the affidavits, on the part of the defendants, and not, that I can find, contradicted on the part of the plaintiff, that after the marriage, upon the occasion of Mr. Stone going to visit his daughter, he made a positive promise that he would account to her in respect of the rents of the estate. It was not until he was leaving the house of his daughter that any claim was made by him on his own behalf.

Under these circumstances I think it clear that Mr. Stone had deliberately determined not to set up the title against the daughter, and that it would be great injustice now to permit him to do so.

In determining the case upon this ground, I desire to be understood as not intimating any opinion that the plaintiff could have succeeded if the case had been more favourable to him in the point of view to which I have referred. On the contrary, I think that the length of time, coupled with the circumstances of the case, would have been sufficient to bar his claim. Some useful observations on that point are to be found in Lord Redesdale's judgment in Cholmondeley v. Clinton, 4 Bligh, 35.

My opinion, therefore, upon the whole clearly is, that this appeal must be dismissed with costs. Perhaps if I had had to deal with the case originally, I should have been of opinion that the bill should also have been dismissed with costs; but being very reluctant to interfere with the discretion of the learned Judge on the subject of the costs, and finding in the note of what passed at the hearing that there was a disclaimer on the part of the defendant of any intention to demand costs, as these costs have not been given by the decree, I think the justice of the case will be satisfied by dismissing the appeal with costs.

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## TWINING et al. v. NEIL et al.

(Court of Chancery of New Jersey, 1884. 38 N. J. Eq. 470.)

On petition by the complainant in foreclosure proceedings to compel the purchaser at a sale made by the sheriff to complete his purchase.

BIRD, V. C. There is no dispute as to the facts in this case. Walker attended the sale and bid $1,150 for the land offered by the sheriff, paid $125, the amount of the percent. of the purchase-money required by the conditions, and signed the conditions. He made no inquiries respecting the title or encumbrances. He examined the property, or was so well acquainted with it that he estimated its fair value before attending the sale. On the day fixed by the conditions for delivering the deed and the payment of the balance of the purchase-money, he employed counsel, and soon learned that the lot which he had bid was encumbered by a mortgage prior to the one on which the foreclosure proceedings rested, and by a tax assessment equal to the full value thereof.

Walker, upon such information, filed his petition in this court, and asked to be relieved from his bid and for an order directing the sher-

iff to refund to him the deposit-money. The court refused to aid him, on the principles laid down in Hayes v. Stiger, 29 N. J. Eq. 196, Seymour v. Delancy, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270, Dillett v. Kemble, 25 N. J. Eq. 66, and Haggerty v. McCanna, 25 N. J. Eq. 48.

And now the complainant comes with his petition and asks the court to compel Walker to pay the amount of his bid. Ought the court to do so? Walker is a plain business man, but little acquainted with the rules of law and the legal methods necessary to be pursued to protect the dealer in real estate. The purchase in this case was made in the most indifferent manner, if not the most negligent; certainly, such conduct in many would be regarded as gross negligence. But shall such indifference or negligence enure to the benefit of the complainant? Shall the court aid him in reaping large advantages from the ignorance (through negligence) of Walker? It is true the law calls such ignorance negligence; but is there no defensive relief in equity? In such case shall this court be more exacting than a court of law? In such case a court of law would pronounce its judgment upon the verdict of a jury; and a jury would assess such damages only as the plaintiff should prove he had actually sustained. Most clearly no jury would go beyond the value of the equity of redemption and costs. Now I am satisfied that the value of the equity of redemption in this case, if anything, was merely nominal. I am as well satisfied that had Walker known the truth, his bid would have been merely nominal, if anything. With such convictions on the mind of the court, is it, nevertheless, the duty of the court to say to Walker:

"You bought at your peril and this court must exact of you, as the just penalty of your ignorance and carelessness, the whole amount of your bid?"

I think not. The guide is not in the words of the rule but in the spirit. Guided by the spirit of the rule, courts of equity often decline to enforce contracts. Parties are left to their remedy at law. If a bargain appears unconscionable this court never enforces it, unless third parties become interested. The court is permitted to exercise its discretion. It is not simply that a bargain is a hard one, but that it is so unequal and unjust as to shock the mind. The following authorities show that courts do not enforce every purchase and also the principle which influences them: Rodman v. Zilley, 1 N. J. Eq. 320; Ely v. Perrine, 2 N. J. Eq. 396; Crane v. De Camp, 21 N. J. Eq. 414; Malins v. Freeman, 2 Keen, 25.

I think, also, that there are cases which sustain me in refusing the aid prayed for by the petitioner. Post v. Leet, 8 Paige (N. Y.) 337; Alvanley v. Kinnaird, 2 Macn. & G. 1; Leslie v. Thompson, 9 Hare, 268; Manser v. Back, 6 Hare, 443; Malins v. Freeman, 2 Keen, 34. Sugd. Vend. & Pur. vol. 1, 364, *310, says when fraud and misrepresentation do not appear, but the estate is a grossly inadequate consideration for the purchase-money, equity will not relieve either party. See, also, Seymour v. Delancy, 3 Cow. (N. Y.) 445; Mortlock v. Buller, 10 Ves. 292.

It is important to observe that the complainant has his remedy at law, which fact has always entered into the consideration of courts of equity. Nor, in this case, must it be forgotten that the complainant, by the conditions of sale, has secured the whole of the deposit-money, which is, as I believe, from the testimony, so much, at least, more than the equity of redemption is worth. In concluding, I think I should distinctly state that, in my judgment, this method of relief is purely defensive; it is not a new doctrine; nor is it in conflict with a single authority which I have had my attention called to in this state; but is distinctly recognized by the chancellor at the close of his opinion, in Haggarty v. McCanna, supra. This view of the case works no injustice to the petitioner, who is also the complainant in the cause. He has the deposit-money. He has the equity of redemption still, precisely what he had at first. Is it said that it may have declined in value? If so, a jury can determine how much, determining such damage as well as every other.

I think the prayer of the petitioner should be denied, and will so advise, but without costs.

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## V. Misrepresentation and Fraud

### MEMPHIS KEELEY INSTITUTE v. LESLIE R. KEELEY CO.

**(Circuit Court of Appeals of the United States, Sixth Circuit, 1907. 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. [N. S.] 921.)**

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

COCHRAN, District Judge.[66] This is the second appeal of this case. The first appeal was dismissed, and the opinion then delivered is reported in 144 Fed. 628, 75 C. C. A. 430. A reading thereof will disclose the ground of the dismissal and the nature of the controversy involved in the case. In brief, the first appeal was dismissed because the decree appealed from was not final. It was a partial dismissal of the bill. It did not dismiss the bill entirely, but only one branch of the controversy raised by it, and that a subordinate one. On the return of the cause to the lower court, it disposed of the whole controversy by a final decree. It receded from the position taken on the former hearing that the contracts between the appellee and the appellant Memphis Keeley Institute had been abandoned and rescinded before suit brought, because of which said partial dismissal of the bill, to wit, in so far as it sought a cancellation of said contracts, was made, and granted appellee the full relief which it sought. It enjoined the appellants from claiming that they had a right to, and were, in fact, administering Keeley remedies at the Memphis Keeley Institute, and ad-

[66] Parts of the opinion are omitted.

judged a cancellation of said contracts and delivery up to appellee of the Keeley remedies in possession of the appellants on their being reimbursed the price paid for same. It is from this decree that this appeal is taken.

The main ground upon which appellants claim that the decree of the lower court should be reversed is that the appellee did not come into that court with clean hands, and therefore was not entitled to the relief it sought and that was granted to it. The position that it did not so come into court is undertaken to be maintained in this way. The business in which the appellee is engaged, to wit, administering, and selling to be administered, what are known as "Keeley remedies" for the opium, liquor, and tobacco habits and neurasthenia, and which was sought to be, and by the decree is, protected from injury and invasion by appellants, has been built up and is being maintained by certain fraudulent misrepresentations. This position was urged on the lower court, and it was claimed that because of it the bill should be dismissed. But it refused to so hold and, as stated, granted appellee full relief. This it did for two reasons: One was that the evidence did not establish the position that appellee's business had been built up and was being maintained by any such misrepresentations. The other was that, even if it did, that fact was not against appellee's right to relief. We will dispose of these two reasons in the order stated. The alleged fraudulent misrepresentations relied on are quite numerous. The main one is that gold is the principal ingredient and effective agent in said remedies. We will limit our consideration to this alleged fraudulent misrepresentation, because we are constrained to hold that the claim of appellants in regard thereto is made good by the evidence.

It is not disputed that appellee represents to the public that gold is the principal ingredient and effective agent in its remedies. So distinct, repeated, and emphatic has been and is its representation to this effect that it must be held that its business has been built up and is being maintained by this representation. The name which it has given its remedies, and by which they are known, is the "Double Chloride of Gold Cure." There is no such substance as the "Double Chloride of Gold." There is a chloride of gold and a chloride of sodium. The claim was that these two substances were ingredients of the remedies, and to voice the claim the short form, of "Double Chloride of Gold" was adopted. It was intended to designate that the remedies contained the two chlorides of gold and sodium. This name is printed upon the labels on the bottles containing the remedies, and is used in the circulars and other means used to advertise the business. The remedy for neurasthenia is called "Gold Neurotine." To emphasize the claim as to the existence of gold in the remedies and its importance, the prominent portion of the lettering on the labels on the bottles is in gold. They contain a picture of the globe with a belt around it encircled by the words, "We belt the world," and on the belt are these words, "Gold cure for opium habit, gold cure for drunkenness, gold cure for neu-

rasthenia, gold cure for tobacco habit"—all in gold. The labels contain this statement, to wit:

"Gold is especially beneficial in its action on the mental forces. It gives the patient courage, hope, and renewed will power; and is the only medical agent that will effectually and forever relieve all craving or necessity for alcohol in any form. The remedy can in no way act injuriously on the patient."

* * * * * * * * *

The sole question at issue in regard to this representation is as to whether it is a misrepresentation and fraudulent; i. e., intended to mislead and deceive the public. If it is untrue and known to be so, the rest follows.

The record contains positive evidence to the effect that it is untrue and known to be so. It contains no affirmative evidence that the representation is true. * * *

This brings us to the other reason, why the lower court refused to give any effect to the position that appellee's business had been built up and was being maintained by fraudulent misrepresentations. It was that, even if this was true, it was not against appellee's right to relief. But, before considering just how this was attempted to be made out, it is to be noted that this court has heretofore held that a court of equity should not protect against injury or invasion a business of selling a medicine which has been built up and is being maintained by fraudulent misrepresentations as to its ingredients, and this on the ground that a suitor in equity should come into court with clean hands. This it did in the case of Fig Syrup Co. v. Stearns, 73 Fed. 812, 20 C. C. A. 22, 33 L. R. A. 56. That was a suit by a manufacturer of a liquid laxative medicine, to which he gave the name "Syrup of Figs" or "Fig Syrup," to enjoin another from interfering with his business by unfair competition. It was held that it was not entitled to the injunction because it falsely and fraudulently represented to the public that the juice of the fig was the important medicinal agent in the composition of the medicine, when, in fact, just a suspicion of fig juice was put into it not for the purpose of affecting its medicinal character or even its flavor, but merely to give a weak support to the statement that the article sold was syrup of figs, and the laxative agent in it was senna. This was so held notwithstanding there was much evidence introduced showing that it was a very useful medicine and prescribed by physicians of high standing. Judge Taft said:

"This is a fraud upon the public. It is true, it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of and is dependent upon such deceit."

The case was subsequently approved and followed by the Supreme Court in the case of Worden v. California Fig Syrup Co., 187 U. S. 519, 23 Sup. Ct. 161, 47 L. Ed. 282.

The case we have here comes clearly within the holding in these

two cases. The ground upon which the lower court held that the fact that appellee's business may have been built up and grown out of fraudulent misrepresentations to the public was not in the way of its right to the relief it sought was substantially this: A dismissal of the bill for that reason would aid the appellants in practicing the very same fraud upon the public that it is claimed that appellee is practicing, and would therefore put the court in an inconsistent position. The way in which it was thought that such a dismissal would have this effect was that it would amount to an adjudication that the appellant Memphis Keeley Institute had a valid subsisting contract with appellee, and thereby enable it to obtain remedies from appellee to administer to patients. But such a dismissal could not possibly have any such effect. It would not be an adjudication as to the rights of the parties as between themselves. It would be a direct refusal to make any such adjudication. And a court of equity will not aid a plaintiff who comes before it with unclean hands, even though by not doing so it deprives itself of the opportunity to prevent the defendant from doing the unclean thing, and thus may be said to indirectly aid the defendant in so doing. In the Fig Syrup Case the defendant was taking plaintiff's business by unfair competition, and was practicing the very same fraud on the public, because of which the court refused to aid plaintiff, yet the court did not stop him from so doing by granting plaintiff injunctive relief, but turned the plaintiff out of court.

Counsel for appellee cites and relies on a number of cases which hold that a court of equity will not turn out of court an unclean man, or a man who has done an unclean thing which has no relation to the thing which it is sought to have protected by its decree. But such decisions have no application here. The uncleanness here has to do with the very thing which the court is asked to protect and prevent from injury and invasion by appellants. The appellee claims to have the right to administer and to sell for administration, in the state of Tennessee, its Keeley remedies, and that appellants are injuring that right and invading its business by asserting that it has the right to and is in fact administering such remedies at the Memphis Institute, and asks the court to protect its right and business from such injury and invasion by enjoining appellants from so claiming, canceling the contracts, and requiring a delivery up of the remedies held by appellant. But that business—the very thing which the court is asked to protect—is, as we have held, unclean in the particular stated. Hence it is a clear case within the rule that a court of equity will not aid one who comes before it with unclean hands.

It should be noted, however, though it is not relied on either by the lower court or by appellee's counsel here, that the fact in regard to appellee's fraudulent misrepresentations, as we have adjudged it, was not set up by appellants in their answer as a defense to the suit. This presents the question whether, in the absence of its having been so presented, any effect can be given to it. It seems to be well settled that

such a matter need not be pleaded as a defense to the suit. If it appears from the record, it will be given effect notwithstanding it has not been pleaded. The theory upon which this is done is that in reality it is not a matter of defense. It is given effect to, not on defendant's account, but because of the public. As said by the Supreme Court of Tennessee in the case of Simmons Med. Co. v. Drug Co., 93 Tenn. 99, 23 S. W. 169:

"It is not strictly speaking a defense at all, but rather an interposition by the court to discourage fraud and wrong upon the public."

The following decisions lend support to and uphold this doctrine: Fetridge v. Wells, 13 How. Prac. (N. Y.) 385; Cardoze v. Swift, 113 Mass. 250; Dunham v. Presby, 120 Mass. 285; Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397; Teoli v. Nordrill, 23 R. I. 87, 49 Atl. 489; Mass. Nat. Bank v. Shinn, 163 N. Y. 360, 57 N. E. 611.

In view of the holding that we have made as to this matter, it is not necessary that we consider any other question raised and discussed on the appeal.

We feel constrained, therefore, to adjudge that the decree of the lower court be reversed, and the cause remanded thereto, with directions to dismiss the bill.

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## HOLMES' APPEAL.

(Supreme Court of Pennsylvania, 1874. 77 Pa. 50.)

PER CURIAM.[67] When the treaty between the parties for the exchange was in progress, both Heckler and his wife were anxious to know whether ague and fever existed in the vicinity of the Indiana farm, and inquired of Holmes as to the fact. He represented that none existed, and that the health of that locality was good in this respect.

The facts show clearly that this was a misrepresentation on his part. It is evident Heckler and his wife made the absence of that disease a material ground for accepting the offer of Holmes. Now clearly, equity, under such circumstance, will not compel a man thus misled to perform specifically a contract of exchange at the risk of his health and that of his family. Even had there been no misrepresentation on Holmes' part, it would be doubtful whether a chancellor would compel specific performance against one who was ignorant of the fact; but when this conduct of the plaintiff is added, there can be no hesitation. The other question does not necessarily arise under this view of the case. Decree affirmed with costs, to be paid by the appellant, and the appeal dismissed.

[67] The statement of facts is omitted.

## COX v. MIDDLETON.

(In Chancery, 1854. 2 Drew. 209, 61 E. R. 699.)

This was a suit for specific performance. The general case made by the Plaintiff was this: that, being possessed of a certain leasehold house and appurtenances for a term of years, he entered into a verbal agreement with the Defendant for the purchase of it; and a lease was actually prepared, approved by the Defendant and executed by the Plaintiff, and tendered for execution to the Defendant. That the Defendant refused to complete that agreement, and afterwards a fresh agreement in writing was entered into and signed by the Defendant. The Defendant afterwards refused to complete that agreement, on the ground that misrepresentations were made to him as to the state of the premises, and he now resisted it at the Bar, on the ground that the agreement was not sufficient within the Statute of Frauds, and on the ground of the misrepresentations. * * *

The following facts are material to the claim of misrepresentation:

Defendant signed a memorandum as follows:

"Mr. Middleton agrees to pay £625 for the cottage and stable, Mr. Cox paying the expenses of the lease held by Mr. Smith. H. Middleton.
"December 4th, 1852.
"Witness: John Newman."

On the 24th December, 1852, the following letter was sent by Mr. Middleton's solicitor to Mr. Holt:

"7 Whitehead's Grove, December 24th, 1852.

"Sir: (Middleton and Cox.) I regret to state that an obstacle has occurred to the further carrying out of this arrangement for the present. The premises were represented by Mr. Cox as substantially and well built, and on that representation Mr. Middleton treated for the purchase of them. His attention having however been called to their construction, he has had them surveyed by Mr. George Handford, of this neighborhood, and much to his disapprobation learns that they are seriously defective. Mr. Middleton however is desirous of doing what is right in the measure, and if Mr. Cox will remedy the defects pointed out in Mr. Handford's report (a copy of which I beg to enclose) to Mr. Handford's satisfaction, he will still carry out the purchase. Requesting you to consider this letter without prejudice, I am, Sir, yours very obediently. H. Whitehead.
"To Charles Holt, Esq.,
"93 Guildford Street, Russell Square."

To this the following reply was immediately returned:

"93 Guildford Street, 24th December, 1852.

"Sir: (Cox and Middleton.) Your client, for the purpose of making a better bargain for himself, shuffled off a verbal agreement and made a written one with Mr. Cox, and he, through you, now attempts to impose upon Mr. Cox by saying that the premises were represented as otherwise than they are. Mr. Middleton was quite aware of the condition of the buildings long before he made his written agreement with Mr. Cox. Unless I hear from you (before the opening of the Chancery Offices) and receive the draft lease back approved, I shall file a bill without further notice.
"Yours most obediently, Charles Holt.
"To H. Whitehead, Esq.,
"7 Whitehead's Grove, Chelsea."

* * * * * * * * * *

THE VICE CHANCELLOR [SIR R. T. KINDERSLEY].[68] * * * The Plaintiff in his letter does not go on to say that the premises were in repair, but that the Defendant knew their conditions. * * *

It is clearly, in my opinion, established that the Plaintiff did represent, on many occasions before the contract, that the premises were substantial and well built, and were, in fact, built for the Plaintiff's own use. But then it is said that, if the Defendant had taken the pains to look, he might himself have seen what was the state of the premises. But this is a suit for specific performance; and in such a suit it is not an answer to the fact of the Plaintiff having made false representations to say the defendant was imprudent. If the case stood on this ground only, I should refuse specific performance. If a plaintiff comes here and asks relief; asks this Court to assist him in what is not the assertion of a strict legal right, but to assist him on grounds standing on the peculiar jurisdiction of this Court, he must shew that his conduct has been clear, honourable and fair. If he has been guilty of misrepresentation this Court will leave him to his remedy, if any, at law. On both grounds, the bill must be dismissed with costs.

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## HIGGINS v. SAMELS.

(In Chancery, 1862. 2 Johns. & H. 460.)

This was a bill for specific performance of an agreement to take a lease of a field for the purpose of quarrying limestone.

The plaintiff was the owner of a field under which was a bed of limestone, which had never been opened from the plaintiff's field, though a quarry had been opened in an adjoining field, and lime procured which was not of first rate quality, and had been tried and rejected by a railway company when a station in the neighbourhood was being built.

The plaintiff, being ignorant of this fact, and having no experience in judging of limestone, on being told by the defendant that the lime would be useless to him unless fit for the London market, represented to him that the limestone would produce lime of first-rate quality, fit for the London market. According to the evidence, the phrase "fit for the London market," would be understood in the trade as signifying lime of the best quality. It appeared also that the rejection by the railway company of the lime from the neighbouring quarry was a fact which might easily have been ascertained on inquiry as to how that lime had turned out. The defendant after this conversation made a cursory inspection of the quarry in company with the plaintiff and two friends of his own; but it did not appear that any of these persons were competent to judge, by inspection, of the quality of the stone for

[68] The statement of facts is abridged and part of the opinion is omitted.

the purpose of lime-burning, the plaintiff being a corn-dealer, and the defendant a lime-dealer but not a lime-burner.

Shortly afterwards, the defendant signed an agreement dated the 11th of June, 1860, for a lease, at a rent of £50 per annum, to be proportionally increased if more than one tenth of the surface of the field was opened. The defendant subsequently ascertained that the limestone would not suit his purpose, and declined to accept a lease, on the ground that the stone was not such as had been represented to him. The plaintiff thereupon filed this bill for specific performance.

Evidence was gone into at some length as to the particulars of the conversations and the inspection of the adjacent quarry, the result of which is stated in the judgment of the court.

VICE-CHANCELLOR SIR W. PAGE WOOD.[69] This is a contest which comes very close upon the boundary that divides cases where the court grants specific performance, from those in which it holds its hand on the ground of misrepresentation. * * *

Upon this evidence I must hold, that in the first instance a representation was made which went beyond the sort of puffing or speculative commendation which is held excusable in a vendor. Either party might have inquired what had been done with the lime procured from the quarry in the adjacent field, and whether it had proved to be fit for the London market; and it is clear from the evidence now given, that, if any such inquiry had been made, there could have been no difficulty in discovering what the facts really were. These circumstances, I think, distinguish the case from the class of which Scott v. Hanson, 1 Sim. 13, is a commonly quoted example, where it was held that the description of a field as an uncommonly rich water-meadow, when it was, in fact imperfectly watered, was too vague a representation to justify the inference that the purchaser relied upon it. The representation here is different, for it assigns a definite quality to the lime by describing it as fit for the London market. Neither can it be regarded as a merely speculative representation.

The strongest authority in favour of the plaintiff upon this point is Jennings v. Broughton, 5 D., M. & G. 126, which was a bill seeking relief against a purchase of shares in a mine on the ground of misrepresentations of the character of the mine. L. J. Turner in his judgment, after referring to a representation that in a particular level the lode showed a body of solid ore resting on the vein, three feet wide, largely intermixed with lumps of ore and calamine, and continuing to maintain the same width and characteristics to the extent of the workings, being seventeen yards further, says:

"I find no evidence to warrant this statement. * * * But to say that these statements in the report were not well founded, is one thing; to say that the plaintiff was deceived by those statements, or was induced by them to purchase these shares, is another thing. Looking at the character which the plaintiff gives of himself, and which is given of him by his witnesses, I think it impossible to believe that he could have been at all induced to pur-

[69] Parts of the opinion are omitted.

**chase these shares by the statement of there being lumps of calamine in this level. And with respect to the lode continuing to maintain the same width and characteristics, the plaintiff was twice at the mine, once before he purchased any shares, and the second time in the interval between his two purchases; and however ignorant he may be of mining, he must at least have been capable of seeing whether the vein had or had not been laid open behind the point where the solid ore was presented to his view. If it had, he must have known what were its characteristics. If (as was the fact) it had not, he must have known that this statement could only be matter of speculation, and not of certainty."**

That is, undoubtedly, very strong. There was a distinct representation of an alleged fact; but that was followed by an examination of the mine, which, according to the view taken of the evidence by the court, must have shown that the representation was really matter of speculation.

Applying the same principle of law to the peculiar facts of the present case, I hold, first, that there was a definite representation; and, secondly, that the examination (conducted as it was by a lime dealer or stone mason and a gentleman who seems to have been something of a chemist and something of an architect) was not such as to show that the previous representation must have been merely speculative. If it ought to be looked upon as a mere speculative statement about the quality of the lime, my judgment should be for the plaintiff; but I cannot come to this conclusion. The quarry had actually been worked, and the lime had been tried in the neighbourhood. The quality was not matter of speculation, but matter of fact, which could easily have been ascertained. The information was at hand, which would have satisfied both parties to the treaty that the lime was not of the quality which the defendant required. * * *

In applying the law to the facts of this case, I give entire credit to the plaintiff's assertion that he knew nothing about the quality of lime; and he has not been asked whether he was aware that the lime obtained from the quarry in the next field had proved a failure. I assume, therefore, that he knew nothing of the matter. But he admits that he knew the lime would be useless to the defendant unless it was fit for the London market, and, therefore (knowing nothing whatever about it), he took on himself to say that it was fit. Up to this point, therefore, the matter is clear, and all that remains is to ascertain whether the defendant acted in reliance on this statement. That he relied solely upon it cannot, I think, be said; but he undoubtedly did rely, to a great extent, upon it. What weighs upon my mind is the circumstance that the quality of the lime was not a mere subject of speculation, but a fact which the plaintiff (without any special familiarity with the business) could have made himself acquainted with. He knew the quarry in the adjoining field had been worked; and if he meant to deal with entire fairness, he ought—before making the representation that the lime was of the desired quality—to have made the obvious inquiry, what became of the lime that had been obtained from it? Instead of doing so he makes a representation in order to secure

a contract, without taking the trouble to inform himself what the truth was.

It is true that the defendant did not rely exclusively upon this statement, because he did go to look at the stone; still his trade was not that of a lime burner; and he cannot be supposed to have trusted merely to what he saw, he really knowing nothing of the quality of limestone.

Under all the circumstances, the case does not appear to me to be one in which this court ought to interfere by decreeing specific performance; but it is not necessary to decide the nice question, whether the contract is valid or not.

There was a distinct representation of fact which the plaintiff, though he did not believe it to be false, made without seeking the further information which was within his reach, and which would have shown him that the statement was not true. After this, notwithstanding the inspection made by the defendant, it would not be right for this court to enforce performance.

The bill will be dismissed, but without costs.

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## LORD BROOKE v. ROUNTHWAITE.

**(In Chancery, 1846. 5 Hare, 297.)**

A bill for the specific performance of a contract. The property was offered for sale at the Auction Mart, London, in July, 1844, and was described as follows:

"Particulars of the residue of the late Lord Monson's estates in Lincolnshire, devised to be sold, comprising Ingleby Wood, with upwards of sixty acres of fine oak timber-trees, the average size of which approaches fifty feet; and also a quantity of ash poles, from ten to twenty years' growth."

The particulars of sale then pointed out the facilities which existed for bringing the timber to market; and the description of the lot to which the question in this cause related, was as follows:

"Lot 1 consists of Ingleby Wood, which contains sixty-five acres two roods and twelve perches of growing timber, chiefly oak and ash poles. It is at present in hand, and the only outgoings are £1. 7s. 3d. land tax, and parish rates £1. 15s."

By the ninth condition of sale, which was the only condition material to the question, it was provided as follows:

"If, through any mis-statement, any error should arise in this particular, the same shall not vitiate the sale; but the purchaser shall take or make adequate compensation, in proportion to the purchase-money, as the case may happen; such compensation to be settled by the referees, or their umpire, to be appointed in the usual manner."

The defendant, by his agent, was the highest bidder for lot 1, at the price of £4,725; and, by letter, promised to pay the deposit of £10 per cent. and the auction duty in ten days. After the specified time had passed, the defendant proposed to pay a moiety of the deposit, and

the rest at the end of a month, and to allow the residue of the purchase-money to remain on the security of the estate. The plaintiff offered to agree to the former, but not to the latter term. The defendant afterwards refused to complete the purchase.

The bill prayed a decree for specific performance of the contract; and that, in case it should appear that any abatement out of the purchase-money ought to be made on the ground of error or misdescription of the premises, the amount of such abatement might be determined by the court.

The answer of the defendant objected to perform the contract, on the ground, as was alleged, that the average size of the trees in Ingleby Wood did not approach fifty feet, and did not amount to more than about twenty-two feet; that the value of oak timber of the larger was very much greater than of the smaller size; that, from the season of the year before the purchase, there was no opportunity for the inspection or examination of the wood; and that the defendant's bidding had been founded entirely on the representation made by the plaintiff in the particulars of sale.

The evidence for the plaintiff went to show, that the timber-trees in Ingleby Wood were of the average size of thirty-four feet six inches each, reckoning those only to be timber-trees which contained at least ten cubic feet of wood; and the witnesses deposed, that, according to the custom of the trade, a timber-tree should contain that quantity. The witnesses for defendant deposed, that there were a much larger number of timber-trees in the wood, including in that description (as they alleged should be included) all trees containing five cubic feet and upwards; that the effect of this computation was to reduce the average size to twenty-two feet each, and to reduce the value of the timber per foot in nearly the same proportion; for, if a tree containing fifty feet was worth three shillings per foot, a tree of twenty-two feet would be worth only two shillings per foot. * * *

THE VICE-CHANCELLOR [SIR JAMES WIGRAM].[70] * * * If, however, there has been a misrepresentation, I cannot refuse the defendant the benefit of that ground of defence, either in the way of compensation, or of a decree dismissing the bill,—merely upon such a speculation. * * * This is a case in which it is impossible to give compensation.

If, however, the court is not able to see that the purchaser is damnified to a definite extent, capable of being ascertained, it may still be right to say that the vendor is unable to give the purchaser that which he promised; and if so, the court may properly refuse to enforce the contract, though it cannot modify it by directing it to be performed with compensation. I agree that an indefinite representation by a vendor ought to put a purchaser upon inquiry; but a definite representation upon a point affecting the value of the subject of sale will entitle

[70] Parts of the opinion are omitted.

the purchaser, if the representation be untrue, to resist the specific performance of the contract. This appears very distinctly from Trower v. Newcome, 3 Mer. 704, Stewart v. Alliston, 1 Mer. 26, and Fenton v. Browne, 14 Ves. 144. Now, the sale in this case took place at a time of the year when the wood could not be viewed. I think, therefore, the representation made must, as against the vendor, be taken as a definite representation that the vendor knew the timber in the wood approached an average size of fifty feet. Was this representation untrue, and the defendant thereby deceived? and if so, can I treat it as immaterial on the ground before alluded to, that the particulars of sale contained no representation as to the quantity of timber in the wood? This, I think, I ought not to do, though I acknowledge there is difficulty in the opposite conclusion. If the wood had consisted wholly of young timber-trees, it could not successfully have been contended that it was what the purchaser had contracted for, for the timber might be useless for years to come; though it might be difficult to say what degree of difference would be enough to vitiate the sale.

The question, then, is, whether the representation was untrue or not. The witnesses for the plaintiff and defendant differ greatly, owing to the different modes in which they ascertain the quantity of timber,—one taking into account trees containing five cubic feet, and the other only those that contain ten. But the plaintiff states that thirty-five feet is the highest average; and he admits that the particulars of sale would have been more correct, if, instead of stating the average as approaching fifty feet, they had stated it at forty. Was the defendant, who is stated to be a timber-merchant deceived by this representation? When I say that a vendor who makes a representation that is untrue, cannot enforce his contract, that, of course, supposes that the purchaser was deceived; if the purchaser knows at the time that the representation is untrue, he is not deceived, and cannot in that case avail himself of the fact that there has been misrepresentation. I am far from being satisfied as to what the justice of the case requires. Looking at that part of the answer relating to Jabez West, I felt considerable doubt whether it might not appear that he had sufficient knowledge of the wood, and that he had not made any representation by which the defendant could be deceived; but if this were so, it was the plaintiff's duty to have made out that case, which he has not done. As it is, there has been a representation which turns out not to be correct, and I think the proper course will be to dismiss the bill, but without costs.

## BUXTON v. LISTER AND COOPER.

(In Chancery before Lord Hardwicke, 1746. 3 Atk. 383, 26 E. R. 1020.)

The defendants entered into an agreement for the purchase of several timber trees, marked and growing at the time it was reduced into writing: and on the first day of November, 1744, the following memorandum was signed by the parties:

"Matthew Lister and John Cooper have agreed with Joseph Buxton for the purchase of all those several large parcels of wood, consisting of oaks, ashes, elms, and asps, which are numbered, figured, and cyphered, standing and being within the township of Kirkby, for the sum of £3050, to be paid at six several payments, every Lady-day for the six following years; and Lister and Cooper to have eight years for disposing of the same; and that articles of agreement shall be drawn and perfected as soon as conveniently can be, with all the usual covenants therein to be inserted concerning the same."

There were two parts of the agreement.

The plaintiff signed one, and the defendants the other; one was left in the custody of the plaintiff, and the other in the custody of the defendants.

The bill was brought by the vendor for the specific performance of the agreement.

LORD CHANCELLOR,[71] upon the opening, said, he did not know any instance of a bill of this nature, where it is a mere chattel only, and nothing that affects the realty.

That a bill might as well be brought for compelling the performance of an agreement for the sale of a horse, or for the sale of stock, or any goods or merchandise.

Sir Joseph Jekyll did, in Cud v. Rutter, 1 P. Wms. 570, decree a specific performance in the case of a chattel, but Lord Macclesfield reversed it, and it has been the rule of the court ever since, not to retain such a bill.

The proper remedy is an action at law, where you may recover damages for the non-performance of the agreement.

The defendants' counsel, to shew the impropriety of such a bill, and that the parties ought to be left to law, cited Roll's Reports, 493, and Latch's, 172.

Upon hearing what the plaintiff's counsel could alledge, in order to take this case out of the general rule of the court, LORD CHANCELLOR delivered his opinion as follows:

The general question is, as to the decree for specific performance, and this divides itself into two subordinate ones.

First, whether the plaintiff is intitled to seek his remedy in a court of equity for a specific performance.

Secondly, whether as to the merits of his case, he is intitled to such a decree.

[71] Parts of the opinion are omitted.

As to the first, I am of opinion, that this is such an agreement, though for a personal chattel, that the plaintiff may come here to have a specific performance. * * *

Secondly, if the plaintiff on the merits of the case is intitled to a decree.

Nothing is more established in this court, than that every agreement of this kind ought to be certain, fair, and just in all its parts.

If any of those ingredients are wanting in the case, this court will not decree a specific performance.

For it is in the discretion of the court, whether they will decree a specific performance, because otherwise, as I said before, a decree might be made which would tend to the ruin of one party.

One objection made by the defendants' counsel to the decreeing a specific performance was misrepresentation.

This depends upon the evidence of John Cooper, son of the defendant Cooper, that his father offered the plaintiff £2800, but he insisted on £3500, and said Fenwick and Clark, two timber merchants, had valued it at so much, and that this was true on his honour, and when he said a thing on his honour, the defendant ought to believe it.

Afterwards the defendants agreed to give £3050 for the wood, on the opinion they had of Fenwick and Clark's judgment.

If this be true, it is an ingredient which will induce a court of equity not to decree a specific performance, for it comes out now that Fenwick and Carter did not set any greater valuation than £2500 upon the timber, and this misrepresentation was the ground which induced the defendants to come into the agreement.

This fact is very particularly put in issue, and yet the plaintiff, who examined Okey and his wife that were present when this discourse passed, do not ask them as to this fact. * * *

Upon the whole, I am of opinion the bill must be dismissed, and if it was to be dismissed upon the misrepresentation it ought to be with costs: but what I would propose is, that if the plaintiff will consent to give up the agreement, I will dismiss it without costs; but if he will bring an action, then with costs.

The plaintiff waiving the agreement, his Lordship decreed accordingly.

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## OLDFIELD v. ROUND.

(In Chancery before Lord Loughborough, 1800. 5 Ves. 508.)

The object of the bill was to obtain a specific performance of an agreement entered into by the defendant to purchase a meadow, called Burnett's Meadow, near Clewer; which was sold by auction to the defendant for £950.

The principal objections made by the defendant were, first, that the premises were described as a meadow, consisting of fifteen acres, without any notice of a way round, and a footpath across it. * * *

The Attorney General and Mr. Thompson for the plaintiff pressed for a decree with costs: the defendant having raised several objections; none of which he could sustain. The way round the field was stated by the answer to be a public road: but upon the evidence it appeared to be only a foot-path; and the answer stated, that the defendant was owner of a house and ground adjoining. * * *

The Solicitor General for the defendant observed upon the variance from the description, and the disadvantage arising from this way; which by length of time had become very wide.

LORD CHANCELLOR.[72] Certainly the meadow is very much the worse for a road going through it: but I cannot help the carelessness of the purchaser; who does not choose to inquire. It is not a latent defect.

Decree according to the prayer of the bill with costs.

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## AARON'S REEFS, Limited, v. TWISS.

(House of Lords. [1896] App. Cas. 273.)

The following statement of the facts is taken from the judgment of Lord Watson:

The appellant company was incorporated in January, 1890, with a nominal capital of £200,000, divided into 800,000 shares of 5s. each, for the purpose of acquiring the right to work and of working ores, auriferous deposits, and precious stones. In February, 1890, the company, under two deeds of purchase, acquired the right to work what is therein described as the mining concession of La Victoria, in the Republic of Venezuela. The price payable for one portion of the concession was £19,000, and for the other £131,000; and the company undertook to pay over to each of the vendors a moiety of the moneys received from the public for the subscription of shares until the first of these sums was paid off, and thereafter to pay two-thirds of the moneys derived from that source, in extinction of the balance of £112,000 of the second sum, retaining the other third as working capital.

The concession of La Victoria was well known to many persons who indulge in gold-mining speculations, and among them the directors of the new company. One of these gentlemen, who was examined as a witness for it in the present case, gave the following abstract of its history. It was first taken up by the Victoria Gold Company, Limited, which was formed for that purpose in the year 1882, who agreed to pay £100,000 for it, and, after "prospecting for mining operations," went into liquidation in November, 1885. In January, 1886, a new company, called Victory, Limited, was formed, and took over the assets and liabilities of its predecessor. The public subscribed for 170,-

[72] Part of the case is omitted.

000 of its 5s. shares; and the whole subscriptions, amounting to £42,-500, were "spent in the mine." The company paid no dividend, but lasted till the end of 1887, when it was wound up by order of the Court, and its property, including the concession, was sold for £2000 in cash, the purchaser at the same time undertaking liabilities to the amount of £8000. A month afterwards a new company, the Victory or Victoria Company, Limited, was started, which is said to have taken over the concern from the last purchaser giving him in exchange £3910 in cash and £131,000 in paid-up shares, besides assuming the liabilities which he had undertaken. The third company did not, like its unfortunate predecessors, find its way into liquidation. So far as appears, it neither spent money in prospecting nor in attempting to work or develop the mine; and the only profitable business it seems to have engaged in was when its leading spirits got up the present and fourth company, and proceeded to transfer the concern to it at the price of £150,000, to be paid in hard cash out of the money to be subscribed by the new shareholders.

In February, 1890, the appellant company issued a prospectus, on the faith of which the respondent in this appeal, an Irish gentleman residing in Limerick county, became a subscriber, on the terms it offered for 100 shares. The prospectus invited subscriptions for 200,000 shares only, upon which a deposit of 1s. per share was to be paid, and no further call made during the year. The shares were allotted to the respondent, who paid the deposit money.

On March 5, 1891, after the expiry of the year, the company made a call of 4s. per share, payable on the 19th of that month. The respondent did not comply with that request, and on April 27 he received an intimation that his shares would be forfeited if payment were not made on or before May 4. On May 5 notice was sent him that the shares had been forfeited. The articles of association provide that a member whose shares are forfeited shall nevertheless remain liable for calls previously made.

On September 21, 1891, the appellant company brought the present suit against the respondent, before the Exchequer Division of the High Court of Justice in Ireland, for recovery of the call of 4s. per share. The defence, which was delivered on December 21, 1891, substantially consisted in the allegation and plea that the prospectus was untrue in material respects, and that his contract to take shares, having been induced by fraud, could not be enforced. In the voluminous proceedings which have followed upon these pleadings the appellant company has traversed the allegations of fraud, and has also maintained that the respondent is estopped from challenging the validity of the contract by reason of his failure, within a reasonable time, to repudiate it, or to take steps for procuring its rescission.

At the trial of the cause before Holmes, J., the jury found (1) That the fact and terms of the sale by the Victoria Gold Mining Company to the City Stock Exchange Company, and of the resale of the last-

named company to the plaintiff company, were material matters which ought to have been disclosed in the prospectus; and (2) that these matters were not disclosed in the prospectus, with the fraudulent intent of concealing from persons reading it matters which if known would have prevented them from becoming shareholders, and of inducing them by such concealment to apply for shares. The jury also found (5) that the defendant was induced to apply for the allotment of shares by the prospectus, and (7) that the statement that the mine had been proved "rich" in the prospectus was false. There are other findings of the jury, none of them favourable to the company, which I do not find it necessary to consider for the purposes of this appeal.

After verdict, the judge who presided at the trial entered judgment for the respondent. A motion to set aside the verdict was thereafter dismissed unanimously by two learned judges of the Exchequer Division. The Court of Appeal was equally divided, the Lord Chancellor and the Master of the Rolls being of opinion that there was neither untruth nor fraud in the prospectus, and also that, if there had been, the respondent would have been barred from objecting to the validity of his contract to take shares by his own delay in repudiating it; whilst Fitz Gibbon and Barry, L. JJ., took an opposite view upon both these points. The Court being equally divided, the order was that the order of the Exchequer Division do stand affirmed. Against these decisions the plaintiffs brought the present appeal. * * *

LORD HALSBURY, L. C.[78] My Lords, this is an appeal from an order of the Court of Appeal in Ireland affirming an order of the Exchequer Division refusing to set aside the findings, verdict, and judgment entered for the defendant (the respondent at your Lordships' bar) at the trial of the action. It was an action in respect of calls on shares. The defendant in the action succeeded in having the judgment entered for him, and the appeal is now brought claiming that the judgment shall be entered for the plaintiffs notwithstanding certain findings of the jury, to which I shall refer presently. * * *

Then, inasmuch as the jury have found that, I think, upon very good evidence in the prospectus itself, it remains only to consider the final question, namely, whether or not there was evidence for the jury which would justify them in finding that this was a fraudulent prospectus—that these statements were fraudulent and false. Now, in dealing with that question, again I say I protest against being called on only to look at some specific allegation in it; I think one is entitled to look at the whole document and see what it means taken together. Now, if you look at the whole document taken together, knowing what we now know and what the jury had before them, I suppose nobody can doubt that this was a fraudulent conspiracy. I observe that one or two of the learned judges below used very plain language upon it, and re-

[78] Parts of the opinion of Lord Halsbury, L. C., and the opinions of Lords Herschell, Macnaghten, Morris, and Davey are omitted.

marked upon the fact that Mr. Gilbert, who seems to have been the head and front of it, was not subjected to an inquiry in a criminal court. But, be that as it may, the question before your Lordships now is whether the jury were justified in finding with these facts before them what they did find.

It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there false representation? I do not care by what means it is conveyed—by what trick or device or ambiguous language: all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in shewing that any specific statement is untrue.

But I do not shrink from the question whether any of these statements are untrue. I think some of them are absolutely untrue. I will take one or two for example, although I think that the whole thing exhibits falsehood. I observed in the prospectus there is a statement to the effect that reports of the most favourable character had been made upon this mine. That is not true. I only mention it in passing—I do not propose to rely upon it. * * *

It is said, "Oh, the mine is very rich still—at all events, you did not give any evidence that it was not;" but if there is this evidence, that three companies have tried to work it and have failed, can anybody say that that reflects no light upon the richness or comparative poverty of the mine? I should have thought it was ample evidence. * * *

For these reasons, my Lords, it appears to me that this appeal ought to be dismissed with costs, and I so move your Lordships.

LORD WATSON (after stating the facts given above). My Lords, Mr. Levett and Mr. Ford said everything that could possibly be urged on behalf of the appellant company; but after hearing them, I found it impossible to differ from the opinion of the great majority of the Irish judges. I think that the findings of the jury which I have already noticed, although the first two of them are peculiar in their form, are not only intelligible, but are reasonable, and are fully warranted by the evidence in the case.

The personal knowledge which its framers had of the antecedents of the Victoria concession must have made it a difficult, if not an impossible task for them to prepare a prospectus which would be attractive without being dishonest. They apparently succeeded in making it attractive; but in doing so they appear to me to have come a long way short of common honesty. The substance of the representations conveyed by it is, that the property acquired by the company had already been proved to be rich in gold, and only required the erection of machinery (tenders for which were about to be invited) in order to be at once in a position to make returns; that it was proposed to erect a

forty-stamp mill in the first instance, and to make additions from time to time; that an average yield of 1½ ounces per ton would give a monthly return of 3600 ounces of gold per month, value nearly £14,000, the greater part of which would be available for distribution as dividends, and that it was not unreasonable to anticipate that the mine would readily and speedily pay dividends to the extent of 100 per cent.

The prospect of becoming interested in a rich mine of gold which was to make returns at once, with the probable result of yielding a handsome dividend although it should not nearly approach to cent per cent, was very alluring. If the readers of the prospectus had known that of the £10,000 which they were asked to contribute during the coming year not one sixpence would be available for working the mine, that there would be no money available for that purpose until £38,000 of calls had been paid, and that thereafter, until a further sum of £112,000 had been paid, only one-third of the subscriptions or calls received by the company would be available, I think they would have taken a much less sanguine view of the situation. It was argued for the company that, inasmuch as its contracts for the purchase of the concession are generally referred to towards the end of the prospectus, the respondent must be held to have had notice of their contents. That appears to me to be one of the most audacious pleas that ever was put forward in answer to a charge of fraudulent misrepresentation. When analyzed it means simply that a person who has induced another to act upon a statement made with intent to deceive must be relieved from the consequences of his deceit if he has given his victim constructive notice of a document, the perusal of which would have exposed the fraud. The extravagance of the plea in the present case is not lessened by the fact that the respondent had no right of access to the document, and that it is clear that he was neither invited nor expected to examine it.

The expression "material matters" which occurs in the first two findings of the jury is one which might in some cases require serious consideration. The duty of disclosure is not the same in the case of a prospectus inviting share subscriptions as in the case of a proposal for marine insurance. In an honest prospectus many facts and circumstances may be lawfully omitted, although some subscribers might be of opinion that these would have been of materiality as influencing the exercise of their judgment. But the statement of a portion of the truth, accompanied by suggestions and inferences which would be possible and credible if it contained the whole truth, but become neither possible nor credible whenever the whole truth is divulged, is, to my mind, neither more nor less than a false statement. It was in that sense that the jury affirmed the suppression of all information with respect to the purchase of the concession to be material and fraudulent; because they thought, as I do, that such suppression was neces-

sary in order to enable the company to manufacture a tempting bait for the unwary, and to submit to them a prospectus which was neither true nor honest.

As already stated, I am also of opinion that the finding, to the effect that the statement in the prospectus "that the mine had been proved rich" was false, was reasonable and was warranted by the evidence; and if so it was unquestionably calculated to deceive, being the very basis upon which the representations made as to the prospects of the mine and it anticipated returns are reared. It appears to me to be proved by the evidence that, not only was the statement false, as found by the jury, but that it was known by the framers of the prospectus to be so. There are no less than twelve reports quoted in the prospectus, which are now relied on as evidencing the large proportion of gold to be found in the quartz rock of the concession, one of these being mere hearsay of somebody else, and another anonymous; only one of the remaining ten purports to contain an assay of samples, which was not made by the writer of it, the writer himself being one of the directors of a defunct company who failed to make the mine pay. No date is attached to any of these reports; but it appears from the evidence of Robert Larchin, a director of the appellant company until March, 1892, that they were all written before December, 1887, when the second company went into liquidation. They bear internal evidence (and there is no proof to the contrary) of having been prepared for no other purpose than that of influencing the share market; and the framers of the prospectus of 1890 were perfectly aware that the brilliant predictions in which they abound had been falsified by experience. Accordingly the appellant company had hardly been formed before they began to press John Nicholls who had been employed by their predecessors and whom they continued to employ at the mine in Venezuela, for a favourable report, of the auriferous qualities of the quartz. They received from him in February the gratifying assurance that he actually had in his possession "several pieces shewing visurable gold," and also that he "saw gold in several pieces of quartz." In April, 1890, further pressure elicited from the same servant the information that:

"Mr. Fenn is testing some of the quartz from the Arran Reef and some from the Howard Reef."

Of the results of that testing nothing was heard at the trial. During the same month Nicholls reported that he had met with "small seams of quartz shewing a little gold by panning"; and in May he further reported that he had "found specks of gold by panning." Not being altogether satisfied with the tenor of the communications which they had received from Nicholls, the company wrote to him on September 16, 1890:

"You must keep two men working on the drive, don't forget, at any cost. It is most important to have something coming forward as to work being done, and I think you will cut the lode first here."

The letter produced the following reply by wire:

"We have struck a well defined lode."

The reply was probably not considered satisfactory, as nothing was heard at the trial of any gold being found in the "well defined lode."

The respondent did not remit the deposit payable in respect of his 100 shares or obtain an allotment of them until September, 1890. Even if the company believed (which in my opinion it did not) in the truth of the representations made in its prospectus with regard to the richness of the mine, it is too heavy a draft on my credulity to suppose that it continued to entertain that belief in September, 1890. In that case its acceptance of the respondent's money and the issue of shares to him, without any explanation of what had come to its knowledge since the date of the prospectus, was neither more nor less than a fraud. The truth is that the whole circumstances of this case are redolent of fraud; and I should have been surprised if the jury had come to any other conclusion than that which is embodied in their verdict.

The question remains whether the respondent was not entitled to challenge the contract under which he became a member of the company by reason of his having unduly delayed his repudiation. I venture to think, with all deference, that the reasoning of the Lord Chancellor of Ireland and the Master of the Rolls upon this point is founded upon a misapprehension of the law. The authorities relating to rescission by the member of a registered company with the view of having his name removed from the list rest upon considerations which involve the interests of creditors of the company, or of his socii; and they have no application to the present case unless it is shewn that on May 5, 1891, the respondent had lost his right to escape from the liabilities of a shareholder on the plea that he had been fraudulently induced. Accordingly, the argument of counsel for the appellant company was, very properly, maintained before us upon the footing that on or before May 5, 1891, the respondent could not have succeeded in a suit to have his name removed from the register of the company. In the absence of a liquidation order, or any equivalent, that argument necessarily rested upon the assumption that the respondent was before that date in the knowledge of the fraud which had been practiced upon him. The main defect of the argument consists in the want of any foundation in fact. There is not a tittle of evidence tending to shew that the respondent had such knowledge. It is true that in answer to a letter of March 10 he had been furnished with the names of the directors of the company, which put him upon his inquiry; and also that before May 6 he had formed a shrewd suspicion that he had been the victim of a fraud. But the whole weight of the evidence supports the conclusion that, until he had an opportunity of examining the documents produced in this suit, he knew of no tangible grounds for disputing the validity of his contract with the company.

In that state of matters the forfeiture of his shares on May 5, 1891,

remanded him and the company to the common law relation of debtor and creditor, which, in so far as concerns the right of rescission, was thus defined by the Exchequer Chamber in Clough v. London and North Western Ry. Co., L. R. 7 Ex. 35:

"We think that so long as he had made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind."

In this case it cannot be affirmed that the respondent had indicated his election to be bound by the contract, or that any innocent third party had acquired an adverse interest, or that the wrong-doer had been prejudicially affected by his delay. It must also be kept in view that the respondent is not seeking to rescind the contract: he is merely resisting its enforcement by the party guilty of the fraud.

For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

Orders appealed from affirmed and appeal dismissed with costs.

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## BROWN v. SMITH et al.

(Supreme Court of Iowa, 1902. 89 N. W. 1097.)

PER CURIAM. The plaintiff held a contract for a quarter section of land in Ottertail county, Minn., from the D. S. B. Johnston Land Company, of the value, according to the evidence, of not exceeding $4 per acre, and claims to have entered into an agreement with defendant by the terms of which, in consideration of a deed to defendant of such land, on which was to be executed a mortgage of $500 to said company by defendant, the latter undertook to convey to plaintiff his dwelling house and two lots, of the estimated value of from $1,600 to $2,000, subject to a mortgage to a building and loan association of $750. The defendant admitted as a witness that he made the contract, but insists that he was induced to do so by the misrepresentations of the plaintiff, and that he promptly repudiated it upon discovery that the land was not as it had been represented. April 2, 1899, Brown wrote of the land:

"It is good soil, only about two and a half miles from Elkhart, on the G. N. Ry."

And again, on April 9th:

"I wish you would read an article in to-day's St. Paul Dispatch about Minn. lands. It is better than anything I can say, and I have been studying it for three years."

Defendant testified that plaintiff told him that the land was good tillable land, which cost him $10 per acre, and was located 2½ miles from the above station, and that in making the agreement he relied upon these statements. The plaintiff denies this, and testified that he

advised defendant that he knew nothing of the land, and that the latter must learn for himself. But, in view of plaintiff's letters, the court might well have accepted defendant's testimony as the more reliable. True, the defendant, who knew nothing personally of Ottertail county, made inquiry concerning land, but, through probable mistake as to its location, was misinformed as to its character and value. If he was influenced somewhat by this mistaken advice, it does not follow that he did not rely on plaintiff's misrepresentations, so that but for them he would not have entered into the agreement. The land was, in fact, 6 miles instead of 2½ from a railroad station, included a pond or lake of about 25 acres, the north half hilly and sandy, all save the lake, and 15 acres of slough, covered with stumps and brush, and only 80 acres, after being cleared, that could be cultivated. Certain it is that with correct information defendant would not have considered a proposition of exchanging property in which his interest was from $850 to $1,250 for a $140 interest in such land.

As the plaintiff was undertaking to obtain an unfair advantage over defendant, and this, in so far as successful, was accomplished by deceit, we have no notion of lending our aid to enable him to carry out his enterprise of getting something for practically nothing. Affirmed.

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## GRAND RAPIDS, G. H. & M. RY. CO. v. STEVENS.

(Supreme Court of Michigan, 1906. 143 Mich. 646, 107 N. W. 437.)

McALVAY, J.[74] Complainant, a Michigan corporation, filed its bill in the Ottawa circuit court, in chancery, to enforce against defendant the specific performance of the following written option: * * *

Complainant was constructing or about to construct an electric three rail railway. It had in its employment one Liggett who was securing the right of way for its road, and also one Chappell who was introducing Liggett and assisting him in such work. Defendant is the owner of 31½ acres of land near the village of Berlin, Ottawa county, upon which she resides with a family consisting of her father, mother and sister, largely dependent upon her. The family is supported from the proceeds of garden truck raised upon this land by defendant with her sister's assistance, and by picking and selling berries. Defendant is, from an injury received when a child, a hunchbacked cripple. Liggett has been engaged in railroad promoting and securing rights of way for 16 years. Chappell is a justice of the peace living in defendant's neighborhood, and had done a little business for her when she purchased the land. These parties came to her house September 13, 1900, between 1 and 2 o'clock in the afternoon, and remained from two to four hours for the purpose of securing this option. Before they left

[74] Parts of the opinion are omitted.

she signed the paper. On March 13, 1901, Mr. Wheeler on behalf of complainant tendered her a deed for signature and $35. She refused to execute the deed or accept the money. There is no dispute about the tender of the money, which has been kept good. Afterwards defendant forbade complainant's workmen to come on the land to construct the road, and attempted to prevent them. The road was built across her land in the nighttime, against her protest, by a large gang of men. Defendant by her answer claims that the option was obtained from her by fraud, misrepresentation, duress, and undue influence, also that it was not mutually binding upon the parties in that complainant was not authorized and empowered by the statute under which it was organized to enter into such an agreement. * * *

We find from the record that Liggett made statements to defendant which were false and misleading. He threatened condemnation proceedings if she refused the option, and enlarged upon the great expense it would make her. He admits he knew his company had no authority to condemn. This woman was ignorant of business affairs, weak, crippled, and excitable. There is no dispute but that after she signed this paper she stated she was not satisfied, and had not been dealt fairly with. The record shows that this option was procured from her by means used on the part of the representative of complainant which amounted to a fraud upon her. * * *

The company built its road upon her land without right or authority, against the protest of this defendant. Under the statute when complainant organized, and when this option was secured, it was only authorized to maintain and own a street railway in and along the streets and highways of any township upon such terms and conditions as might be agreed upon by the company and the township board. It was by an amendment of the Legislature of 1905, that such corporations were authorized to use private rights of way, and were given the right of eminent domain. Pub. Acts 1905, p. 182, Act No. 133. It is not necessary to discuss the question of ultra vires raised by defendant in the case. The above statement relative to the statute is added as bearing upon matters already discussed, and because the record discloses that complainant and its agent Liggett knew at the time this option was secured that such amendment was necessary.

The decree of the circuit court is reversed, and the bill of complaint dismissed, with costs of both courts to defendant.[75] * * *

[75] A motion to modify the decree (1) by determining the defendant's damages for appropriating the right of way, or (2) by enjoining defendant from interfering with the operation of the railway pending condemnation proceedings, was denied.

In Brown v. Smith (1901) 109 Fed. 26 (ante, pp. 105, 548), the court quoted with approval the following statement made in Slaughter v. Gerson, 13 Wall. 379, 20 L. Ed. 627:

"The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand

## VI. CONCEALMENT

### HAYWOOD v. COPE.

(In Chancery, 1858. 25 Beav. 140, 53 E. R. 590.)

The Plaintiff was seised of a farm called the Bank End Farm, situate in the parish of Norton in the moors, in Staffordshire, and of the coals and minerals under it, and for working which shafts had been previously sunk, which had been visibly abandoned. The farm consisted of about twenty-seven acres, two roods, and two perches.

The Defendant applied to the Plaintiff for a lease of the coal mines, and after some negotiations, and after the Defendant, accompanied by some friends, had examined the shaft, as far as was possible (see 25 Beav. p. 148), the Plaintiff and Defendant, on the 15th of January, 1855, signed the following agreement:

"Mr. Charles Cope agrees with Howard Hayward, Esq., for those two seams of coals known as the two-feet coal and three-feet coal, lying under lands to be hereafter defined in the Bank End estate, near Norton, in the county of Stafford, at the rate of ninepence per ton for all coals and slack going over a weighing machine, 112 lbs. to cwt., or 2240 lbs. per ton, minimum rent £100 per annum, on lease of fourteen years. Mr. Cope to pay for all surface trespass, at the rate of £5 per acre, to commence paying minimum rent within eighteen months from date of agreement, all coals and slack sold or raised in the intermediate time to be paid for, at the rate of 9d. per ton. Howard Haywood, Esq., agrees to let to Mr. Charles Cope the before-mentioned two seams of coals at the price beforementioned."

Shortly after the agreement had been signed the Defendant entered into possession. He commenced working the coal mines, and he continued to work them regularly until July, 1855, and off and on until October, 1856.

On the 26th of May, 1855, the Plaintiff's solicitor forwarded to the Defendant, for his approval, a draft lease, in which the particulars of the land under which the mines lay were defined and scheduled. The Defendant made no objection to the draft, and retained it, notwithstanding various applications made to him to return it. At Christmas, 1856, the Defendant first objected that the coals had not turned out

the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his owh voluntary blindness, and been misled by overconfidence in the statements of another."

so well as he expected, and in January, 1857, he declined to accept a lease—

"on the ground that the mines were not (as he alleged) what they were represented to be, either as to thickness or quality; and that his surveyor had stated that the coal was absolutely not worth getting."

The Defendant afterwards returned the draft lease.

On the 26th of March, 1857, the Plaintiff filed this bill, for a specific performance of the contract; for an account of the coal worked, and for payment by the Defendant of the royalty and rent.

The Defendant resisted the specific performance on the ground of the uncertainty of the contract, of the misrepresentation and concealment of the Plaintiff, of the delay which had occurred, and of the hardship of being obliged to pay £100 a year during the remainder of the time, without receiving any benefit from the mines.

Mr. Selwyn, Mr. Hadden, and Mr. Jessel, for the Plaintiff. The Defendant principally relies on misrepresentation and concealment, but there has been none; the Defendant examined the mine and acted on his own judgment; he cannot now repudiate the contract, merely because the collieries have turned out less profitable than he anticipated.

The rule of law as to concealment of the defects in the property sold is thus laid down by Sir Edward Sugden (1 Sugden's Vendors & Purchasers, 1, 2):

"I. Moral writers insist that a vendor is bound, in foro conscientiæ, to acquaint a purchaser with the defects of the subject of the contract. Arguments of some force have, however, been advanced in favour of the contrary doctrine; and our law does not entirely coincide with this strict precept of morality. Even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser, yet if they were patent, and could have been discovered by a vigilant man, no relief will be granted against the vendor."

So in Attwood v. Small, 6 Cl. & Fin. 232, it was held:

"That if a purchaser choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations, the rule being caveat emptor, and the knowledge of his agents being as binding on him as his own knowledge."

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY].[76] * * * The next question is, was the Plaintiff bound to say that he had worked the mine and that he had found it unprofitable? That someone had worked and abandoned it was obvious, for there were the shafts and the abandoned workings which the Defendant examined. Was it incumbent on the Plaintiff to inform him that he was the person who had worked it some twenty years before, and found it to be not worth working? It is to be observed that the subject-matter of this contract is a mine, that is to say, seams of coal, which may turn out better or worse, and is always, in some degree, a speculation. It

[76] The statement of facts is abridged and parts of the opinion are omitted.

may turn out better, or it may turn out worse, and it is well known that leases and sales are always made with reference to this circumstance. With the exception of knowing that the Plaintiff had worked it, the Defendant knew as much as anybody could know by his own examination; but whether the seams were to improve or to deteriorate was a matter which could only be ascertained by the future working. They have turned out ill, but the consequence of that is not, in my opinion, that the Defendant can reject the contract, any more than the Plaintiff could have rejected it, or have demanded higher terms, if the seams had turned out profitable. * * *

In my opinion this is a contract which was fairly entered into between the parties; there is nothing to invalidate it, and the usual decree must therefore be made for the specific performance of the contract, with costs to the present time. * * *

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## SHIRLEY v. STRATTON.

(In Chancery before Lord Loughborough, 1785. 1 Brown, Ch. 440.)

This was a bill for the specific performance of an agreement for the purchase of an estate in marsh-land, at Barking, in Essex, and for payment of a sum of 1000*l.* the purchase-money. The defence was, that the estate was represented to the defendant as clearing a neat value of 90*l.* per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an outgoing of 50*l.* per annum. And it appearing, upon evidence, that there had been an industrious concealment of the circumstance of the wall, during the treaty, LORD CHANCELLOR dismissed the bill, but without costs.

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## WALTERS v. MORGAN.

(In Chancery before Lord Campbell, 1861. 3 De Gex, F. & J. 718, 45 E. R. 1056.)

This was an appeal from the dismissal by Vice-Chancellor Wood of a bill for specific performance. The Plaintiff William Walters had been a master mariner, but afterwards became a brickmaker at Tenby, and the Defendant Thomas Morgan was a retired draper, formerly residing at King's Cross.

The agreement was dated the 9th December, 1857, and made between the Plaintiff and Defendant; and thereby the Defendant agreed to grant to the Plaintiff and the Plaintiff agreed to take of the Defendant for one whole year from the day of the date of the agreement the right of digging, searching for and carrying off from land of the De-

fendant in Pembrokeshire described in the agreement all and all manner of stone, sand, minerals and clay in or upon those lands, and the Plaintiff agreed to pay to the Defendant for such grant the full sum of 3d. per ton weight of 2880 lbs. for stone, rock or sands and minerals carried from the premises, and the full sum of 4d. per ton weight of 2880 lbs. for all clays worked or so carried off; and it was further thereby agreed that at the option of the Plaintiff Walters the Plaintiff might take and the Defendant would, at the expiration of twelve months, grant to the Plaintiff a lease for a term of twenty-one years renewable, to commence from Christmas 1858, such lease to contain a covenant on the part of the Plaintiff to pay the Defendant the said rate per ton royalty and all usual covenants; and further, the Defendant agreed to grant sufficient lands on which the Plaintiff might erect buildings and offices for the works he might require during the term of his lease, at no increased rental, provided such land should not exceed in quantity one acre; and the Plaintiff agreed, that if he should not require the lease, he would, at the expiration of twelve months, leave all holes and diggings which he should make sound and properly filled up.

In the month of July 1858 the Plaintiff's solicitor forwarded to the Defendant's solicitor the draft of a lease in pursuance of the agreement, and requested the Defendant's solicitor to alter it in such a way as he might think proper, and return it for revision.

On the 19th July, 1858, the Defendant's solicitor wrote to the Plaintiff's solicitor a letter, saying that it would be premature to discuss the draft lease before the twelve months had expired. On the 9th December, 1858, the Plaintiff's solicitor wrote to the Defendant's solicitor a letter containing the following passages:

"Under an impression, derived as I am instructed from a statement by Mr. Morgan to Mr. Walters that he was willing to grant this lease without awaiting the expiration of twelve months, the draft of that document was prepared by me and handed by Mr. Walters to Mr. Morgan in the early part of July last for his approval and was subsequently submitted by him to you. The result was, as you will remember, that Mr. Morgan finally objected to sign any lease at that time, and suggesting a doubt whether the agreement was binding upon him, determined at all events to do nothing in the matter until the expiration of twelve months. As that period will expire to-day I must request to be at once informed whether Mr. Morgan is ready or whether he declines to execute a lease to Mr. Walters in accordance with the above-mentioned agreement. In the former case I must beg you to return me the draft with any modifications you may consider your client entitled to have made in it, and in the latter my instructions are immediately to take the necessary steps for compelling a specific performance of the agreement by your client."

The bill after stating to the foregoing effect and setting out some further correspondence, prayed a specific performance of the agreement.

The Defendant by his answer stated that the agreement was entered into by him when he had recently purchased the property and was unacquainted with it, and under circumstances amounting to concealment and misrepresentation of the value of the property on the part of the

Plaintiff, who had lived in the neighbourhood of the property for some time and was well acquainted with it, and moreover that the Defendant was induced to sign the agreement by surprise and without any opportunity of considering the stipulation as to granting a lease, the agreement having been brought to him ready for signature without any draft having been submitted to him, and that upon his objecting to sign it without further consideration the Plaintiff had represented that the amount to be agreed to be given by the agreement for the sand and clay was the same that he had given to Mr. Wilson, a neighbouring landowner, by which the Defendant was led to believe that the sum offered was the fair value; that the Plaintiff had stated that if the land turned out to be more valuable he would give the Defendant his "fair share."

THE LORD CHANCELLOR.[17] This was a bill for the specific performance of an agreement for a lease of mineral property; the bill having been dismissed without costs. * * *

The ground on which I am of opinion that the decree ought to be supported is, that by the contrivance of the Plaintiff the Defendant was surprised and was induced to sign the agreement in ignorance of the value of his property. I most fully concur in the doctrine of concealment and misrepresentation as laid down by Lord Thurlow in Fox v. Mackreth, 2 B. C. C. 420, and qualified by Lord Eldon in Turner v. Harvey, Jac. 169. There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a nonexisting fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree for a specific performance of the agreement.

So, a fortiori, would a contrivance on the part of the purchaser, better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time to deliberate, and take advice respecting the conditions of the bargain.

In the present case, although the parties had met on several occasions before the signing of the agreement, and had conversed about the digging in the land for a year by way of experiment, yet till the written agreement for the lease was brought by the Plaintiff to the Defendant "cut and dry," there does not appear to have been any negotiation between them for a lease, nor any proposal respecting the term to be granted (which is substantially forty-two years), or the royalty to be

[17] Part of the opinion is omitted.

reserved, or any of the covenants to be contained in the lease. Then the Plaintiff urges the Defendant to sign the agreement, saying:

"You will trust to me for making a fair allowance if it should turn out more valuable."

This is of a piece with his afterwards employing his own solicitor to prepare the lease, and trying to get it signed by the Defendant without the Defendant's solicitor having seen it. A purchaser who so conducts himself cannot be said to have proceeded with the good faith which even jurists require in such a transaction. * * *

Upon the whole I cannot say that the Appellant was improperly advised to bring this appeal; and I therefore order the appeal to be dismissed without costs—the deposit to be returned to the Appellant.

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## KIMBER v. BARBER.

(In Chancery, 1872. 8 Ch. App. 56.)

In the year 1850 a company, called the Colonization Assurance Corporation, was formed, but it appeared to have fallen into abeyance. Early in January, 1870, Kimber, Barber, and others, desired to reorganize the company, and to appoint new directors. Before new directors were appointed it was necessary to acquire a large number of shares, in order to qualify the new directors. The Defendant Barber knew that Kimber was anxious to acquire shares for this purpose, and on the 19th of January, 1870, called upon him, and told him that he, Barber, knew of 264 shares for sale at £3. Barber was thereupon authorized by Kimber to buy the shares at £3. The shares were accordingly bought; 64 of them were transferred to Kimber, and 200 to his nominees, one T. G. Taylor, a broker, being the transferor, and Kimber paying Barber £795 for the shares and the transfer duty.

Kimber, as he alleged, subsequently learnt that the shares had been in fact bought by Barber from one T. Jones at £2 a share, with a view to the sale to Kimber, and had been transferred by Jones to Taylor under the direction of Barber. Kimber thereupon filed the bill in this suit against Barber and a Mrs. Rutt, for whom Barber alleged he had bought the shares, charging that the 264 shares were purchased from Jones by Barber, as agent for the Plaintiff, and praying for a declaration that the Plaintiff was entitled to the benefit of the purchase of the 264 shares from Jones, and that the Defendants, or one of them, might be decreed to pay to the Plaintiff the sum of £264 being the difference between the prices paid; or otherwise, that the sale of the shares might be set aside, and that the Defendant Rutt might be decreed to repay to the Plaintiff the sum of £795 paid by the Plaintiff, he offering to re-transfer the shares to the Defendant Rutt.

It appeared, on the evidence, that Barber wrote on the 13th of January to Jones, asking, as for a friend, whether he would sell his shares,

and on the 17th of January Barber concluded an agreement with Jones and forwarded him a blank transfer. After the interview of the 19th of January, Barber instructed Taylor to prepare bought and sold notes to the effect that the shares had been bought through Taylor as the broker, and the shares were afterwards transferred by Jones to Taylor. As Barber had not sufficient money to pay for all the shares, some of them were lent to him by Taylor, for the purpose of being transferred to Kimber. There was much other evidence in the case, which, for the purpose of this report, is immaterial.

Kimber had transferred 10 of the 64 shares to other persons, so that at the time when the bill was filed he held only 54 shares.

1872, April 18. LORD ROMILLY, M. R., after stating the facts of the case, and reading the prayer of the bill, continued:

I think that the first part of the relief prayed is not within my power to give. It would in fact, be making a new contract for the parties, which I have no right to do. They were the Defendant's shares which he sold for £3, and I have no right to compel him to sell them for £2, or for any other price than the price he stated. But at the same time it is quite clear that he ought not to be allowed to gain any advantage by the concealment from the Plaintiff of the real facts of the case, and of his interest in the shares. The proper relief, therefore, would be that which is prayed for in the second branch of the prayer; and if the matter stood between the parties exactly as at first, I should have had no hesitation in granting it. I am of opinion that the conduct of the Defendant in concealing the real facts, and in endeavoring to complicate the matter by the introduction of Mrs. Rutt and of the stockbroker, Mr. Taylor, are such as to entitle the Plaintiff to ask that the whole transaction should be set aside, and the shares restored to the Defendant Barber, and the money repaid by him to the Plaintiff, if that be possible. But now arises this difficulty: The Plaintiff is not in a situation to restore the shares, for he has parted with a great portion of them, and has retained only 54 of them for himself, the rest having been transferred to persons, no one of whom is a party to this suit. The consequence is that the Plaintiff had precluded himself from obtaining the relief prayed for in the second branch of the prayer of the bill. The view that I take of this case is fully represented in the case of Great Luxembourg Railway Company v. Magnay, 25 Beav. 586, which came before me in 1858. In that case the Defendant, Sir William Magnay, having been supplied by the Luxembourg Railway Company with a large sum of money to buy a concession made by the Belgian Government, it turned out that he was himself the owner of that concession, and that he sold it to the company for his own benefit as the vendor. I held that the transaction could not stand, and that the only proper relief would be to annul the whole transaction, and to order the concession to be returned and the purchase money to be repaid. But pending the suit, the Luxembourg Railway Company had themselves sold this concession to another person, and had thereby

adopted the transaction, assuming and acting on its validity; and consequently I held that, having done so, they were no longer in a position to restore the Defendant to the position in which he was before the suit was instituted; and thereupon I dismissed the bill in that case, but without costs. I take the same view of this case, and adopt the observations I made in that case. I am of opinion that the only proper relief is to restore the shares and repay the money; but the Plaintiff has rendered this impossible. I have no control over the holders of the other shares, and do not even know, if they were parties, whether they would, without exception, consent to restore the shares transferred to them. Most certainly I could not compel them so to do, and no decree of mine could touch the holders of these 210 shares, between whom and the Defendant there is not any privity.

The Plaintiff has therefore precluded himself from obtaining the relief prayed for; but as the suit was occasioned by what I consider to have been the misconduct of the Defendant Barber, the bill must be dismissed without costs.

The Plaintiff appealed.

Mr. Fry, Q. C., and Mr. Woodroffe, for the Plaintiff.

Mr. Shebbeare (Sir R. Baggallay, Q. C., with him), for the Defendants, contended, on the facts, that the Defendant Barber was not an agent for the Plaintiff; and that if he was agent, he was so gratuitously, and not bound to the Plaintiff. The Plaintiff knew all about the company and the price of the shares, and could not complain of having been deceived in the price.

LORD SELBORNE, L. C. I am sorry to say that I cannot quite agree with the Master of the Rolls in this case, although it appears to me that in substance His Lordship took exactly the same view of the facts, or, at all events, very nearly the same view of the facts, as I do.

(His Lordship then stated that he agreed with the Master of the Rolls in thinking the whole case as to Mrs. Rutt fictitious. His Lordship believed the statements of the Plaintiff, and held it to be established that there was as to these shares a fiduciary relation between him and Barber. Barber knowing the wish of the Plaintiff to get some shares, wrote to Jones, applying as for some one else. Barber's case was that this application was for Mrs. Rutt, but his Lordship agreed with the Master of the Rolls that that case had failed. His Lordship commented further on the evidence as shewing that Barber was throughout the agent of the Plaintiff, and had not even been able to pay for the shares until he got the Plaintiff's money.)

To my mind, with the greatest deference to the Master of the Rolls, if His Lordship thought otherwise, this is a very clearly established case of agency. That being so, I see no difficulty in the relief which is asked by the first part of the prayer. It seems to me the common relief, the relief which was given in Hichens v. Congreve, 4 Russ. 562, 577, in Bank of London v. Tyrrell, 10 H. L. C. 26, and in other cases too numerous to mention.

It is unnecessary to inquire, therefore, whether, if I had been obliged to consider the alternative part of the prayer, I should have been pressed with the difficulties which weighed upon the mind of the Master of the Rolls, I will not go into that farther than to say that, as it appears to me, the case of Great Luxembourg Railway Company v. Magnay, 25 Beav. 586, 4 Jur. (N. S.) 839, is, assuming it to be well decided, a case in its circumstances very different from the present case. On the view which I take of the facts in this case, there is no difficulty in granting the relief sought by the first portion of the prayer.

I am obliged, therefore, to reverse the decree made by the Master of the Rolls, and to substitute a decree in the terms of the first part of the prayer of the bill, for the payment by the Defendant Barber of the sum in question, and that he also pay the costs of the suit.

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## McMANUS v. CITY OF BOSTON.

**(Supreme Judicial Court of Massachusetts, 1898. 171 Mass. 152, 50 N. E. 607.)**

Bill by McManus against the city of Boston for specific performance. The case is reported to the supreme judicial court.

BARKER, J.[18] On October 27, 1896, the school committee of the city of Boston, having power, under St. 1895, c. 408, § 2, with the approval of the mayor, to designate for school purposes lands which the board of street commissioners shall thereupon take by purchase or otherwise, passed an order requesting the board of street commissioners to take, by purchase or otherwise, the land which the plaintiff by this bill seeks to compel the city to take and pay for, and this order was subsequently approved by the mayor. When the order was passed, the plaintiff was not the owner of the land. The approval of the order by the mayor took place on November 5, 1896, and on that day the plaintiff bought the land for $5,700, in anticipation of the action of the school committee and street commissioners, and shortly after offered it to the city for $9,500, saying that that was a fair price, and not disclosing what the land had cost him. On December 22, 1896, the board of street commissioners voted to purchase the land for the city for school purposes, of the plaintiff, for the sum of $9,500; and on the same day the plaintiff signed a written agreement under seal to convey the land to the city for that sum. The bill alleges that the plaintiff on that day agreed in writing with the board of street commissioners to sell the land to the city for the sum of $9,500; which the city, through the board, agreed to pay; and the answer alleges that on that day the plaintiff offered the land to the board of street commissioners for the sum of $9,500, by the written paper of that date, signed by him, and above mentioned. The answer denies that there was any agreement on the part of the

[18] Part of the opinion is omitted.

board of street commissioners other than that contained in its vote of December 22, 1896, which was to purchase the land of the plaintiff for $9,500. The report does not state whether or not this vote was communicated to the plaintiff. It was communicated on the day of its passage to the school committee, who on January 4, 1897, passed an order that the sum of $9,500 be paid to the plaintiff for the land upon his giving to the city a deed satisfactory to its law department, and also passed another order transferring funds to enable the payment to be made. The plaintiff's deed not having been accepted, nor the price of the land paid to him, he brings this bill. * * *

The remaining question is whether the facts that the plaintiff bought the land on November 5, 1896, for $5,700, in anticipation of the action of the school committee and street commissioners, and shortly after offered it to the city for $9,500, not disclosing what the land had cost him, should cause the court in its discretion to refuse a decree for specific performance. These facts do not of themselves show that the contract was unreasonable or unfair or inequitable, or that it was tainted with fraud or bad faith, or that it would operate as a fraud on the public. The allegations of the answer that the full value of the land was $5,700, and that $9,500 was an exorbitant and excessive price for it, are not found by the report to be true. The circumstances stated in the report are suspicious, but are yet consistent with the fact that the price at which the board of street commissioners voted to purchase the land was a fair one, and that there was no fraud or bad faith. If the price was so exorbitant as to make the contract unconscionable, a court of equity would not decree specific performance. We should not, however, refuse to grant that relief merely because the vendor, ascertaining that a certain parcel of land would be needed for a public purpose, had had the address to purchase it at much less than its fair value, and then to sell it to the city at a fair price, through a board charged with the duty of taking it for the city by purchase or otherwise. If the price was exorbitant, the contract might well, under the circumstances, be found to be unconscionable, and one which a court of equity would not specifically enforce.

As this was not proved, and as there was a contract of purchase which the city has failed to perform, we think the plaintiff is entitled to a decree. Decree for plaintiff.

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## WOOLLUMS v. HORSLEY.

**(Court of Appeals of Kentucky, 1892. 93 Ky. 582, 20 S. W. 781.)**

HOLT, C. J. In August, 1887, the appellant, John Woollums, was living upon his mountain farm of about 200 acres in Bell county. He was then about 60 years old, uneducated, afflicted with disease disabling him from work, owned no other land, and but very little personal property. He knew but little of what was going on in the business

world, owing to his situation and circumstances in life. He moved in a small circle. At this time the appellee, W. J. Horsley, who was then a man of large and varied experience in business, who was then buying mineral rights in that locality by the thousands of acres, and who was evidently familiar with all that was then going on and near at hand in the way of business and development in that section, through his agent entered into a contract with the appellant, which was signed by the latter only, by which he sold to Horsley all the oils, gases, and minerals in his land, with customary mining privileges, for 40 cents per acre, and obligated himself to convey the same by general warranty deed free of dower claim or other incumbrance when the purchase money was paid, to wit, one half in three months, and the balance in four months from the first payment, or as soon as the deed should be made; three dollars of it, however, being then paid.

It is suggestive upon the question of the then value of the purchase, and as regarded by Horsley, that his agent, who made it, was to get $80 for his pay, or as much as Woollums was to receive for all he sold, and also that this agent does not testify in the case. The purchase money was not paid as stipulated, but the reason given is that it was a sale of the minerals by the acre, and the quantity of land was not known, and Woollums refused to survey it. Nothing appears to have transpired between the parties until the summer after the trade, when Horsley demanded a deed. He says he sent his agent to do so before that time, but it does not appear that he did so. In December, 1888, this suit was brought for a specific performance of the contract. The main defense is that it was procured through undue advantage, and under such circumstances that in equity its performance should not be decreed. The answer also sets up inability to convey with contingent right of dower relinquished, as the wife refused to unite in the deed; but it is alleged, and not denied, that the husband induced this refusal by her, and the appellee offered to accept a conveyance without her relinquishment, a proper reduction of the purchase money being allowed. Pom. Cont. § 438. The specific execution of the contract was ordered.

Considering all the circumstances, and the rule applicable in such a case, the judgment should not be upheld. There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in the party, but of sound discretion in the court. It requires less strength of case on the side of the defendant to resist the bill than it does upon the part of the plaintiff to enforce it. If the court refuses to enforce specifically, the party is left to his remedy at law. Thus a hard or unconscionable bargain will not be specifically enforced, nor if the decree will produce injustice, or under all the circumstances be inequitable, will it be rendered. In other words, a court of equity will not exercise

its power in this direction to enforce a claim which is not, under all the circumstances, just as between the parties, and it will allow a defendant to resist a decree where the plaintiff will not always be allowed relief upon the same evidence. A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought, ethics are considered, and a court of equity will sometimes refuse to set aside a contract, and yet refuse its specific performance. Story says:

"Courts of equity will not proceed to decree a specific performance where the contract is founded in fraud, imposition, mistake, undue advantage, or gross misapprehension, or where, from a change of circumstances or otherwise, it would be unconscientious to enforce it." 2 Story, Eq. Jur. § 750a.

Kent also says:

"It is a rule in equity that all the material facts must be known to both parties to render the agreement fair and just in all its parts; and it is against all the principles of equity that one party, knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a specific performance." 2 Kent, Comm. p. 491.

It was held in Patterson v. Bloomer, 95 Amer. Dec. 218, and the same rule has been announced in other cases, that an application for specific performance is addressed to the court's sound discretion, and will not be granted unless the contract is made according to legal requirements, is certain, reasonable, equitable, mutual, on sufficient consideration, consistent with public policy, and is free from gross misapprehension, fraud, surprise, or mistake. The appellee testifies that he did not know anything as to the mineral value of this land when the contract was made, but it is evident he had a thorough knowledge of the value in this respect of lands generally in that section, and of the developments then in progress or near at hand. All this was unknown to the appellant. It is evident his land was valuable almost altogether in a mineral point of view. While it is not shown what it was worth at the date of the contract, yet it is proven to have been worth in April, 1889, $15 an acre, and that this value arises almost altogether from its mineral worth; and yet the appellee is asking the enforcement of a contract by means of which he seeks to obtain all the oil, gas, and minerals, and the virtual control of the land, at 40 cents an acre. The interest he claims under the contract is substantially the value of the land. Equity should not help such a harsh bargain. The appellee shows pretty plainly by his own testimony that when the contract was made he was advised of the probability of the building of a railroad in that locality in the near future. His agent, when the trade was made, assured the appellant that he would never be bothered by the contract during his lifetime. He was lulled in the belief that the Rip Van Winkle sleep of that locality in former days was to continue, and the grossly inadequate price of this purchase can only be accounted for upon the ground that the appellant was misled and acted under gross misapprehension. The contract was not equitable or reasonable, or grounded upon sufficient consideration, and no interest has arisen in

any third party. A court of equity should therefore refuse its specific enforcement, but the appellant should have what was in fact paid, with its interest, and, when this is done, his petition should be dismissed.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

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## JONES v. STEWART.

(Supreme Court of Nebraska, 1901. 62 Neb. 207, 87 N. W. 12.)

Error to district court, Lancaster county; Hall, Judge.

Action by John T. Jones against Willard E. Stewart. Judgment for defendant, and plaintiff brings error.

DAY, C.[79] The facts in this case present a very singular transaction. On and prior to November 12, 1892, Willard E. Stewart was the owner of lots 7 and 8 of College Hill, an addition to the city of Lincoln, upon which was erected a seven-room dwelling house. The premises were incumbered by a mortgage of $2,000, together with a small amount of accumulated interest and taxes. On said day, and for several years prior thereto, the plaintiff, under the name of John T. Jones, treasurer, had on deposit and to his credit in the First National Bank of Lincoln $2,609.35; and, incomprehensible as it may seem, this fact had entirely escaped his attention. The defendant, discovering this fact, made a proposition to the plaintiff to deed him the property above mentioned, subject to the incumbrance, for an assignment of the plaintiff's interest in and to certain property, the nature and location of which the defendant declined to disclose. One of the conditions of the proposed trade was that plaintiff should sign his name to the papers without seeing, reading, or knowing the contents of the instrument he signed. After some modification of the proposition, the parties came to an agreement, in pursuance of which the defendant on November 12, 1892, executed and delivered a warranty deed conveying the premises above mentioned to a person named by the plaintiff, for plaintiff's use, and also paid to the plaintiff $100 in cash. In consideration of this conveyance and the cash payment, the plaintiff, in pursuance of the agreement, signed two papers without reading them or seeing their contents, or knowing what they contained, except that they were to operate as an assignment of certain interests which he had, the nature of which he was ignorant. At the time of the negotiation the plaintiff secured a written statement from the defendant that there was nothing contained in the papers which plaintiff signed which would subject him to criminal liability or bring upon him public ignominy or disgrace. Protected by this simple assurance, he blindly entered into the contract, and signed the instrument placed

[79] Part of the opinion is omitted.

before him. One of the papers so signed was a check in favor of the defendant on the First National Bank for $2,609.35, by means of which the defendant drew said sum from the bank and applied it to his own use. Plaintiff kept the real estate for about two years, at which time he sold it, realizing from the sale just sufficient to pay the mortgage lien upon it. In 1894 plaintiff discovered the nature and extent of the property he had assigned to the defendant, and the full purport of the contract he had made dawned upon him.

This action was brought in the district court of Lancaster county to recover of the defendant $2,609.35 and interest, and is in the nature of an action for deceit. As a basis for his claim, the plaintiff, in substance, alleges: That he was induced to sign the check without reading it or seeing its written and printed contents by the untruthful and fraudulent representations made to him by the defendant. That defendant told him he wished to procure from plaintiff a power of attorney and an assignment; that it would not put the plaintiff in a worse condition or position, lose him any money, or deprive him of any interest, but would be of great value to the defendant. That plaintiff, by oversight and error, forgot the fact of his deposit in the bank, and, relying on the representations made by the defendant, and believing them to be true, signed his name twice, but, in doing so, unknowingly signed the check on which the defendant drew said money from the bank. The answer denied any false or fraudulent representations whatever to induce him to sign the papers, and alleged that the plaintiff signed the check and papers voluntarily and knowingly, and in accordance with the agreement entered into between the plaintiff and defendant. The trial resulted in a verdict and judgment in favor of the defendant, to review which the case is brought to this court on error.

Much as the court may feel disposed to condemn the selfish cunning manifested by defendant in this transaction, and to lament the artless confidence of plaintiff, yet the legal rights involved are governed by well-established principles of the law, and by the law only must they be settled. The rule is well established that where persons are dealing with each other upon equal terms, and no confidential relation exists between them, neither is bound to disclose superior information he may have respecting the transaction, and, in the absence of fraud or deception to induce the contract, the court can afford no relief. The law presumes every man capable of taking care of his own interests, and his poor judgment or unfortunate trades cannot form a basis of interference by the court. To recover, it was necessary for plaintiff to prove that the representations were made, that they were false, that plaintiff believed the representations to be true and relied upon them, and that he was injured thereby. The question of fact as to whether defendant had made any false or fraudulent representations, upon which plaintiff relied in entering into this transaction and signing the check and power of attorney, was submitted to the jury under proper

instructions, upon evidence which was slightly conflicting, and the finding of the jury is conclusive upon this court.

For the purpose of determining the amount of plaintiff's damage, in the event the jury should find there had been false representations made by defendant, upon which plaintiff relied in making the contract, testimony was introduced on both sides as to the value of the property at the date the trade was made. Plaintiff's witnesses (four in number) placed the value of the real estate at sums ranging from $2,500 to $2,700, while the defendant's witnesses (seven in number) placed it at from $4,000 to $5,000. There was ample evidence for the jury to find that the value of the property received by the plaintiff was equal to the value of the property he parted with. This question was also submitted to the jury under proper instructions, and, being resolved by the jury in defendant's favor upon fairly conflicting evidence, their finding will not be disturbed. Loan Ass'n v. Strine, 59 Neb. 27, 80 N. W. 45; Van Housen v. Broehl, 59 Neb. 48, 80 N. W. 260. This rule has been announced so many times by this court that it is unnecessary to cite authorities to support it. Fourteen cases can be found in the index of 59 Neb., under the title of "Review." * * *

The defendant testified that he told the plaintiff that, in his opinion, the property he was deeding to him was of about equal value of the property he was getting from plaintiff. To discredit this, and to show defendant did not regard the properties of equal value, plaintiff sought to show that defendant had paid $600 for the information which enabled him to make the trade. We can see no error in excluding the testimony. It was entirely immaterial what defendant may have paid for the information. He may have made a good or a bad bargain. It did not go to show that the value of the property was less than defendant claimed. It is a matter of common experience that persons oftimes make great sacrifices of their property for the purpose of realizing therefrom ready cash.

All of the elements of fraud presented by the pleadings were fully and fairly submitted to the jury by the instructions, and, after a careful investigation of the record, we can find no legal reason to disturb the judgment. It is therefore recommended that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

HOLCOMB, J., dissents.

## STANDARD STEEL CAR CO. v. STAMM.

(Supreme Court of Pennsylvania, 1904. 207 Pa. 419, 56 Atl. 954.)

The court found as a conclusion of law that the complainants were not entitled to specific performance, and accordingly dismissed the bill.[80]

BROWN, J. The material facts in this case are undisputed. Shortly before March 20, 1902, W. D. George went to the town of Butler to procure options to purchase land in his name, but intended really for the benefit of the Standard Steel Car Company, which contemplated the erection of a large plant for the construction of steel cars. He employed W. D. Brandon, Esq., a member of the Butler bar, to assist him, but did not disclose the name of the company he represented. After George had procured options for a number of properties, he found it important to procure one for the property of the defendant, which is the subject of this controversy, and, having so informed Mr. Brandon, his attorney, the latter called to their assistance J. F. Anderson, one of the appellants. On March 20, 1902, Anderson took Stamm, the appellee, to Brandon's office, and procured the following option:

"Received of J. F. Anderson this 20th of March, 1902, five dollars for an option to purchase at any time within sixty days at the price of $14,000, a tract of land in Butler, Pa., bounded north by Pillow street, east by Willow street or Fair Ground Road, south by Charles Duffy and west by public road; containing nine acres, more or less, with the appurtenances. Possession of the house and lot—the residence property—to be given in thirty days after acceptance of this option, and of the balance also in thirty days, except so far as it may be necessary for him to operate his brick yard for the season for which purpose he retains possession until November 1, 1902, and thereafter of the kiln until he can remove his brick, which he agrees then to do with all reasonable diligence. Acceptance of this option to be in writing. The amount of purchase money to be paid eight thousand dollars on acceptance of option when deed clear of encumbrance is to be made, and balance in payments of $2,000 a year for three years with interest, to be secured by mortgage.

"J. George Stamm. [Seal.]
"J. F. Anderson. [Seal.]

"Attest: W. D. Brandon."

On April 1, 1902, the option was accepted in writing by Anderson, and subsequently he assigned it to the Standard Steel Car Company, the other appellant. While Brandon and Anderson knew at the time the option was given that a manufacturing company contemplated locating its plant in Butler, its name had not been disclosed to either of them. When the option was given, the agreement was that, if it should be exercised by Anderson, Stamm would go to the office of Mr. Brandon and execute the deed. He did not do this, but there were interviews between him and Brandon and Anderson for the purpose of closing the contract, in which he expressed his willingness to perform his part of it, but excused himself for not promptly doing so on the ground that his wife was unwilling to join in the deed, and requested

[80] The statement of facts is abridged.

time for the purpose of inducing her to do so. Another reason given by him for asking for delay was that there was some trouble about car tracks over his land. He subsequently admitted that this latter reason was a mere pretext, and that, as the real reason for his delay was the unwillingness of Mrs. Stamm to join in the deed, he wanted a little more time to talk it over with her. On July 19, 1902, Brandon notified Stamm that the deed for the property would be accepted without its execution by his wife, but he refused to so execute and deliver it to the purchaser. On September 27, 1902, the purchase money of $8,000 and Anderson's bond and mortgage for the balance, according to the contract, were tendered to the defendant, and he still refused to comply with his agreement.

This bill was then filed on November 5, 1902, and, under the foregoing facts, was dismissed by the court below, for the reason that, as Anderson had not disclosed to Stamm, at the time the option was procured, his knowledge of the fact that a manufacturing plant would probably come to Butler, such concealment was a fraud upon Stamm, in the face of which he ought not to be compelled to specifically perform his contract. The words of the learned trial judge in his conclusion that the bill ought to be dismissed for the reason stated are:

"Under the undisputed facts in this case it would be inequitable to compel the defendant to convey the land to the plaintiff, the Standard Steel Car Company. The option, when taken, was not taken for the Standard Steel Car Company, nor by its direction, nor did said company have any knowledge that it was to be taken, or that it had been taken, for some time thereafter. Mr. J. F. Anderson, who took the option, was a volunteer. He had no interest whatever in the premises. He is not asking for a conveyance to himself. He has been in no way injured or wronged by the refusal of the defendant to convey the land. At the time he took the option he believed that a manufacturing plant was coming to Butler, and he had reason to believe that the defendant had no knowledge of the facts relative thereto. His conduct in his dealings with the defendant was, in effect, fraudulent as to the defendant. Mr. Anderson testifies that he concealed the knowledge he had of the probable coming of some new industry, knowing or believing, if he disclosed it, the defendant would ask a higher price for his land than he did. He knew, if the plant did come, it would greatly enhance the market value of the defendant's property; and, as a fact, it has largely enhanced the value of said property. There is no evidence in the case of an imperative necessity that the car company should own the property of the defendant for the convenient and successful operation of its plant."

The statement that Anderson is not asking for a conveyance to himself is an inadvertence, for the prayer of the bill is for a decree that a deed be executed and delivered to him or his co-complainant.

In Anderson's negotiations with Stamm for the option it is not pretended that he made any misstatement, or practiced any deception or imposition, or refused, at Stamm's request, to disclose any information which he possessed. As a matter of fact, he was in possession of no definite information. It was limited to the probability that a company, unknown and unnamed to him, might locate in Butler, and, among other lands, might need that of the defendant for its business purposes. As we gather from the testimony, he, with other citizens

of the place, was anxious to have the manufacturing company come among them, and, most naturally, was willing to assist in the movement to induce it to do so. With not the slightest evidence of any intention to deceive Stamm, or to practice a fraud upon him, he negotiated with him on a pure business basis. Each dealt with the other at arm's length, the prospective seller trying to obtain the best possible price paid for his land, and the option was given only after the prospective buyer had agreed to give all that was asked for it. There is nothing to show that the price agreed to be paid was not full and adequate at the time the option was given. And now, for no other conceivable reason than that the value of his land has greatly increased, the defendant would avoid performance of a contract in which there is involved nothing dishonest in law or in morals. Before the option was exercised, the appellee heard that the manufacturing company might come to the town, but he made no objection on that account when Anderson notified him that he would exercise it. Such exercise turned it into a contract, enforceable by either party, whether the company came or not, and, if it had not come, Anderson would have had to pay the purchase money, though the same might have been much more than the property was worth and than anybody else would have paid for it. What Anderson is alleged to have concealed was nothing more than a rumor, which might have been true or false. He concealed no fact then in existence that had actually affected the real market value of the property. But, even if he had, and the concealment under what took place between him and the prospective vendor had not amounted to actual deception, no fraud would have been practiced.

The complaint of the appellee is, that Anderson did not speak when it was his duty to speak.

"A concealment, to be material, must be the concealment of something that the party concealing was under some legal or equitable obligation to disclose." Kerr on Fraud (Am. Ed.) 95.

"Concealment which amounts to fraud in the sense of a court of equity, and for which it will grant relief, is the nondisclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate, and which the other party has a right, not merely in foro conscientiæ, but juris et de jure, to know."

In Neill v. Shamburg, 158 Pa. 263, 27 Atl. 992, the plaintiff sought to set aside her sale of an oil lease, alleging as one of her reasons concealment by the purchaser at the time of the purchase of the fact that oil was being produced upon a neighboring leasehold owned by him, and we held that the failure of the purchaser to make such disclosure was not a fraud upon her. If the information had been imparted to her, she might have refused to sell, or demanded more; but it was said by the present chief justice:

"Unless there is some exceptional circumstance to put on him the duty of speaking, it is the right of every man to keep his business to himself."

There was no exceptional circumstance here requiring Anderson to repeat to Stamm the rumor of the probability of the location of the

manufacturing company in their town. On the contrary, common business prudence required him to remain silent, for, if he had spoken of the rumor, he might not have been able to negotiate at all. On this very point the learned trial judge says:

"Had Mr. Anderson frankly confided to Mr. Stamm the information and knowledge he had, and which was entirely proper that he should have done, it is scarcely possible this option would have been given."

If Anderson had been asked to speak on a material matter, and had answered falsely, Stamm would not be bound by the option, nor the contract that flowed from it; and, if he had refused to speak when asked, Stamm would have dealt with him at his own risk. But such is not the situation.

Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661, was a case in which the vendee did not disclose to his ignorant vendor the fact known by him that there was a mine of chrome on the land he wished to purchase. The vendor subsequently would have avoided his deed for the reason that the vendee had not informed him of the presence of the chrome on the property at the time he sold it, and Black, J., said:

"A person who knows that there is a mine on the land of another may nevertheless buy it. The ignorance of the vendor is not of itself fraud on the part of the purchaser. A purchaser is not bound by our laws to make the man he buys from as wise as himself. The mere fact, therefore, that Tyson knew there was sand chrome on Harris' land, and that Harris himself was ignorant of it, even if that were conclusively established, would not be ground for impugning the validity of the deed."

In Guaranty Safe Deposit & Trust Co. v. Liebold, 207 Pa. 399, 56 Atl. 951, in which we have this day filed an opinion, we said what we repeat as applicable to the facts here:

"In this commercial age options are daily procured by those in possession of information from which they expect to profit simply because those from whom the options are sought are ignorant of it. When the prospective seller knows as much as the prospective buyer, options can rarely, if ever, be procured. * * * The prospective buyer seeks an option, instead of at once entering into a contract for the purchase of land, because, no matter what information he may possess exclusively, he is unwilling to act upon it until it becomes a certainty. In the meantime, on the contingency of its becoming so, he makes his contingent bargain to purchase. This is fair in law and in morals. Hershey v. Keembortz, 6 Pa. 128; Harris v. Tyson, 24 Pa. 347 [64 Am. Dec. 661]."

The reason given for dismissing plaintiffs' bill and refusing a decree for specific performance is untenable, and cannot be sanctioned in this practical age. The decree of the court below is reversed, and it is now ordered, adjudged, and decreed that the bill be reinstated, and that upon the tender of $8,000 of the purchase money by J. F. Anderson to the appellee, and the execution and delivery by him of the mortgage to secure the three annual payments of $2,000 each, balance of the purchase money, the appellee, J. George Stamm, execute and deliver to him, and said J. F. Anderson, a deed for the land described in the bill; the costs on this appeal and below to be paid by the appellee.

## LIVINGSTON v. PERU IRON CO. et al.

(Court of Chancery of New York, 1831. 2 Paige, 390.)

The bill in this cause was filed by the son and grantee of John Livingston, deceased, to set aside the conveyance of a lot of land, on the ground of fraud. The bill stated among other things, that Palmer, one of the defendants, applied to J. Livingston to purchase the land in question, which was then wild and uncultivated, and that he falsely represented to Livingston that the same was of little or no value except for a sheep pasture, for which purpose he wanted the lot; whereas in point of fact he had previously discovered a valuable ore bed on the premises; which fact he fraudulently concealed from Livingston. The bill also stated that in consequence of this representation and fraudulent concealment, Livingston was induced to sell 164 acres of land to Palmer at $2 per acre; when the ore bed alone was worth $70,000.

The Peru Iron Company demurred to the bill for want of equity. They also showed for special grounds of demurrer, that it appeared by the bill that the complainant was not the sole heir at law of his father; that the conveyance to him, in January 1820, while the defendants were in possession claiming the land as their own under the previous conveyance, was void by the statute against buying pretended titles; and that all the heirs at law should have been made parties to the suit. * * *

THE CHANCELLOR (WALWORTH). Upon the merits of this case the demurrer cannot be sustained. I am not aware of any case in our own courts, or in England, where the simple suppression, by the buyer, of a fact which materially enhanced the value of the property, has been deemed sufficient to set aside the sale, on the ground of fraud. The rule is different where the purchaser applies to a court of equity to enforce the specific performance of an agreement. In such a case this court will not enforce a specific performance of the contract, if the complainant has intentionally concealed a material fact, from the adverse party, the disclosure of which would have prevented the making of the agreement; but he will be left to his remedy at law. It has even been questioned by many whether the suppression of a material fact by the one party, of which fact he knew the other party to be ignorant, was not of itself sufficient to avoid the contract on the ground of fraud. Thus in Perkins v. McGavock, Cook's Rep. 417, the court of errors and appeals in Tennessee say, it is a sound principle of equity that each party to a contract is bound to disclose to the other all he knows respecting the subject matter materially affecting a correct view of it, unless common observation would have furnished the information. They also say that the neglect to disclose facts within the knowledge of one party, and not of the other, would in equity be considered a concealment which is both immoral and unjust. Although our courts have not gone that length, yet, even in this state, very slight circum-

stances, in addition to the intentional concealment of a fact, have been considered sufficient to constitute a fraud upon the other party. Thus in Wardell v. Fosdick & Davis, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383, where the defendants had taken a deed of land which they afterwards ascertained had no actual existence, and after this they sold and assigned their interest under that deed to the plaintiff, without disclosing to him that fact, he was permitted to recover against them for the fraud. So also in Monell & Weller v. Colden, 13 Johns. (N. Y.) 395, 7 Am. Dec. 390, where the vendor of a water lot, knowing that the purchasers wanted to buy the lot for the purpose of obtaining the privilege of a wharf, represented to them that the owners of land bounded on the water had a right by law to apply to the commissioners of the land office for a grant of the privilege to build a wharf adjacent to the land, whereas he in fact knew that the lands under the water had been previously granted, the purchasers were allowed to recover for the fraud. And in a recent case before Lord Eldon, he adverts to the general principle that parties dealing for an estate have a right to put each other at arms length; and that if the purchaser knows there is a mine upon the estate, and the vendor makes no enquiry, the former is not bound to give him information thereof. But he says:

"Very little is sufficient to affect the application of that principle. If a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate." Turner v. Harvey, Jacob's R. 178.

And certainly if the purchaser does any act, or makes any declaration, with the intention of misleading the seller and preventing him from ascertaining the real situation of the property, and at the same time conceals from him a fact which he knows to be material, he is guilty of a fraudulent deception.

From the statement in the bill this case appears to be one of that description. The defendant Palmer had discovered a valuable mine on the lands of Livingston, which were then wild and uncultivated and lay remote from the residence of the latter. Knowing that he could not obtain the land if he discovered the fact of the existence of the mine, he does not content himself with making a bargain, in the language of Lord Eldon, at arms length; but he falsely and fraudulently represents the land as being of no value except for a sheep pasture, and states that he wants it for that purpose. By this deception the vendor is thrown completely off his guard, and he contracts to sell the land at the usual rate or price, of rough broken land in that region, instead of directing his agent, near the premises, to enquire and ascertain its true value.

But I think there is an unsuperable objection to the complainant's recovering upon his bill in its present shape. Although the conveyance of the land was obtained by a fraudulent misrepresentation, it was not void. It was only voidable, at the election of the vendor. And the defendants or some of them were in the actual possession of the premises, claiming title to the same under their deed, at the time of the con-

veyance to the complainant. The legal title to this property could not pass to the complainant, under that conveyance, while it was thus held adversely. If John Livingston was still living he would be a necessary party to a bill to rescind the sale on the ground of fraud. Since his death, all his heirs at law, or the devisees of this particular part of his estate, are necessary parties. I lay out of question what was said on the argument as to this conveyance to the complainant being in the nature of a testamentary disposition of his property, to carry into effect a previous arrangement. The deed of January 1820, is not set up in the bill as a devise of the estate, but as an absolute grant; neither is it stated to have been executed in due form of law as a will of real estate.

The demurrer must therefore be allowed, with liberty to the complainant to amend his bill by making all the heirs at law, or the devisees of John Livingston, parties thereto, on payment of costs. And if he does not amend within sixty days, the bill must be dismissed, with costs to the defendants.

It may be proper however to suggest that if the fact is, as stated by the defendant's counsel, that John Livingston devised no part of this land to the complainant, but that he actually made a will by which it was devised to other persons, under the general description of all the residue of his estate, no amendment can help the complainant. In that case it will be necessary to dismiss the bill in this suit, and to bring a new action in the names of those to whom the legal title passed on the death of John Livingston, if they shall be advised to proceed further in this matter.

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## MARGRAF v. MUIR.

(Commission of Appeals of New York, 1874. 57 N. Y. 155.)

Appeal from order of the General Term of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff, entered upon the report of a refereee and granting a new trial.

This action was against the vendor for specific performance of a contract to convey a lot of land, situate in Westchester county, and for damages for breach of the contract in case it could not be specifically performed.

The defendant is the widow of Alexander Muir, who died intestate in 1858, seized of a lot of land in Westchester county. He left six children, three of whom were yet minors when the contract in question was made. The defendant with her children, resided in Brooklyn, and the plaintiff resided in Westchester county, near the lot in question. She did not know what the lot was worth, but he knew it was worth $2,000 in consequence of its recent rise in value. This knowledge he concealed from the defendant and contracted with her to purchase it for $800. She contracted in her own name, expecting that

those of her children who were of age would unite with her in the conveyance, and that she could get from the court the right to convey on behalf of her minor children. Before the making of the contract the lot had been sold for taxes, and a lease thereof given in pursuance of such sale. At the time of making the contract, the plaintiff knew that the lot belonged to defendant's children and that proceedings would have to be taken in some court to give her the right to convey; and, he also knew, that the land had been sold for taxes, and this latter fact she did not know. The referee found that the lot was worth $2,000. And ordered judgment for the plaintiff for $1,200, the difference between the contract price and the value of the lot. Further facts appear in the opinion. * * *

EARL, Com.[81] This was an unconscionable contract and could not be specifically enforced on the ground of the inadequacy of the consideration. The plaintiff lived near the lot and knew its value. The defendant lived at a distance and did not know its value. While the plaintiff did not make any misrepresentations, he concealed his knowledge of the recent rise in value of the lot and took advantage of her ignorance, and thus got from her a contract to convey to him the lot for but a little more than one-third of its value. Such a contract, it is believed, has never yet been enforced in a court of equity in this country. When a contract for the sale of lands is fair and just and free from legal objection, it is a matter of course for courts of equity to specifically enforce it. But they will not decree specific performance in cases of fraud or mistake, or of hard and unconscionable bargains, or when the decree would produce injustice, or when such a decree would be inequitable under all the circumstances. 2 Story, Eq. Jur. § 769; Willard, Eq. Jur. 262; Osgood v. Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513; Id., 14 Johns. 527; Seymour v. Delancey, 6 Johns. Ch. 222; Seymour v. Delancy, 3 Cow. 531, 15 Am. Dec. 270. * * *

The General Term did not therefore err in reversing the judgment, and its order should be affirmed and judgment absolute ordered against the plaintiff, with costs.

All concur.

Order affirmed and judgment accordingly.

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## HETFIELD v. WILLEY.

(Supreme Court of Illinois, 1883. 105 Ill. 286.)

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County.

MR. CHIEF JUSTICE SCOTT[82] delivered the opinion of the Court. * * *

The bill is to enforce the specific performance of a written agreement between complainant and defendant, concerning a sale by the

[81] Part of the opinion is omitted.

[82] Part of the opinion is omitted.

former to the latter of his interest in the firm of Frank Field & Co., a firm then and previously engaged in manufacturing crackers and confectioneries. As respects the terms of the agreement there can be no controversy, as it is signed by the respective parties. It obligated defendant to pay complainant $5000 for his interest in the firm of Frank Field & Co.—$1000 of which sum was to be paid on or before the 1st day of August next after the making of the contract, $2000 in one year, and $2000 in two years, the latter payments to be evidenced by two promissory notes, bearing interest at the rate of eight per cent per annum, which said notes were to be secured by a mortgage on lands of defendant described in the bill. On the hearing, the circuit court decreed a specific performance of the contract, and that decree was affirmed by the Appellate Court for the First District. The correctness of the decision of the latter court is called in question on this appeal of defendant.

The defence made is, that the contract is not fair,—that defendant was induced to enter into it under a misapprehension of the real facts, and that complainant contributed to that result by statements not entirely candid or accurate, upon which defendant confidently relied, and was thus overreached in the transaction. The rule is a familiar one that applications for the specific performance of a contract are within the sound legal discretion of the court hearing the cause. That discretion, of course, is a sound legal discretion, controlled always by the equitable circumstances of the case, and not by the mere caprice of the chancellor. This branch of the law is so familiar it is hardly necessary to restate principles so well understood. Before a court of equity will compel the specific performance of a contract, it must appear it was founded on a good and valuable consideration, and is reasonable, fair and just in all its parts. It is for the reason a court of chancery will not lend its aid to give a party the benefit of an unreasonable or unjust contract, the enforcement of which would work a serious hardship. If his contract is a legal one, and its specific performance, if compelled, would be oppressive, the party seeking a remedy must find it in the law courts, and not ask a court of chancery to assist him. This court has had frequent occasion to say, a court of equity is not bound to enforce every contract, even though it be a legal one, and there might exist no sufficient reason for annulling it. Equity will withhold its aid if there be anything that makes it unreasonable or inequitable the party should have performance of his agreement.

It appears defendant performed the contract in part by making payment of most of the first installment agreed to be paid, and then ceased to do more. Shall he now be compelled to go forward and complete his agreement? To do so would undoubtedly subject defendant to very serious loss. On the principle just stated, equity will hesitate to compel the execution of a contract the performance of which would be oppressive on the obligated party. Considering the whole evidence contained in the record, it is impossible to escape the conviction it

would subject defendant to considerable loss to compel him to perform the contract under the circumstances. The assets of the firm were not near so valuable as defendant supposed them to be. The concern owed many more local bills than he had any reason to anticipate. It is said he should have examined the books to have ascertained more accurately the value of the firm assets. There are two answers to this suggestion: First, the books did not show to a casual observer the exact condition of the accounts due the firm, whether good or bad; and second, the books kept by the regular book-keeper did not show all the local bills owing by the firm. That class of bills only appeared on a private memorandum book kept by one member of the firm, who had charge of that branch of the business. This fact was known to complainant, and was not known to defendant at the time of the sale. When complainant referred defendant to the books for information, he did not advise him where the private memorandum book containing an account of the city bills owing by the firm could be found. Had defendant examined the books as any prudent man would have done, it will be presumed he would have examined only such as were kept by the book-keeper of the firm. It could hardly be expected he would have inquired whether the several partners kept private memoranda of matters pertaining to the firm business. It is proved there were several thousand dollars of city bills owing by the firm that did not appear on the book-keeper's books. The amount was certainly sufficient to very materially affect the value of the firm assets. Of these city bills defendant did not seem to have any knowledge when he executed the written agreement it is sought by this bill to enforce by a decree in chancery. Complainant had full knowledge, and he ought to have communicated to defendant that information. He must have known the amount of the city bills very materially affected the value of his interest in the firm he was selling to defendant. In this respect he does not stand so fair that he may invoke the aid of a court of equity.

It will be remembered that the contract was made on the 6th day of July, 1880, and it was some time in October before defendant refused to perform it, and offered to rescind the agreement. That, it is said, was too late; that he should have discovered sooner he had been overreached, and offered to rescind the contract. That may be, and doubtless is, true; but defendant is not asking the aid of a court of equity to enable him to rescind the agreement. Nor is it a material inquiry now whether defendant could rescind the contract after the lapse of so great a period. A more serious question, and one with which the court has now to deal, is, whether complainant has shown a contract so fairly obtained, and so just, that he may invoke the aid of a court of chancery to compel a specific performance. In view of all the circumstances in evidence it can hardly be said that he has. His contract with defendant may be a legal one, and defendant may be required to abide it or answer in damages. That question need not now be determined. Conceding that agreement is obligatory on both par-

ties, under all the circumstances it seems most proper they should be referred to the law courts to adjust the difficulties between them. Whatever claim complainant may have against the defendant, arising out of the agreement, may be compensated by damages recoverable in an action at law. It is no answer to this view of the law to say that complainant may have told defendant, in the office of the lawyer who prepared the papers, he did not know what his interest in the firm was worth, and that he wanted it understood he was selling his interest, whatever it might be, for the sum named in the contract. He may have told him all this, and yet if he obtained an unfair contract from defendant by failing to disclose material facts affecting the value of the interest he was selling, equity will not decree the execution of the agreement in his favor. It will leave him to his remedy at law, whatever it may be.

The judgment of the Appellate Court will be reversed and the cause remanded.

Judgment reversed.

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## WHITTED v. FUQUAY.

**(Supreme Court of North Carolina, 1900. 127 N. C. 68, 37 S. E. 141.)**

FURCHES, J.[88] This is an action upon an alleged contract for the sale of land in which a specific performance is demanded. The relief prayed for was refused, and plaintiffs appealed to this court. There were two issues submitted to the jury, upon which they passed:

"(1) Did the defendant, A. P. Fuquay, contract and agree in writing to convey to plaintiffs the lands described in complaint at the price of $1,000, as of date 19th November, 1898, reserving one acre near spring? Ans. Yes.

"(2) Would the specific enforcement of such contract be oppressive and inequitable? Ans. Yes."

There were other issues submitted, but they were not passed upon by the jury. * * *

Then, does the evidence show that it would oppress, or would be oppressive, on the defendant to require him to perform this contract,—that is, to convey land recently worth $300 for $1,000? And does this justify him in withholding from the plaintiff the right he had to have the contract specifically performed, because the jury found that it would be oppressive for him to do so, without its being found that the plaintiff practiced a fraud on the defendant, or that he in some way dealt unfairly with the defendant, or that he took some unfair advantage of him in the transaction, or that plaintiff suppressed some fact from the defendant of which he had knowledge and the defendant did not have, and by reasonable diligence could not have. Without, at least, some of these elements, we are unable to see why a specific performance should not have been granted. There must be something

[88] Part of the opinion is omitted.

more than the fact that a party had made a bad trade to relieve him from his obligation to perform it. The simple fact that the defendant sold a tract of land worth $1,500 for $1,000 will not do so, and this is all the defendant can complain of, as he sold it to another for $1,500, after coming to this county, seeing the land, and knowing all about the railroads. The defendant was raised on this land, and knew every foot of it. There had been no minerals found upon it, to change its intrinsic value, of which the plaintiffs knew and the defendant did not. Nothing had happened to the land but what the defendant knew. The only thing alleged by the defendant is that two railroads had been built, one from Raleigh to the land, and another from Apex to a point near the land, and sawmills had been erected near the land, that enhanced its value. These roads are public enterprises, open and notorious, and of equal knowledge to all persons. The sawmills were the result of the construction of the roads, and it would hardly seem probable that the defendant, who owned the tract of land only worth $3 per acre a few years ago, would not have been quickened to find out something of the cause, when he had a dozen applications from different parties to buy it at a price above $10 per acre. But defendant testified that he—

"had heard rumors of a railroad contemplated to the property. * * * Had heard rumors that railroad was completed, but gave it no credence. These rumors came in a letter from the locality; letter written by either one of my brothers or Mr. Blanchard. * * * Forty or fifty or sixty or perhaps ninety days before the 17th November a brother of witness, who lived in one and one-half miles of spring, wrote that he believed there was to be a railroad, because Mr. Angier got some hands in part off his land, grading the road."

It is a well-settled rule that any knowledge of a fact the truth of which may be ascertained by proper inquiry puts the party on notice, and deprives him of his equity. Ijames v. Gaither, 93 N. C. 358. But, upon a thorough examination of the evidence (consisting principally of the correspondence), we see nothing concealed from the defendant, or unfair in the transaction, on the part of plaintiffs,—nothing that appeals to the court to cause it to withhold from the plaintiffs a specific performance of the contract, taking it that there was a contract to sell. Bryson v. Peck, supra. We are therefore of the opinion that plaintiffs' sixth prayer for instruction, "that there is no sufficient evidence in the case to authorize the jury to answer the second issue, 'Yes,' and, if the jury believe the evidence, they will answer said issue, 'No,'" should have been given.

Error. New trial.

FAIRCLOTH, C. J. I agree to a new trial, but not with the opinion on the merits.

## McPHERSON v. KISSEE.

(Supreme Court of Missouri, Division No. 2, 1912. 239 Mo. 664, 144 S. W. 410.)

Ejectment for 41.60 acres of land in Taney county. Judgment was given for defendant Kissee in the circuit court of Taney county on October 26, 1911, specifically enforcing a contract to exchange the land in controversy for a farm owned by said defendant. From this judgment plaintiffs appeal.

Plaintiffs were the owners of 35 head of hogs, a log wagon, and the 41.60 acres in controversy, upon which land was located a flouring mill, all of which property they agreed to exchange for the equity of defendant Kissee in a farm of 240 acres in Dade county, Mo. After execution of the contract for exchange of property, plaintiffs allowed defendant Kissee to take actual possession of the personal property and flouring mill before the abstract of title to defendant's property was submitted to them. Upon examining the abstract of title, plaintiffs declined to complete the exchange of property, and demanded that they be restored to possession of the flouring mill, on the alleged ground that defendant's farm was incumbered for a larger amount than was represented by him in the contract. Defendant Kissee declined to surrender possession of the mill, whereupon this action ensued.

The correctness of the judgment below rests upon a proper construction of the following written contract between plaintiffs and said defendant Kissee:

"* * * It is agreed and understood by and between us, the undersigned R. C. Kissee, and H. S. McPherson, that each of us furnish good abstract of title to premises described and that we furnish each other a general warranty deed, duly executed and acknowledged to premises described and owned and controlled by each of us; the lands and property agreed to be sold by H. S. McPherson and the Bradleyville Milling Company to be free and clear of any incumbrances whatever; the lands agreed to be sold by R. C. Kissee, to be sold subject to two deeds of trust to secure payment of $5,000.00. * * *"

The defendant Kissee admits that, when the foregoing contract was signed, there were outstanding mortgages against his farm in Dade county, as follows: A first mortgage of $4,000 to a Kansas City firm, a second mortgage of $1,000 to the Golden City Bank, and a third mortgage for $803 in favor of the same parties to whom the first mortgage was given. However, he avers that the $803 mortgage was given for part of the interest on the $4,000 loan, and really did not create a separate indebtedness, and hence the contract truthfully represented the incumbrances on the property at $5,000. While these mortgages were not introduced in evidence, it appears reasonably clear by the record that the $4,000 mortgage could not have been paid off and discharged without paying the third mortgage of $803 in full.

BROWN, J.[84] * * * It was the duty of defendant Kissee to in-

[84] The statement of facts is abridged and parts of the opinion are omitted.

form plaintiffs fully of the amount and nature of the incumbrances upon the property he undertook to trade to them; and, as he failed to perform that duty, he is not entitled to a decree of specific performance. * * *

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## FALCKE v. GRAY.

(In Chancery, 1859. 29 Law J. Ch. [N. S.] 28.)

KINDERSLEY, V. C.,[85] after stating the facts of the case, said: * *

The interference of a court of equity, although of daily occurrence, is something which is exceptional, and although discretionary, is not to be used arbitrarily, but must be governed according to ascertained rules, and must not be exercised when in the view of the court it would do that which would be unreasonable and shocking to the feelings of mankind. If there were nothing more in the case than that Mr. Falcke bought of Mrs. Gray property worth £200 for £40, I think I ought to say, "bring your action, for I will not assist you." But it appears to me that in this case there are circumstances which render it clear that I ought to refuse specific performance. This transaction was not the case of a seller endeavouring to get the best price for his commodity and a buyer endeavouring to give the smallest. The clear intention of Mrs. Gray was, that there should be put upon the articles what was a fair and reasonable price; and though she was told by Mr. Brend that he was not a judge of these matters, still she asked his opinion, and he said, "Suppose we say £40." Mr. Falcke, to do him justice, does not appear to have pressed the matter; but still Mrs. Gray must be held to have considered that that was a fair and reasonable valuation. She could not positively tell. She says it was a legacy from a lady who was reported to have had an offer from George the Fourth of £100 for the jars. But what was Mr. Falcke's position? He says he knew very well that it was not a reasonable price; and was this, then, what Mrs. Gray intended? Knowing the value of the articles, Mr. Falcke allows the contract to be signed on this footing; and the question is, whether he can come to the court, and say, "Compel Mrs. Gray to perform this contract"? This court is not a court of honour, and is not to decide the case because one of the parties has not acted as a man of honour ought to act. I admit that these articles are of fluctuating value, yet still they have a market value. I admit that I could not set aside this contract; yet it appears to me that, consistently with justice, I ought to refuse to interfere to enforce the contract. In doing his I ought to dismiss this bill, without costs, as against Mrs. Gray. It was, indeed, contended that she ought not to have been a party, and that the bill ought to have been filed against the defendants, Messrs. Watson, alone. I think that, under the circumstances, the plaintiff was right in making

[85] The statement of facts, here omitted, as well as the omitted part of the opinion, is printed on page 91, supra.

Mrs. Gray a defendant. Then, as regards Messrs. Watson, it has not been proved that they knew anything of the previous sale to Mr. Falcke, and the plaintiff can have no relief against them. On the whole case, therefore, the bill must be dismissed, without costs against Mrs. Gray, but with costs against Messrs. Watson.

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## REDGRAVE v. HURD.

(In Chancery, 1881. 20 Ch. Div. 1.)

In January, 1880, the plaintiff, a solicitor of Birmingham, inserted in the Law Times the following advertisement:

"Law Partnership.—An elderly solicitor of moderate practice, with extensive connections in a very populous town in a midland county, contemplates shortly retiring, and having no successor would first take as partner an efficient lawyer and advocate about forty, who would not object to purchase advertiser's suburban residence, suitable for a family, value £1600, three-fourths of which might remain on security—no premium for business and introduction. A large field is here open for an efficient man, and great advantages for free education of sons. Address R. J., No. 1919, 10 Wellington Street, Strand."

The defendant applied by letter to the address indicated, and a correspondence ensued, the negotiation proceeding on the footing that the plaintiff should receive the defendant as his partner and transfer to him a moiety of his practice and the plaintiff's leasehold house for £1600. On the 12th of February the plaintiff and defendant had two interviews, at the latter of which the defendant's wife was present. There was a direct conflict of evidence as to what passed at these interviews, the plaintiff asserting that he stated the business to bring him in about £200 a year, the defendant and his wife saying that the plaintiff stated it to bring it from £300 to £400 a year. The parties were examined orally in court, and Mr. Justice Fry held that greater weight was to be attributed to the evidence of the defendant and his wife than to that of the plaintiff, and held that the plaintiff had either represented his business as bringing in about £300 a year, or from £300 to £400 a year.

On the 14th of February the defendant wrote to the plaintiff:

"Of course I should duly rely on your promise to do all you could to extend the business among your friends. Still I should be glad to have some idea as to the amount of business done at your office in the past three years and the nature of the nucleus with which we should start. Would you, therefore, be able to give me an hour next Tuesday to go into this matter and settle the terms of partnership?"

On Tuesday, the 17th of February, the parties accordingly had an interview at the plaintiff's office. The plaintiff produced to the defendant three summaries of business done in 1877, 1878, 1879. These summaries shewed gross receipts not quite amounting to £200 in a year. The defendant asked how the difference was made up, and the

plaintiff shewed him a quantity of letters and papers which he stated to relate to other business which he had done. No books of account were produced, the plaintiff not having kept any books which shewed the amount of his business, but the plaintiff shewed the defendant some letter-books and diaries and a day-book. The defendant did not examine any of the books, letters, and papers thus produced, but only looked cursorily at them, and ultimately agreed to purchase the house and take a share in the business for £1600. Mr. Justice Fry came to the conclusion that if the letters and papers to which the plaintiff referred had been examined they would only have shewn business to the amount of £5 or £6 a year. The defendant wished the written agreement to set out that the £1600 was the consideration for the purchase both of the house and the share in the practice, but the plaintiff refused to assent to this, and an agreement was drawn up and signed on the 2d of March, 1880, by which the defendant agreed to purchase the house for £1600, the practice not being referred to. The defendant paid a deposit of £100, and on the 17th of April, 1880, was let into possession of the house, and removed thither with his family from Stroud; but finding, as he alleged, that the practice was utterly worthless, he gave up possession, and refused to complete the purchase. The plaintiff, in June, 1880, commenced an action for specific performance of the written agreement to purchase the house. * * *

Mr. Justice Fry decided for the plaintiff. The defendant appealed.

JESSEL, M. R.[86] This is an appeal from a decision of Mr. Justice Fry, granting specific performance of a contract by the defendant to buy a house from the plaintiff, and dismissing with costs a counterclaim by the defendant asking to rescind the contract, and also asking for damages on the ground of deceit practised by the plaintiff in respect to the agreement. * * *

As regards the facts of this case, I agree with the conclusions of Mr. Justice Fry on every point but one, and my failure to agree with him in that one is the cause of my concurring in reversing his decision. What he finds in effect is that the defendant Hurd was induced to enter into the contract by a material misrepresentation made to him by the plaintiff Redgrave, but he comes to the conclusion that either he did not finally rely upon that representation, or that if he did rely upon it he made an inquiry which, although ineffectual and made, as he says, carelessly and inefficiently, bound him in a court of equity, and prevented him from saying that he relied on the representation. I have already dealt with that as a matter of law, and I will deal with it presently as a matter of fact, because I think there was an omission to notice a most material fact, or rather, I should say, an omission to give sufficient weight to it, for it is noticed in the judgment which is now appealed from. * * *

[86] The statement of facts is abridged and parts of the opinions of Jessel, M. R., and Lush, L. J., and all of the concurring opinion of Baggallay, L. J., are omitted.

Then the learned judge goes on to say:

"According to the conclusion which I come to upon the evidence, the books were there before the defendant, and although he did not trouble to look into them he had the opportunity of doing so. In my judgment if he had intended to rely upon that parol representation of business beyond that which appeared in the papers, having the materials before him, he would have made some inquiry into it. But he did nothing of the sort."

Now in that respect I am sorry to say that the learned judge was not correct. There were no books which shewed the business done. The plaintiff did not keep any such books, and had nothing but his diaries, and some letter books; and therefore, it is a mistake to suppose that there were any books before the defendant which he could look into to ascertain the correctness of the statements made by the plaintiff; and the whole foundation of the judgment on this part of the case, even if it had been well founded in law, fails in fact, because the defendant was not guilty of negligence in not doing that which it was impossible to do, no books being in existence which would shew the amount of business done. Then the learned judge continues:

"He did nothing of the sort. I think the true result of the evidence is this, that the defendant thought that if he could have even such a nucleus of business as these papers disclosed, he could by the energy and skill which he possessed make himself a good business in Birmingham."

Then that being so the learned judge came to the conclusion either that the defendant did not rely on the statement, or that if he did rely upon it he had shewn such negligence as to deprive him of his title to relief from this court. As I have already said, the latter proposition is in my opinion not founded in law, and the former part is not founded in fact; I think also it is not founded in law, for when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract, relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue. it must be shewn either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation. If you tell a man, "You may enter into partnership with me, my business is bringing in between £300 and £400 a year," the man who makes that representation must know that it is a material inducement to the other to enter into the partnership, and you cannot investigate as to whether it was more or less probable that the inducement would operate on the mind of the party to whom the representation was made. Where you have neither evidence that he knew facts to shew that the statement was untrue, or that he said or did anything to shew that he did not actually rely upon the statement, the inference remains that he did so rely, and

the statement being a material statement, its being untrue is a sufficient ground for rescinding the contract. For these reasons I am of opinion that the judgment of the learned judge must be reversed and the appeal allowed.

As regards the form of the judgment, as the appellant succeeds on the counter-claim, I think it would be safer to make an order both in the action and the counter-claim, rescinding the contract and ordering the deposit to be returned. As I have already said, it is not a case in which damages should be given. * * *

LUSH, L. J. I entirely agree with my learned brothers as to the propositions of law applicable to this case which have been laid down by the Master of the Rolls, and as they have been so clearly and pointedly expressed I do not think it at all necessary to repeat them, because I have not myself the least qualification to suggest as to those propositions. And so far they differ from one part of the judgment of the learned Judge in the Court below, in which he appears to hold that where a false representation has been made and papers are handed to the party to whom it is made, from which if he chose he might detect the falsehood, and he does not do so, he is in the same position as if he had done so. I entirely differ from that view, and think what my learned brother said was the correct view of the law, that where a false representation has been made it lies on the party who makes it, if he wishes to escape its effect in avoiding the contract, to shew that, although he made the false representation the defendant, the other party, did not rely upon it. The onus probandi is on him to shew that the other party waived it, and relied on his own knowledge. Nothing of that kind appears here. On the question of fact, I regret to say, that I cannot follow the learned Judge of the Court below, in the inference he draws from the facts which were before him. * * *

The misrepresentation as to the business therefore entitles the defendant to be discharged from his contract for the purchase of the house; but I agree, for the reasons stated by the Master of the Rolls, that he is not entitled to damages.

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## VII. HARDSHIP

### KIEN v. STUKELEY.

(High Court of Parliament, 1722. 1 Brown, P. C. 191, 1 E. R. 506.)

The respondent being seised in fee of a messuage and lands at Holbeach, in Lincolnshire, let on lease at the yearly rent of £20 clear of all deductions, except the land-tax, by articles of agreement between him and the appellant, dated the 20th of July, 1720, did covenant and agree, that for the considerations therein after-mentioned, he would, on or before the 29th day of December then next, at the proper costs

and charges of the appellant, make to the appellant, his heirs and assigns, for ever, a good estate in fee-simple of the premises, to the satisfaction of the appellant and his counsel. And by the same articles, the appellant did promise and agree, that upon such assurance and conveyance being made and executed, he would pay to the respondent £800, being forty years purchase; upon condition that the premises did then pay yearly rent of £20, otherwise to abate in proportion to forty years purchase; and that the appellant should have the rents from Lady-day then last, and all the wood and timber-trees, and other trees then growing and being upon the premises. And at the time of executing these articles, the appellant paid the respondent £120 in part of the purchase-money, who gave a receipt for the same accordingly.

At the time of making this purchase, the appellant intended to pay for the same, by the sale of South-Sea stock, which then bore the extravagant price of £1000 per cent; but this intention being frustrated, by some delay in making out the title, the appellant declined to complete his purchase.

Whereupon, in Hilary term, 1720, the respondent exhibited his bill against the appellant in the Court of Exchequer, for a specific performance of the articles, and to have the remainder of the purchase-money paid; to which bill, the appellant, by his answer, insisted, that in regard the plaintiff had not made out his title within the time limited by the articles, and that the price thereby stipulated was extravagant and unreasonable, he ought not to have the aid of a Court of Equity to support the articles, or decree a specific performance thereof.

But when the cause came to be heard, on the 8th of February, 1721, the Court decreed, that the said articles of agreement should be duly performed; and ordered, that the Plaintiff's title deeds should be forthwith brought before the Deputy Remembrancer, and that he should report the plaintiff's title to the premises, and compute what was due to him from the defendant, for the interest of £680, being the remainder of the said purchase-money, from the 29th of September, 1720: and that the defendant should pay the plaintiff the said £680 and interest, upon his executing the conveyances of the premises, and should take and receive to his own use the rents and profits of the premises, which accrued due from Lady-day, next before the date of the said articles.

From this decree, the defendant appealed; insisting that the premises lying in the Fens of Lincolnshire, were not, at any time, really worth more than fifteen years purchase, on account of the accidents and necessary outgoings, which those kind of estates are liable to; and although at the height of South-Sea stock, lands, as well as every thing else, were raised to an extravagant price; yet, as that proceeded from the general delusion which all men lay under, as to the imaginary value of South-Sea stock, and a supposed vast increase of their riches, which very soon appeared chimerical and groundless, such an agreement as the present, made at that particular juncture, under such circumstances,

and upon such hard and unequal terms, ought not to be aided or carried into execution by a Court of Equity; but the party should be left to such remedy as he could have at law.

On the other side it was contended that there was no pretence of fraud or surprize in obtaining the articles; but, on the contrary, the appellant entered into them with great deliberation, was well apprised of the value of the estate, and had the articles drawn by his own solicitor. That to compel a specific performance of articles, concerning the purchase of lands, was the proper business of a Court of Equity; and hardly a term passed without instances of decrees of this kind. And, that at the time of entering into these articles, lands in that part of the country were at forty years purchase; and the respondent could have sold the lands in question at that rate, for ready money.

But, after hearing counsel on this appeal, it was ordered and adjudged, that the decree therein complained of, should be reversed; and that the respondent's bill in the Court of Exchequer should be dismissed without costs.

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## BERNEY v. PITT.

**(In Chancery, 1686. 2 Vern. 14, 23 E. R. 620.)**

The plaintiff being a young man, as he alleged, and his father tenant for life only of a great estate, which by his death was to come to the plaintiff in tail; and during his life allowing the plaintiff but a narrow allowance, he became indebted, and borrowed £2000 of the defendant in 1675, and entered into two judgments of £5000 apiece, defeasanced each of them, that if the plaintiff outlived his father, and within a month after his father's death, paid the defendant £5000, and if the plaintiff should marry in the life-time of his father, then if he should from such marriage during his father's life pay the defendant interest for his £5000, the defendant should vacate the judgment; with this farther clause in the defeasance that it was the intent of the parties, if the plaintiff did not outlive his father, that the money should not be repaid. January, 1679, the plaintiff's father died, and to be relieved against the said judgments upon payment of the £2000 lent with interest, was the bill; which complained of a fraud, and a working upon the plaintiff's necessity when in streights.

This cause came first to be heard in Hillary-Term, 27 Car. II, before the Lord Nottingham, who in regard the judgments were for money lent, and not for wares taken up to sell again at under-value, as improvident heirs used to do; and in regard of the express clause in the defeasance of the defendant's losing all, if the plaintiff died before the father, did not think fit to relieve the plaintiff against the bargain itself, without paying the £5000 with interest from a month after the plaintiff's father's death; and did decree upon the payment of the £5000 with interest, the defendant should acknowledge satisfaction upon the

judgment; and the money was paid, being £5390, and the judgments vacated accordingly.

And now the cause coming to be re-heard at the plaintiff's instance, before the LORD CHANCELLOR JEFFERIES, it was insisted that there was no true difference in the case of an unconscionable bargain, whether it be for money or for wares; and that the inserting the clause in the defeasance, that the defendant should lose his money, if the plaintiff died before his father, did not differ the case in reason at all from any other bargain made by the plaintiff, or other tenant in tail, to be paid for at their father's death; for that in these cases, if the tenant in tail died living the father, the debt would be lost of course, and therefore, the expressing of it particularly in the defeasance, made the bargain the worse, as being done to colour a bargain, that appeared to the defendant himself unconscionable; and though there was not in this case any proof of any practice used by the defendant, or any on his behalf to draw the plaintiff into this security; yet in respect merely to the unconscionableness of the bargain, the Lord Chancellor discharged the Lord Nottingham's decree; and did decree the defendant Pitt to refund to the plaintiff, all the money he had received of him, except the £2000 originally lent, and the interest for the same.

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## WILLAN v. WILLAN.

(In Chancery, 1814. 2 Dow, H. L. 274.)

John Willan, of How Hatch, South Weald, Essex, appellant's uncle, in 1792, held the farm of Brownswood, Hornsey, from the Prebendary of St. Paul's, under a lease renewable every seven years at a fine at the will of the Prebendary. Willan, the uncle, died August 11, 1792, at the age of 82, having devised his freehold estates to his great nephew, William Willan, for life, and to the son of W. Willan in remainder, and limited his leasehold estates as nearly as possible in the same way as the freehold. On the 6th August, 1792, while the uncle was confined to bed by the illness of which he died, an agreement was entered into between him and his nephew, the appellant, who then held the Hornsey farm of his uncle under a sub-lease; which agreement, signed by both parties, and witnessed by the attending physician and apothecary, was in these terms:

"It is hereby agreed, between John Willan, of How Hatch, in South Weald, Esq., of the one part, and his nephew, John Willan, of the Bull and Mouth Inn, London, on the other part, that the present lease of the farm at Hornsey, which the said John Willan, of the Bull and Mouth, now has of his uncle, shall be cancelled, and a new lease of 21 years, renewable every seven years for ever, or so long as the said John Willan, Esq., or his assigns, hold the same from the Prebendary of St. Paul's, shall be granted of the farm that he now holds, and also of that farm now let to William Stap, and also of that now let to Mary Collier, at the yearly rent of £565 clear of land tax, and all other taxes, to commence at Michaelmas, 1794.

"And it is farther agreed, that if any fines shall be demanded on account of an increase of buildings on any of the above farms, the said John Willan, of the Bull and Mouth Inn, shall pay those fines."

A lease having been executed in terms of this agreement by the trustees under the uncle's will, William Willan, the great nephew, alarmed at the increase of the fines, which threatened to render the Hornsey lease of no value to him, filed his bill in chancery, praying that it might be declared that the agreement had been unduly obtained, and that it might be set aside; and that the lease founded upon it might be declared to have been executed by mistake, and might be delivered up, &c.; or at least, that the stipulation for perpetual renewal might be declared to be unreasonable, and to have been obtained by surprise and imposition upon the uncle without consideration, and that it ought to have no effect, &c.

Elizabeth Willan, the uncle's widow, had, on the 5th August, written by his desire to the nephew, stating, that—

"the uncle was ill, wished to give him the preference of Hornsey, and begged that he would come and talk about it."

The nephew came next day along with the Rev. Joseph Baines, a clergyman of unblemished character, and much esteemed by the uncle. The nephew and Baines went into the uncle's bed-room, where the agreement was prepared, and then the physician and apothecary were called up to witness the signing. The widow was not present during any part of this transaction, but in a quarter of an hour after the nephew had left the room, the uncle sent for him again, and, in the widow's presence, said,

"John, that agreement must not stand; it is giving the estate away."

The appellant replied:

"You, sir, have left the estate to my son, on failure of William Willan's having children, so I shall be making the farm better."

And added:

"If you do not approve of it when you are better, the agreement shall be cancelled."

The physician on his examination (the apothecary and Baines had died some time before the bill was filed) stated that on the day when the said agreement was prepared and signed, the uncle was in a state of the greatest imbecility of mind and body, and totally incapable of attending to or understanding any business that required thought, reflection, or consideration; that he hesitated to witness the signing, and would not have done so, had he not been informed, and believed, that it was merely a common lease, of which the terms might have been before considered. The deposition of the widow and several others went to show that the uncle was of sufficiently sound mind at this time, though the widow admitted that his mind occasionally wandered.

The uncle had on the same day (August 6) executed a codicil to his will. The uncle and nephew did not appear to have lived on terms of intimacy. It ought to be observed, that in 1789, Willan, the uncle, had made an agreement for a lease of certain other premises at Horn-

sey, held in the same manner, with one Hoare, covenanting to renew perpetually. But there he took a fine, and an advance of rent.

The agreement was set aside in the court below, on the ground of its having been a surprise on both parties, and the lease executed in consequence was decreed to be delivered up. The decree was affirmed on a rehearing, and thereupon the nephew appealed.

LORD ELDON [CHANCELLOR].[87] He had not proceeded in his judgment below on the ground that the agreement was fraudulent, though he thought it would have been a fraudulent use of it to carry it into effect. * * *

But this had appeared to him to be an agreement obtained by surprise, and in this sense, that it was a surprise on both parties; and that the appellant had agreed to give it up, if it had the effect of going beyond what was intended. * * *

He had stated below, and he still thought, that the testator intended to give the appellant some additional advantage, but not the advantage of this perpetual renewal, &c. He was of opinion that the evidence bore him out in this, that the uncle was not absolutely of non-sane mind, but that he was in such a state of imbecility, arising from indisposition, that he might easily at the time misconceive the effect of the agreement; and, in point of fact, it did afterwards occur to him that it might have a different effect from what was intended, and that the estate must in a short time be purchased at a rate which would leave nothing to the lessor. It appeared that he desired his wife to call the appellant, who had not left the house, into his room, and that when the appellant came, the testator said,—not in these exact words, but in effect:

**"This matter must be reconsidered—the agreement must not stand—it is giving away the estate."**

The appellant then honestly said:

**"You have left the estate to my son, in failure of William Willan's having children; so I shall be making the farm better. If you do not approve of it when you recover, it shall be given up."**

It had been strongly objected that this evidence ought not to have been received. But the appellant had read it, and, independent of that, the evidence of this conversation was material, for the purpose of showing that there existed such a misunderstanding as that against which the bill prayed to be relieved; and besides, the interrogatories led to it. * * *

When he spoke of surprise, he merely meant, that it was a case where, from imbecility, and the absence of proper advice, the testator did not understand the effect of what he did, and that it was unconscionable in equity that an agreement should be executed which was a surprise on both parties.

It had then been insisted, that if one lease could not be granted, at least the agreement ought not to have been delivered up; and that this

[87] Parts of the opinion are omitted.

was one of the cases where, though equity would not execute the agreement, it would leave the party to his remedy at law. He thought this case did not fall within that distinction. He did not say that here there was any dishonesty; but if an agreement was obtained by surprise, under such circumstances as occurred in this case (vide, 16 Ves. 86,) it was against equity to permit any use to be made of it.

Then it had been said, that a lease had been actually executed by the trustees upon the foundation of this agreement. The answer was, that the trustees granted it without sufficient knowledge of the circumstances, and that their cestui que trusts ought not to be prejudiced.

These were the grounds on which he had proceeded below, and with this statement he should leave the case with their Lordships. But, in justice to himself, to their Lordships, and the parties, he had again examined the case diligently, and if he had seen cause to alter his opinion, their Lordships would give him credit so far as to believe that no one could have been more ready to avow the change and to act upon it.

LORD REDESDALE. This was a bill to set aside an agreement entered into at a time when one of the parties was on his death-bed, and clearly in a state of imbecility, and also to set aside an actual lease founded upon it, on this ground, that the uncle, when he signed it, neither knew nor understood the contents of it, and that advantage was taken of his circumstances to get his signature.

The effect of the agreement was clearly to put an end, in no very long time, to the value of the property to the lessor; for the facts were these [states them]—the only stipulation in favour of the lessor being, that if there should be an increase of fines on account of new buildings, they should be paid by the lessee. All the rest, arising from improvements in agriculture, &c., were to fall on the estate. It was scarcely possible to suppose that any man in full possession of his faculties could enter into such an agreement for valuable consideration. Then it was said, that this was partly for natural love and affection. But where an agreement purported in the body of it to be for valuable consideration, it could never, though obtained by a relation, be supported on the ground of natural love and affection; for if it could, every agreement made with a relation must be supported, however inadequate the consideration.

The nephew came to the uncle's house in consequence of a letter written to the former by order of the uncle, and the letter stated the object to be to give him a lease in preference to others. The uncle was, at the time, not incapable of making an ordinary lease, or a codicil to his will, which he did the same day, but was incapable of applying himself to a contract of this kind, which required deliberation and calculation, for this was clearly a contract for valuable consideration. Doctor Kirkland attended as a witness: he remonstrated that the uncle was not then in a condition to attend to business, and he was informed that this was a mere lease between landlord and tenant, the terms of which had been settled before. No calculations appeared to have been entered

into by the parties, or if entered into, they were perfectly false; for the agreement was such, that the lease would soon produce nothing to the lessor, who must therefore abandon it, as he was entitled to do; for there was no contract binding him at all events to renew. Suppose there had been no evidence of debility at the time, it might be questioned whether such an instrument, obtained under such circumstances, without any previous consultation as to the terms of the contract, might not be considered as the effect of surprise.

Another circumstance had been brought into the cause,—the agreement for the lease to Hoare, in which also the lessor covenanted to renew, and the lessee covenanted not to erect new buildings. Possibly the lessor might have entered into this agreement without having sufficiently considered the terms of it; but at any rate the terms were very different from those of the agreement now impeached. There the lessor received a fine of £225 and an advance of rent.

He did therefore conceive that the respondent had made out the charge that the uncle did not understand the effect of the agreement, and that advantage was taken of his situation to induce him to sign it. There appeared to him no contrariety in the evidence as to the state in which the uncle was at the time of the signature. He was capable of making a codicil to his will, but not of doing anything which required deliberation. This besides was a bargain, and different in its nature from that expression of volition required in making a will.

If the whole of Mrs. Willan's evidence was to be received and believed, the uncle himself afterwards considered it as an improvident act. If the conversation stated by her actually took place, it showed that the effect of the agreement had before been understood by neither the one nor the other. But then it was said that this evidence ought not to have been received, because that point was not directly in issue. It appeared to him that it ought to be received,—1st, Because he considered it as evidence of the surprise which was directly in issue, as evidence of the mutual misunderstanding, or at least of misunderstanding in the uncle; 2d, Because it came out on the examination for the Appellant; and, 3d, Because it was read by the appellant himself. He could not object to his own evidence, thus adopted, and say that he could have answered it by other evidence. According to the argument at the bar, if twenty facts were stated in the bill, and all were denied by the answer, and a single witness deposed to each fact, there must be issues to try them all. He did not think the rule went that length.

His conception of the case then was this,—that where a contract was manifestly unreasonable, if one of the parties, taken by surprise while in a state of debility, was made to depart from an original intention, and to act contrary to a previous design, then the contract ought to be set aside, as this was an advantage taken of his infirm state.

Then a question was made, whether the agreement might not have effect as to one lease. It appeared to him that it could not. When the agreement was found to be so unreasonable that it could not be exe-

cuted in toto, they could not draw the line. They could not say what the uncle really meant to do. They had no evidence of his intention but this agreement, which was bad.

Another question was, whether the agreement ought to have been delivered up. He thought it perfectly clear, that where an agreement was obtained under such circumstances,—as by surprise, for example, —that it was not fit to be acted upon in equity, it was unfit that it should be acted upon at law, and in such cases the practice was to order it to be delivered up; or, if an action was brought upon it, to order a perpetual injunction to restrain that action. He could not see why, if it was improper to act on this agreement in equity, it should be acted on at law. His opinion therefore was, that the decree ought to be affirmed, and he was authorized to state, that a noble and learned Lord (CARLTON), not now present, but who had attended at the hearing, concurred in that opinion.

Decree affirmed.

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## YOUNG v. CLERK.

(In Chancery, 1720. Prec. Ch. 537, 24 E. R. 241.)

The bill was to have a specific execution of articles, whereby the defendant had agreed to let the plaintiff a lease of the premises for 18 years, at the rate of £67. 10s. per ann.

The case was thus: The plaintiff, for about 20 years last past, had held the premises, as tenant to one Thomas Goodhew, at the rent of £40 per ann. Thomas Goodhew was entitled to those lands, under a lease of 21 years, with power of a reversal from the Archbishop of Canterbury; and on his death, which happened about two years since, the estate came to Henry Goodhew, his brother, by virtue of a family settlement made the 20th of December, 1689; and thereupon his lease being determined, he applied to Henry Goodhew for a new lease; but before a new lease was made he likewise died, having first made his will, and thereby devised this estate to his daughter, with whom the defendant after intermarried, and thereby in her right became entitled to the premises for the residue of the lease, with a power of reversal; and thereupon the plaintiff applied to him likewise for a new lease to make up the compleat term of 21 years, which Thomas Goodhew had agreed with him for, and of which there was about 18 years to come.

The defendant had never seen the land, and knew nothing of the nature or value thereof, and therefore desired him to consider it, and come and see the lands which lay near Canterbury, before he came to any agreement concerning them: it appeared, and was fully proved in the cause, that the lands were worth, and were actually let by the plaintiff to under-tenants at £3 and £3. 10s. an acre per ann., being hop lands, and the tenants were, by covenants in their leases, to plant them and leave them planted with hops, to lay on so many load of dung

every year, to bear all parish taxes, and to be at other expenses, so that the plaintiff had £167 per ann. coming in by them, without any expense on his part, though he had never paid more than £40 per ann., rent to Thomas Goodhew.

When the defendant went down to Canterbury, he did take a view of the lands in the plaintiff's company, who had promised and engaged him to lie at his house; but it did not appear that he had any opportunity whatsoever of informing himself otherwise than from the plaintiff himself, who was continually with him, what the value of the lands was, nor had the defendant himself any judgment on a bare view of the lands what they were worth per ann.; but he asked the plaintiff to let him see the counterpart of the leases he had made to his under-tenants, which would have fully informed him therein, but that was shuffled off, on pretence he could not find them, or that they were left with a friend of his, and so the defendant knew nothing of the rent the plaintiff received from his under-tenants, or the terms on which they held the lands; and it was fully proved in the cause, that the defendant expressed great dissatisfaction thereat, and was unwilling to come to any articles of agreement with the plaintiff; but by the importunity of the plaintiff, and others then present, he was prevailed on to agree to it, and thereupon the articles in question were drawn up and executed between them; after which the defendant discovered the imposition, and that the plaintiff had above £100 per ann. clear above the rents he was to pay him, and that without any trouble or expense whatsoever on his part: the defendant on discovery of this, and informing himself fully of the value and nature of the land, thereupon refused to execute a lease pursuant to the articles; and to oblige him to it was this bill brought.

LORD CHANCELLOR was clear of opinion, that this court was not bound to decree a specific execution of articles, where they appeared to be unreasonable, or founded on a fraud, or where it would be unjust or unconscionable to assist them; that from the circumstances of this case, these articles were plainly of that sort; that though there was no direct fraud proved, yet from the great undervalue of the land, and that too without any expense whatsoever on the plaintiff's part, it appeared to him to be an unreasonable and shameful contract; that it was indeed good at law, and therefore left the plaintiff to his legal remedy for recovery of what damages he could by non-performance of the articles, but dismissed the bill as to any specific execution thereof.

——— v. WHITE.

(In Chancery, 1818. 3 Swanst. 108, note.)

The bill was for a specific performance of an agreement by which the defendant was to take a lease of a way-leave over the plaintiff's close, at the yearly rent of £10, for the use of a colliery which the defendant intended to take; and was likewise to employ the plaintiff's son in the colliery during the term, and allow him £20 per annum during the first 7 years, and £30 the second: at the close of the articles, the defendant obliged himself to the performance under a penalty. After the execution of them, some other colliers took a lease of other lands, which, as well as the plaintiff's, lay between the colliery and the river, and so rendered the plaintiff's way leave useless to the defendant; and the defendant could not obtain a lease of the colliery, and the lease that he was to take being for the use of the colliery, though there was no fraud proved in the plaintiff hindering the defendant from taking the other way-leaves or the colliery,

Yet my Lord would not decree a specific performance, but directed only a quantum damnificavit by the defendant's not taking the lease; and that part that related to the employing the son, he totally rejected, there being no colliery to employ him in.—Lord Colchester's MSS., in a collection entitled as containing cases from Easter, 1706, to Michaelmas, 1713.

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## HELLING v. LUMLEY.

(In Chancery, 1858. 3 De Gex & J. 493, 44 E. R. 1358.)

These were two appeals from the decision of Vice-Chancellor Stuart, holding that the Plaintiff was entitled to the enjoyment of a box No. 124 at the opera house, of which the Defendant was the lessee.[88] * * *

THE LORD JUSTICE TURNER. This is a bill filed by the trustee of a deed of the 15th of March, 1823, claiming either the possession or occupation of box No. 124 at the opera house, or an equivalent in money. [His Lordship read the prayer of the bill.]

The case arises thus: In the year 1792 a lease of the opera house was granted to William Taylor, through whom Edmund Waters claimed title. By this lease it was provided that with the exception of certain specified boxes, not including No. 124, no box should be let for a greater term than that of the season, or from year to year. But the forty-one specified boxes might be let without any such restriction. The lease contained a covenant for renewal. The term having become vested in Waters, he, on the 25th August, 1821, contracted to sell his

[88] The statement of facts is abridged.

interest in the lease, and in any renewed terms to Chambers. That contract contained a reservation in these terms: [His Lordship read it.] So that Waters reserved the right of possession of box No. 124 for himself and his nominees during the term and any renewed term. Having this reserved right Waters settled it by the assignment of March, 1823, upon trusts for the benefit of his creditors, and the Plaintiff is the present trustee of that deed. The Vice-Chancellor was of opinion that the Court ought to declare the Plaintiff entitled as against the Defendants Lumley and Lord Ward, to the benefit of the reservation of the box, and that the Defendants, and all claiming under them are bound to give the occupation of the box according to the terms of the reservation, and His Honour granted an injunction and directed accounts as sought by the bill. From that decision two appeals have been brought, one by each Defendant.

In the first place it is said that if the Court enforces specific performance of the agreement constituted by the reservation, the consequence will be a forfeiture of the lease under which the landlord may re-enter. And it is said that Courts of Equity do not decree a specific performance of an agreement of which the consequence would be a forfeiture. But when a Defendant sets up the consequence of forfeiture as a defence to a bill for specific performance, the Court must be well satisfied, before it admits the validity of such a defence, that forfeiture will follow from the specific performance of the agreement, and it must also look at the fact by whose acts and conduct the forfeiture would be occasioned. The Court will not permit a Defendant to put himself in such a position as that his performance of his agreement shall create a forfeiture, and then to turn round and say that the Plaintiff shall not have a specific performance of the agreement, because the Defendant has by his own act enabled the landlord to enter, upon the agreement being performed. How does the present case stand in that point of view? The original lease contained a contract that no box, except forty-one which were specified, should be leased except for the season, or from year to year. This lease has, however, expired, and therefore there could not possibly now be any breach of the contract contained in it. A new lease was granted in 1845, and it appears that although forty-one boxes were also excepted in the new lease they were not specified, so that the Defendant Lumley had a right to deal as he pleased with any forty-one boxes which he thought fit, he having a power of selection for that purpose. In the year 1845, therefore, Mr. Lumley was in this position. He had power to select the box No. 124 as one which he might be at liberty to lease otherwise than for the season, or from year to year. By so making his selection he would have the power to perform specifically the contract constituted by the reservation. He thought proper to select forty-one other boxes, and having so selected he then says he cannot grant a lease or carry out the reservation in the deed of 1821, because, having already made his selection of forty-one boxes, not including No. 124, he would by selecting

that box have selected forty-two instead of forty-one boxes. If, therefore, there was any danger of a forfeiture being incurred under the covenant contained in the lease, it would be occasioned by the act of Mr. Lumley, and not by the act of the Plaintiff. Now, Mr. Lumley took, as is admitted, with notice of the reservation, and must be bound by it. If, then he has put it out of his power to perform the agreement constituted by the reservation, the consequences must fall upon him and not on the Plaintiff. I am not, however, satisfied that the performance of the agreement contained in the reservation would create a forfeiture, for the contract may admit of this interpretation—that the lessee might let anyone occupy the box No. 124 from night to night during several successive seasons, and I do not see anything to prevent his doing so. But if there were it would arise from the act of Lumley and not from the contract. The first ground therefore cannot be maintained.

But then it is said that in truth there was no such right in existence in Waters at the time of the agreement, and that the true construction of the reservation is to confine it to such right (if any) as Waters had, and that if he had none the reservation was inoperative. I think that this argument scarcely requires an answer to be given to it. For the right which is referred to in the reservation is a right of occupation for six persons, not only during the whole of the original but during any renewed term. It is further argued that this was a mere personal right, and that the intention of the parties simply was that Waters should personally enjoy the occupation of the box. The terms of the agreement do not, in my opinion, admit of that construction. This appears to me to be clear from the use of the word "nominees," shewing that Waters might grant to anyone the right of occupying the box. There appears to me nothing which prevented Waters from selling that right. Some argument has also been grounded on the delay which has taken place in enforcing the agreement. But I think that there has been no such delay as to displace the right.

It should, I think, be noticed in the decree that the Defendants decline to make the compensation which is prayed by the bill. I think the decree right, with that exception, and that the Appellants should pay the costs.

THE LORD JUSTICE KNIGHT BRUCE. We have thought it as well to make a slight alteration in the language of the decree, but it will create no substantial difference. A single appeal would have been frivolous and vexatious; the two appeals are doubly so.

## DOWSON v. SOLOMON.

(In Chancery, 1859. 1 Drew. & S. 1, 62 E. R. 278.)

On the 8th of June, 1858, the unexpired term of thirty-three years in a house and premises at Champion Hill, Surrey, held under a lease from the master, wardens, &c., of Dulwich College, was sold by auction subject to certain particulars and conditions of sale, and the Defendant, Leon Solomon, having been declared the purchaser at such sale, signed the memorandum of agreement for the purchase, and paid the deposit on the purchase-money.

By the conditions subject to which the property was sold, it was provided that the purchaser should pay to the vendors the remainder of his purchase-money and complete the purchase on the 20th of July, 1858, and should be let into possession from that day, and that up to that time all outgoings should be cleared by the vendors, but that if the purchase should not be completed on the day fixed for completion the purchaser should pay £5 per cent. on his purchase-money until the same should be paid, and should not be entitled to compensation on account of such delay. * * *

The vendors were trustees for sale under a will; and in the month of June Mr. Dowson, one of the trustees, and who it appeared acted for himself and his co-trustees in the matter, went to the office of the insurance company where the premises had been insured to pay the premium on the policy, and finding that it would expire on the 24th of June, and expecting that the purchase would have been completed on the 20th of the following July, the day fixed for completion, he renewed the policy for one month only, which month would expire on the 24th of July. Mr. Dowson did not give the purchaser, or even his own co-trustees, notice that he had renewed the policy for only one month, and on the 24th of July, 1858, the policy expired.

When the parties met for completion on the 26th of August, 1858, the purchaser applied for the receipt for the last premium on the policy of insurance, and on ascertaining that the policy had dropped he refused to complete, on the ground that the lease from Dulwich College was forfeited by reason of the breach of covenant, but the purchaser subsequently offered to complete if the vendors would obtain from Dulwich College a waiver of the forfeiture. This however, the vendors refused to do.

The vendors' solicitors then offered that either the vendor or the purchaser should insure the premises without prejudice to any questions between them; but the purchaser refused to take either course, and on the 7th of September following the purchaser gave the vendors notice that his contract for purchase was at an end, and demanded the return of his deposit money. * * *

THE VICE-CHANCELLOR [SIR R. T. KINDERSLEY].[89] This is a suit

[89] The statement of facts is abridged and parts of the opinion are omitted.

by vendors for specific performance of a contract to purchase a certain leasehold house and premises. The Defendant, the purchaser insists that by reason of the dropping of the insurance the title became defective, and that therefore the contract is at an end; or, at all events, that it is a case in which the Court will not under the circumstances decree specific performance. * * *

The main ground, and one raising a question of considerable difficulty, upon which I am unable to find any direct authority to guide me, is what is the effect of the dropping of the insurance after (though very shortly after) the day fixed for the completion of the contract, and after the title had been accepted by the purchaser. The second edition of sale fixed the 20th of July for the completion of the contract; and by that condition all outgoings up to that time were to be cleared by the vendors. On that day, therefore, according to the intention and agreement of the parties, the vendors were to convey the property to the purchaser on receiving the purchase-money. The effect of such a contract is, in my opinion, this: that from the date of the contract the vendors became trustees of the property, the beneficial interest remaining in themselves until the 20th of July, the day fixed for completion; and from that day (supposing the contract should happen not to be then completed) and the legal estate still remaining in the vendors, they were trustees for the purchaser, in whom the beneficial interest then was from that day, and thus the relation of trustees and cestuis que trust was constituted between them. But it must be observed that this relation of trustee and cestuis que trust is not absolute and complete; it is conditional and sub modo. It is conditional on the vendors making out a good title, which they may never be able to do, and it is also conditional on the purchaser paying his purchase-money, which he may never be able to do. The relation of trustee and cestuis que trust is so far constituted that the purchaser has become in equity the owner of the premises. * * *

Looking, then, at these parties as being to a certain extent trustees and cestuis que trust, but being, in truth, vendors and purchasers, the question is this, how long did it continue to be the duty of the vendors, under these circumstances, to keep up the insurance and to perform the other covenants in the lease so as to prevent a forfeiture? (I need not refer to the other covenants, it is quite sufficient to take this one, which is the covenant in question; for whatever applies to this covenant would apply to any of the others.) That up to the 20th of July, the day fixed for the completion of the contract, it was their duty to keep up the insurance, and not only to do so but to do it at their own expense, I have no doubt; for, by the express terms of the contract, the vendors were to clear all outgoings up to that day. But the question is, was it their duty to do so after the day fixed for the completion of the purchase? And, first, was it their duty to keep up the insurance after that day at their own expense? Now, to try this question, let me suppose that the purchaser knew (as he did know) that by the terms

of the lease the estate was liable to forfeiture if the insurance dropped. He knew that perfectly well at least from the time of the delivery of the abstract; but let me suppose he not only knew that, but that he also knew on what day the insurance would expire, and that he refused to provide the money to pay the premiums for renewing the policy, insisting that the vendors were bound to pay it out of their own pockets; while on the other hand the vendors offered to renew the policy if the purchaser would supply the money; the question would be—what ought to be the view of the Court upon such a state of things? If such were the state of circumstances I should not hesitate to decide that question against the purchaser. Not only was the purchaser, in my opinion, so far the owner, at least from the 20th of July, the day fixed for the completion of the contract, as that the property was thenceforth at his risk, but by the express terms of the contract the vendors were to clear all outgoings up to that day, which necessarily implies that after that day the vendors were not to be held liable for any outgoings. Therefore, upon the dry question by whom the expense of renewing the insurance after the 20th of July ought to have been borne, I am of opinion that it ought to have been borne by the purchaser. If so, the question between the parties to resolve itself into this; was it so far the duty of the vendors to inform the purchaser, that is voluntarily to give him the information of the day on which the existing policy would expire, that their omission to do so, followed by the dropping of the insurance, entitles the purchaser to say that there is an end of the contract? That seems to me to be the point into which the whole question resolves itself as between these parties; and I think the question must be tried upon the same grounds as if upon the dropping of the insurance the lessors had actually entered for the forfeiture and avoided the lease.

Now I do not think that it can be laid down as a general proposition that the omission of the vendors to give that information, followed by a forfeiture (if it had been so), is of itself sufficient to avoid the contract. To try that general question, upon which I can find no direct authority, let me divest the present case of its peculiarities, and let me suppose that at the time of the contract on the 8th of June there had been an existing policy which had (say) six months to run, and that for some reason, not arising from any difficulty as to the vendors' title (which the purchaser had accepted), the completion had been delayed beyond the expiration of those six months. The purchaser knew just as well as the vendors of the covenant in the lease to keep the premises insured, and that a breach of that covenant involved a forfeiture of the term. That was all apparent on the face of the abstract which had been in his hands ever since about the 16th of June, and which had been carefully examined by his legal advisers. The purchaser had accepted the title shewn by that abstract at least as early as the 14th of July, and he knew or he must be taken to have known that at least from the 20th of July, the day fixed for completion, the property was at his

risk, there being nothing which could then prevent the ultimate completion of the purchase but his own failure to pay his purchase-money, the title having been accepted. He knew further, or he must be taken to have known, that it was for him to provide the money necessary to pay the premium on renewing the policy of insurance. He had become in equity the owner of the property. Was it not then, to say the least, extreme negligence on his part to make no inquiry and take no trouble on the subject? Though he had become the equitable owner of the property he did not give himself the trouble to inquire when the policy would expire. If he had inquired of the vendors and had received from them no information, or false information, as to the time at which the policy would expire, then indeed the case would assume a very different aspect. But having himself forgotten or neglected to make the inquiry, does it die in his mouth to complain that the vendors forgot or neglected to give the information voluntarily? I am not saying that in such case there would be no negligence on the part of the vendors; but the question which I am at this time considering is this, whether it can be laid down as a general proposition applicable to all cases (applicable for example to such a case as I have been supposing), that the omission of the vendors to inform the purchaser of the day on which the insurance would expire, the purchaser making no inquiry on the subject, is of itself sufficient to avoid the contract. I am not prepared to lay down such a general rule. If the relation of trustee and cestui que trust were so constituted between these parties from and after the 20th of July as that all the reasoning applicable to the case of pure trustee and cestui que trust would be applicable to them, I apprehend there can be no doubt that it would have been the duty of the cestui que trust to have provided the trustee with money to keep up the insurance if he had wished it done, which of course he would to prevent a forfeiture; and although the trustee would be much to blame who omitted to give voluntarily to the cestui que trust all the information he possessed in relation to the matters, I cannot say that the omission of the trustee to give that information would be a reason why that trustee should be liable to make good the value of the property to the cestui que trust. There may have been negligence in each, certainly as much negligence in the purchaser as there was in the vendor, and infinitely more inexcusable and extraordinary negligence, considering that from the 20th of July at all events the purchaser was the beneficial owner of the property, and one would have thought that for his own interest he would have been more vigilant, and more attentive to a question of the greatest importance with reference to the very existence of the property which he had agreed to purchase.

But there are in the present case certain special and peculiar circumstances which lead me to the conclusion that it is one of those cases in which the Court ought not to decree specific performance. The vendors knew, at least Mr. Dowson (who seems to have been the one of the trustees for sale, who acted for the others) knew, that the policy

which existed at the date of the contract would expire on the 24th of June, that is not quite a month before the day fixed for the completion of the purchase; and Mr. Dowson, knowing that it was the duty of the vendors to renew, went to the insurance office and renewed the insurance; but instead of the ordinary policy for twelve months, he renewed by taking a policy for one month only, so as to carry the insurance on to the 24th of July, that is, only four days beyond the day fixed for the completion of the contract, expecting, no doubt, that the completion would take place on that day, and probably intending on that day, when they met to complete, to give the information to the purchaser, who would then have just time enough to renew the insurance. Now, I see no reason to suspect that Mr. Dowson intended any harm to the purchaser; indeed he could have no motive for that. I assume, according to his own representation, that he had completely forgotten that matter, and unfortunately he not only forgot to mention the matter to the purchaser, but he also forgot to mention it to his own cotrustees, or to the solicitor for the vendors. This conduct, however unintentionally on the part of Mr. Dowson, in effect operated as a trap into which the purchaser would fall if he should omit to exercise due diligence; and unfortunately the purchaser fell into it. I do not mean to say that the vendors were bound to renew for a year; but if in renewing they thought fit to run the matter so fine as to cause great risk to the purchaser, they must not be surprised if a Court of Equity refuses to lend them its assistance against the purchaser. Moreover, when the fact of the dropping of the insurance was discovered on the 26th of August at the meeting which was held for the purpose of completion, the purchaser offered still to complete the purchase if the vendors would procure a letter or document from the lessors to the effect that they would not take advantage of the forfeiture. This proposal was unfortunately declined by the vendors; and on the 7th of September the purchaser sent them a written notice declining altogether to complete the contract. The vendors, it is true, did afterwards think better of the matter, and ultimately effected a new insurance, and procured from the lessors a letter waiving the forfeiture. But the purchaser adhered to his notice of the 7th of September, and therefore the waiver was too late. Under all the circumstances I am of opinion that I ought not to assist the vendors by decreeing specific performance; and therefore the bill must be dismissed, but without costs.

## PEACOCK v. PENSON.

(In Chancery before Lord Langdale, 1848. 11 Beav. 355, 50 E. R. 854.)

This bill was filed by Peacock against Penson and Hunter, praying as against them, the specific performance of an agreement entered into by the Plaintiff for the purchase of Lot 17 of land, which, together with other lots, was put up to sale by auction on the 16th of July, 1844.

Part of the land, including Lot 17 (being that in question), belonged exclusively to Penson; but the other part belonged, in equity, exclusively to Hunter, under a contract previously entered into between them; and the legal estate of the whole was outstanding in a mortgagee. The whole was sold together, and under the same conditions of sale.

Conditions and particulars of sale had been printed and circulated, and referred to a map denoting the positions and quantities of the several lots, and describing the existing road and certain proposed new roads intended to be made on the property, comprising all the lots. The description, among other things, stated, that about twenty-seven acres of ground "were well adapted for building purposes, and set out with good roads, and would afford frontages eligible for the erection of genteel residences of a superior description;" and it was stated, "that the proposed plan by which the lots were to be sold, secured to each lot wide and handsome roads." The twelfth condition of sale provided:

> "That the vendor should, at his own expense, within six calendar months, make and plant with lime trees the roads marked on the plan as intended roads, and form and gravel the footpaths, and should be repaid by the purchasers of Lots 6 to 17 inclusive, the expenses thereof, in proportion to their frontages, respectively, to such intended roads."

By the fourteenth condition of sale:

> "If any mistake should be made in the description of the premises, or any other error whatsoever should appear in the particulars of the estate, such mistake or error should not annul the sale, but be made matter of compensation to be settled in the usual way by arbitration."

At the sale, the Plaintiff was the highest bidder for and purchaser of Lot 17 belonging to Penson, for £255, and he signed an agreement to become the purchaser of that lot accordingly. Part of the land was leasehold, and it turned out, that by the terms of the lease, one of the roads contemplated could not be made through it, as proposed, without incurring a forfeiture of the lease. Under these circumstances a dispute arose between the parties as to the vendor's obligation to make this new road. The Plaintiff required the vendor to make it; but the Defendant said, that he could not do so without incurring a forfeiture. The parties being unable to come to any arrangement, this bill was filed by the purchaser for a specific performance. * * *

The cause now came on for hearing.

THE MASTER OF THE ROLLS.[90] * * * It is an agreement for the sale of a very small lot of land, sold by auction with several other lots, and the conditions state:

"That the land is set out with good roads, and would afford frontages eligible for the erection of genteel residences of a superior description," and "that the proposed plan by which the lots will be sold, secures to each lot wide and handsome roads."

I cannot doubt that this representation would be sufficient to induce persons to buy, on the notion that they would be surrounded by respectable villas, and a deviation from this plan might lead to quite a different result. I believe that persons desirous of purchasing land for building purposes, are most anxious to know whether the neighbourhood will be respectable or not.

It has been argued, that if approaches are afforded to each house, that is all that could be required, and further, that the vendors are merely answerable in damages; but I cannot think the Plaintiff has no interest in the several roads proposed to be made, although there may be great difficulty in ascertaining the value of such interest.

The question is, whether he has been induced to purchase the land, in part at least, by the representation that by the plans means were afforded of collecting a respectable neighbourhood, and whether the vendor did not hold out reasonable expectations that the land would be so laid out as to be occupied by persons having "genteel residences of a superior description."

I think that the not unreasonable demand, which the Plaintiff made before the suit, for a compensation, ought not to deprive him of his equitable right, and I consider him entitled to a decree for specific performance to the extent to which it can be performed, if he is willing to take it with an abatement.

I will take time to consider what decree ought to be made. * * *

But it appears to me that the vendor could not make the road without incurring a risk of forfeiture of the piece of leasehold through which it should pass, or of being sued by the lessor; and that this is not a case in which the Defendant ought to be called upon to incur that risk. Harnett v. Yeilding, 2 Sch. & Lef. 549.

I think that the Plaintiff is entitled to a specific performance of the agreement without any stipulation as to the new road in question, and if he desires it, I will refer it to the Master to inquire, what, if any, damage will be sustained by him in consequence of the road not being formed.

Compensation was offered before the bill was filed, I have read the proceedings with great regret. The Plaintiff seems to have acted as his own solicitor, and with less caution than he probably would have used in the case of a client. I dismiss the bill with costs against Hunter and Warde; and as against Penson, whose contract gave rise to the question, I give no costs up to the hearing.

[90] The statement of facts is abridged and parts of the opinion are omitted.

## LEWIS v. BOND.

(In Chancery, 1853. 18 Beav. 85, 52 E. R. 34.)

In 1846 the Defendant Bond obtained a building lease for ninety-nine years under the Marquis of Bute, which contained a covenant against carrying on a beer-shop or any offensive trade upon the premises, and a proviso for re-entry on breach of the covenants.

The Defendant subsequently agreed to grant a lease of the premises to the Plaintiff with the usual covenants. The Plaintiff entered into possession before any under-lease had been granted, and he opened a beer-shop; and, persisting in this course of conduct, the Defendant ejected him. The Plaintiff filed this claim for the specific performance of the agreement for a lease.

Mr. Denny, for the Plaintiff, argued that the forfeiture had been waived by the Marquis of Bute; and, as the Plaintiff was willing to take such lease as the Defendant could grant, the Defendant could not raise the objection.

Mr. Pearson, for the Defendant, argued that an under-lease, without the restrictive covenants, could not be granted, and that the Plaintiff had notice of the terms of the original lease; secondly, that the acts which would forfeit the lease, if granted, would also forfeit the right to a specific performance.

The following cases were cited: Flight v. Barton, 3 Myl. & K. 282; Doe d. Ambler v. Woodbridge, 9 B. & Cr. 376; Gregory v. Wilson, 9 Hare, 683; Cosser v. Collinge, 3 Myl. & K. 283; Neap v. Abbott, Cooper, 333; Marquis Townshend v. Stangroom, 6 Ves. 328; Mason v. Armitage, 13 Ves. 25; Macher v. The Foundling Hospital, 1 Ves. & B. 188; and Platt on Leases.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. What I have to consider is, whether the Plaintiff is entitled to a specific performance of the lease for fourteen years on the terms to be determined in Chambers. I am of opinion that the circumstances of the case preclude the Plaintiff from such specific performance. The Plaintiff takes the agreement, knowing that the Defendant is tenant under the Marquis of Bute. That is itself constructive notice of the lease, and he must be deemed to have known that the Defendant could only grant a lease with such restrictions as those under which he held.

The evidence is distinct that the Plaintiff was aware of the covenant in the lease in 1852, for, in that year, he applied to the trustees of the Marquis of Bute as to the question arising from the carrying on of a beer-shop. If up to that time there was a waiver as to the past, there was no promise that the objectionable trade might be carried on for the future. It was expressly said that they could make no agreement on the subject. There can be no question but that the Plaintiff continued to carry on the same business, and the continuance of the breach of covenant gave a right of re-entry.

In September the Defendant gave the Plaintiff notice to quit, with an intimation that if he relinquished the objectionable trade he might continue possession of the premises. He chose to continue it, and to commit a forfeiture.

It is true that this Court will relieve in some cases, though in others it will not, as in the case of a breach of a covenant to insure. But the Court will not compel a grant of that which, if already granted, would have been forfeited.

I am of opinion that I cannot grant a specific performance in this case. It is a trifling suit for £2 a year, and the Plaintiff must pay the costs.

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## MURDFELDT et al. v. NEW YORK, W. S. & B. RY. CO.

**(Court of Appeals of New York, 1886. 102 N. Y. 703, 7 N. E. 404.)**

* * * The plaintiff in this action seeks a specific performance of the covenant for this under-passage, and the trial court found that it was not a case calling for the exertion of the power of the court in that direction, and the general term was like-minded.

EARL, J.[91] In view of the difficulty in constructing a useful passage under the railroad, and the inutility to plaintiffs of such passage, if constructed it was certainly within the discretion of the court below, in the exercise of its equitable jurisdiction, to deny specific performance of defendant's contract to construct the passage, and leave the plaintiffs to their remedy for damages for breach of the covenant. Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365. * * *

The judgment should be affirmed, with costs. All concur.

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## BROWNE v. COPPINGER.

**(In Chancery in Ireland, before the Right Hon. Maziere Brady, 1854. 4 Ir. Ch. 72.)**

The petition in this case prayed the specific performance of an alleged agreement to grant a new lease of certain lands in the county of Cork, held by the petitioner from the respondent for the residue of a term of 31 years from the 25th of March, 1824. No formal agreement in writing had been made, but the respondent had forwarded to the son of the petitioner a draft lease, inclosed in the following letter:

"Dear Maurice—I now send you the draft lease according to promise.
"Yours, very truly, W. R. Coppinger."

This was relied on as a sufficient agreement to take the case out of the statute of frauds. The case made by the respondent in his affidavit

[91] **The statement of facts is abridged and part of the opinion is omitted.**

was, that the petitioner, who was tenant of the respondent under a lease of 1824, had, in the year 1851, applied to the respondent for a reversionary lease of the lands, which the respondent declined to grant. The petitioner then proceeded to take successive exhausting crops out of the land, and told the respondent, on his remonstrating:

"That if he did not give her a new lease upon her own terms, she would squeeze every atom of substance out of it."

Under this pressure, the respondent verbally agreed to grant a new lease, and accordingly prepared the draft mentioned in the petition, which he forwarded on the 19th of October, 1852. No further step was taken by either party until the 6th of March, 1853, when an interview took place under the following circumstances:

The lease of 1824 reserved a right of way, across a portion of the demised lands, to the lessor and some of his tenants, and the same reservation was contained in the draft of 1852. The petitioner obstructed this way, and on the respondent remonstrating with her, she declared she would not allow the use of the way, nor take any lease reserving it; that she wanted no lease from the respondent, and that she would work the worth of her money out of the ground, during the residue of her unexpired term: on this, the respondent said he would not grant any lease not reserving that right of way. In October, 1853, the petitioner, for the first time, applied to the respondent to have the draft lease executed, which he refused to do.[92] * * *

THE LORD CHANCELLOR. Whatever may be the extreme law of the case, the petition here seems founded on a scanty measure of conscience. The petitioner begins by telling the landlord that, having but a few years of her term unexpired, she intends to deprive the land of value, in her own phrase "to squeeze every atom of substance out of it." That might have been summum jus, but it was also without doubt summa injuria—a more apt illustration of the maxim could scarcely be conceived. Such threats may compel the landlord to yield, but when the lessee comes here to ask this court to enforce rights acquired by such means, she must prove a clear contract. Now, what took place here? It is alleged that Mr. Coppinger yielded, and arranged that he would give a new lease; but of that we have no evidence, save the letter inclosing the draft renewal: of course that is perfectly good evidence, but only to the extent of submitting to grant the lease upon the terms appearing in the draft; and it would have been quite sufficient if those terms had been accepted, but until they were accepted there was no contract which could be enforced. That draft was not returned for twelve months afterwards; and six months after it had been sent, on a controversy arising as to a right of way, the lessee refused to accept the lease on the terms contained in the draft. As I said, there must be clear evidence of the existence of a contract, and the real evidence here is evidence of waiver of any contract which may have ex-

[92] The statement of facts is abridged.

isted. It certainly is not a case in which the court is inclined to enforce a contract—a case founded on extreme right, or rather on extreme wrong, injury and fraud. I assuredly will never countenance attempts to make such claims the foundation of rights in this court, and I shall therefore dismiss this petition, with costs.[93]

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## MOETZEL & MUTTERA v. KOCH.

(Supreme Court of Iowa, 1904. 122 Iowa, 196, 97 N. W. 1079.)

Appeal from District Court, Scott County; James W. Bollinger, Judge.

Action in equity for specific enforcement of an alleged oral contract for the sale of real estate. Decree for plaintiffs, and defendant appeals.

WEAVER, J.[94] The evidence tends to show that in the forenoon of April 7, 1902, a member of the plaintiff firm and defendant met in a saloon in the city of Davenport, where, with the assistance of one Carroll, a real estate agent, and others gathered about the same table, a verbal agreement was entered into by which defendant was to convey the plaintiffs a certain improved lot in said city at the price of $25,000, of which sum $5,000 was to be paid in cash on the execution of the papers, and the remainder, with interest at 5 per cent., to be secured by mortgage upon the property, payable in 5 or 10 years, at plaintiffs'

[93] In Kimberley v. Jennings (1836) 6 Sim. 340, Vice Chancellor Shadwell said: "It does not clearly appear to be the meaning of the Agreement, that, if the event happened that the Defendant did not continue, during the whole term of Six Years, in the Service of the Plaintiffs, he should be disabled from engaging in any other Service or Employment for the remainder of the term. It has been assumed, in the course of the Argument, that this part of the Agreement is to be taken by itself, and that, whatever might happen during the term, the Defendant should not engage in any other Employment. But, attending to the whole of the Agreement, the true Construction of it seems to be that, during such portion of the term as the Defendant should continue in the Service of the Plaintiffs, he should not enter into any other Employment; but, if he should be dismissed during the term, then that he might engage himself in the Service of other Persons. Supposing, however, the meaning of the Agreement to be such as I have stated it to be still it would afford a strong reason against the interference of the Court; for it would be what is commonly termed 'a Hard Bargain'; inasmuch as the Agreement is so constructed that if, from illness or any other cause over which the Defendant could have no control, he should become incapable of serving the Plaintiffs, they have the option either of discharging him, or discontinuing the payment of his Salary, and insisting that, for the remainder of the Six Years, he shall not engage in the Service of any other Individual. Nothing could be more harsh towards a young Man dealing with great Traders, than that he should be allowed to enter into an Agreement, which placed him so entirely in their power. And, although events have happened which have precluded the Plaintiffs from availing themselves of this harsh Stipulation, still I must look at the Agreement as it was originally concocted, in order to see whether, on the whole, it was such as this Court would countenance."

[94] Parts of the opinion are omitted.

option. Upon reaching the agreement as to the terms of the transaction, there was paid by plaintiffs to defendant, it is claimed, the sum of $500, in part satisfaction of the cash installment. The defendant denies entering into the agreement or receiving any part of the alleged price of the property, and further attempts to show that the time of the alleged sale he was badly intoxicated, and had no adequate or reasonable comprehension of the nature of the transaction. It is on the question of fact involved in this claim that the determination of this case depends. * * *

His wife swears that at this time her husband had been upon a prolonged debauch, and in this she is strongly corroborated. She says that he was in the habit of "getting up in the night and drinking," and during the night of April 6th he drank more or less, and was "full" in the morning. He himself says that he had "perhaps a pint or so" before leaving home. It is shown by others that he early made the round of several saloons, and was intoxicated at half past 7 that forenoon. About 8 o'clock he was met by Carroll, and some talk ensued about the sale of the property. Nothing definite was arrived at, and they separated; the defendant going to Abel's saloon, where the deal was afterward made, and Carroll going to the plaintiffs' place of business. In a short time Carroll sought defendant, and found him sitting at a table in a back room at Abel's. Of his condition at that time Abel testifies that, in his opinion, Koch was drunk, and, to his knowledge, had been in that condition for three weeks. Two other witnesses who saw him there say that he sat at the table with his head bent over in drunken stupor, and they heard him say: "I don't want to sell my property. I want to see my wife first"—and mumbled something else, which was not understood. * * *

While there is some conflict in the testimony upon this point, we think it fairly shown that, when the terms of the sale were inquired about, defendant did not undertake to state them for himself, but Carroll stated them, and obtained, it is claimed, some sort of assent thereto from the defendant. Muttera then produced the $500, and defendant hesitated or refused to take it, saying that he would have to change his will, and would have trouble with his wife, whereupon Koester took the money and counted it for him. Then, as plaintiffs' witness says, Koch "had the money lying in front of him, and he commenced to waver, as though he wanted to back out"; and at this juncture Koester again came to the rescue, telling him it would be a disgrace for him to back out, assured him he was getting a good bargain, and advised him to complete the sale. This argument seems to have proved effective, and (defendant having taken the money) Koester adds:

"Then we all set them up, and took a drink. I think we must have drank seven or eight rounds after the sale was sanctioned."

It farther appears that at this point, defendant having spoken of going to plaintiffs' saloon to "spend some money with the boys," Koester

interfered, and suggested that he take the $500 across the street and deposit it; and, upon defendant's refusal so to do, Koester himself took the money to the bank, and brought the certificate back to the defendant. Notwithstanding the seven or eight drinks just taken by defendant, in addition to numerous other potations indulged in that morning, Koester solemnly assures us Koch was still "as sober as a judge," and perfectly competent to do business; and yet, in spite of this extraordinary demonstration of Koch's judicial equilibrium, his friend thought it wise to assume this unusual measure of guardianship for the protection of one whose abundant capacity to protect himself he repeatedly and emphatically affirmed. The contract itself is not without a bearing upon the fact here under inquiry. Plaintiffs insist that the property is worth not to exceed $20,000, yet say that defendant was to permit $20,000 of the purchase price to be deferred for 10 years, with interest at 5 per cent. This interest is treated in argument as payable annually, but we fail to find anything in the alleged contract or in the decree of the district court which would enable defendant to enforce collection of interest till the end of the 10-year period. The financial responsibility of plaintiffs is not such as to materially aid the defendant's security. A very material part of the value of the property is in the building constructed upon it, yet there was no stipulation or agreement to keep it insured for the benefit of the mortgage; the order by the district court to that effect having no basis in the contract pleaded or proved.

As an entirety the contract was a reckless and improvident one on defendant's part, and, while that fact may not be sufficient to justify us in holding it invalid, it has some tendency to corroborate the claim that Koch, normally a person of some business capacity, was not entirely himself when he agreed to its terms. That he was intoxicated to some degree, at least, when the contract was made, is hardly open to doubt. When the evidence is carefully read, we find no witness present on that occasion who undertakes to say that defendant was not more or less under the influence of liquor; and the chief difference between the witnesses appears to be upon the abstract question as to the degree of inebriety which must exist before a man can be said to be drunk or incapacitated for business. The very fact that, with the parties all living in the same city, and having their own respective places of business, plaintiffs should deem it necessary, on receiving word from Carroll, to take the $500 and hasten to the saloon where defendant was to be found; that Carroll, and not defendant, should have been the man to state the terms of the sale; that Koester, and not defendant, should count the money; that plaintiffs at this juncture should have taken the precaution to engage counsel to protect interests not then threatened by any dispute; that Koester should have taken the reluctant and wavering defendant in hand, and, by rebuke, argument, and persuasion, brace him up to the point of taking possession of the money lying before him, and should then persuade him to return it, in order that it might be deposited in the bank, and not squandered in a drunken de-

bauch—these things, with others tending in the same direction, are so unusual, if not so inconsistent with the ordinary course of legitimate business, that, when added to the direct testimony bearing upon defendant's condition, we are convinced he did not and could not give intelligent assent to the agreement now sought to be enforced. At any rate, the equity of plaintiffs' claim is not so clear, nor is the contract itself so manifestly fair and just, that specific performance will be decreed. It is an elementary proposition that the enforcement of specific performance is not a matter of right, but rests in the sound discretion of the chancellor. It may easily happen that circumstances which will not justify the setting aside of a contract may yet be ample grounds for refusing to order its specific enforcement. It is enough if, in the judgment of the court, the result of such enforcement will tend to injustice or oppression, or to the triumph of fraud or imposition. The contract must not only be fairly procured, but fair in itself. Story's Eq. Jur. §§ 750–769; Rust v. Conrad, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720; Harper v. Sexton, 22 Iowa, 443; Smith v. Shepherd, 36 Iowa, 253; Clark v. Maurer, 77 Iowa, 717, 42 N. W. 522. Applying this test, we are abidingly satisfied that plaintiffs are not entitled to specific performance.

It is urged by appellees that, whatever may have been the merits of the case originally, defendant should be held to have ratified the contract. We have examined the record bearing upon this proposition, and believe it sufficiently appears that defendant tendered back the $500, and repudiated the alleged agreement, within a reasonable time after he became sufficiently sober to intelligently transact business, and learned of the nature of the transaction in which it was claimed that he had taken part. We think there was no ratification.

It follows that the decree of the district court must be reversed, and the plaintiffs' bill dismissed. Reversed.

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## WAITE et al. v. O'NEIL et al.

(Circuit Court of the United States, W. D. Tennessee, 1896. 72 Fed. 348.)

This was a bill by Charlotte H. Waite and others against J. N. O'Neil and others for a specific performance of the covenants of a lease, and for other relief.

The plaintiff, for herself and as guardian for her children, in May, 1881, executed to the defendants O'Neil & Co. a lease to the river front and landing in front of four lots in South Memphis, with ample space for a roadway along the landing at all stages of the water, and no more; the said landing to be used for the moving, storing and unloading of coal, wood and ice barges or boats. The plaintiff covenanted to keep and secure the defendant lessee in the peaceful use and possession of

said premises during the term of the lease, unless default of payment of rent or other condition of the contract be made; and the defendant lessee agreed to deliver up the premises, at the expiration of the lease, in good order and condition, and to make good all damages to said premises, except the usual wear and proper use of the same, and to keep the roadway thereon in repair.

In the early part of 1886 the banks of the river, through the operation of currents, began to cave away, and in April, 1886, the extraordinary flood then prevailing swept out of existence a large part of these lots, and their river front, as it did much of the adjacent property. This caving was so serious that it amounted almost to a public calamity, and demanded and received at the hands of the property owners and the government of the United States costly efforts to restrain the ravages, that resulted to some extent favorably. The landing, however, was never fit for any further use by the lessees after the destruction began.

The proof establishes, beyond controversy, that the destructive influences were beyond the control of a single property holder, and that the lessees could not, by the expenditure of any reasonable sum of money, have done anything to arrest the erosion caused by the currents of the river, which destroyed their property and that of the plaintiff in these premises. * * *

It is also proved that the lessor herself did nothing to arrest the progress of destruction, unless the disputed subscription to the fund by her can be taken as an effort in that direction.

The document constituting the lease between the parties shows that it was written upon the ordinary form of a lease of real estate, found, printed, at the stationers'; that some of the covenants therein are written into the blank form, and others are found in the printed portion which contains also some interlineation. After the date line, found in the opening clause of the lease, that which follows is written in down to the words:

"And the said first party covenants that she will keep and secure the said second party in peaceful use and possession," etc.

In the printed covenant for re-delivery to the lessor in good condition, and to make good all damages to said premises, except the usual wear and proper use of the same, and to keep the roadway thereon in repair, these last words about the roadway are written in. After the printed covenant for the service of process in the absence of the lessees, the covenant for the construction of the roadway at the expense of the lessees, and against unnecessary digging in the ground, is written in the blank form, down to the printed words of the covenant against alterations or repairs by the lessees without the consent of the lessor.

The bill was filed to enforce a specific performance of these covenants, or, in lieu thereof, damages for their nonperformance, for the collection of the rent not paid, and for general relief. The defendants

make their answer a cross bill, as they may in the state court from which the case was removed, and pray a rescission of the lease and an injunction against the collection of the notes given for the rent. * * *

HAMMOND, J.[95] * * * It does not seem to me that the landlord has any better claim than that against a tenant for compensation for destruction that comes, without his fault, from external forces, such as storms, floods, earthquakes, and the like, in the absence of an express warranty, in the sense that the very words are used in the contract to make it express and clear, and not in the sense of being implied from other expressed words in the covenants, however broad, which may be made to stretch over such an injury by expansion of construction. Chancellor Walworth tells us that it was a law of Sesostris, an Egyptian king, that, if the violence of the river should wash away a part of the land, the tenant should be proportionately abated in his rent; but I do not find it anywhere adjudged, as the result of the ordinary covenants on either side, that either party to a lease shall be liable in damages to the other for the results, direct or consequential, of such destruction. Where it can be done reasonably within the power of ordinary business operations, either party may under such covenants be, and often they are, required to repair and restore and rebuild, or pay the cost of doing these things, and often very hard bargains are so enforced; but these demands fall within the ordinary description of injury that is in a sense reparable, and not to the re-creation of things that have been utterly destroyed, as land that is swept away by flood, as this was. In the absence of an express covenant to the contrary, such losses fall on the owners, each according to his holding; to the lessor or landlord that which he has owned, and to the lessee or tenant that which he has used. Tayl. Landl. & Ten. §§ 329, 347, 360, 373, 386.

On the other hand, the tenant must always pay the rent under such circumstances. Viterbo v. Friedlander, 120 U. S. 707, 712, 7 Sup. Ct. 962, 30 L. Ed. 776. There was, for a long time, a great struggle to break away from this seemingly harsh rule, and introduce, as an equity, a reduction or abatement of the rent when the property was destroyed. No less a personage than Mr. Justice Story urged it as counsel in one of the cases cited below, and was told by the bench that the contention had been finally overthrown. Chancellor Kent states the same thing in his text, and it is now well understood to be as Mr. Justice Gray states it in the case last cited. Mr. Taylor, in his work on Landlord and Tenant, so often quoted and commended in the highest places, seems to approve the discarded suggestion of an equitable abatement "where a part of the land is lost to the tenant by the act of God," and states that he is not liable for the whole rent, "as where the sea break in and overflow a part of the land." He cites for this the ancient Case

[95] The statement of facts has been rewritten and parts of the opinion are omitted.

of Richards le Taverner, Dyer, 56a, and Rolle, Abr. p. 236, pl. 1; but, on subsequent consideration, the courts became thoroughly hostile to this view, at least so far as it relates to that kind of loss for which the tenant is in no sense himself responsible. * * *

But, moreover, as before stated, a court of equity will not specifically enforce such hard bargains, even where there is an express covenant. Tayl. Landl. & Ten. § 268. Therefore, if the defendants here had covenanted in the use of this land to indemnify the plaintiff against all loss by flood or currents, and it came about that the loss was so enormous as to destroy the whole ground, river landing and all, so that a restoration was impossible, and the money it would have taken to stop the destruction was so out of proportion to the value of the thing leased as to make it unconscionable, a court of equity would, in its discretion, refuse specific performance.

Hardness of bargain alone will not suffice to stay the hand of a court of equity, and it was so decreed in the case of a lease of telegraph wires where the rent money was inadequate. Telegraph Co. v. Harrison, 145 U. S. 459, 471, 12 Sup. Ct. 900, 36 L. Ed. 776. But it was refused where the circumstances showed that it was unconscionable to compel a man to comply with a contract that was oppressive. Manufacturing Co. v. Gormully, 144 U. S. 224, 237, 12 Sup. Ct. 632, 36 L. Ed. 414. And in another case, where it was refused because the proof was doubtful, the rule is stated that, while the discretion to withhold relief is not to be exercised capriciously or arbitrarily, but according to settled principles, it must always be done with reference to the facts of the particular case. Hennessey v. Woolworth, 128 U. S. 439, 9 Sup. Ct. 109, 32 L. Ed. 500; Nickerson v. Nickerson, 127 U. S. 668, 8 Sup. Ct. 1355, 32 L. Ed. 314; Cheney v. Libby, 134 U. S. 68, 78, 10 Sup. Ct. 498, 33 L. Ed. 818. In Dalzell v. Manufacturing Co., 149 U. S. 325, 13 Sup. Ct. 886, 37 L. Ed. 749, the court quotes approvingly Lord Hardwicke's rule that the contract must be "certain, fair, and just in all its parts." In the case of Railroad Co. v. Cromwell, 91 U. S. 643, 23 L. Ed. 367, Mr. Justice Bradley said the court would not shut its eyes to the evident character of the transaction. In Marr v. Shaw (C. C.) 51 Fed. 860, it is said that "where, upon a review of all the circumstances of the case, it is patent that it will produce hardship or injustice to either of the parties," specific performance will be refused. And in Pullman Palace Car Co. v. Texas & P. R. Co. (C. C.) 11 Fed. 625, specific performance was refused because the contract was unconscionable as against the public.

All these cases cite the leading case of Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501, so much relied on here, where the contract was decreed to be performed upon conditions which provided against its inequitable features, which is impossible in this case. Mr. Story sums up the result by saying that "courts of equity will not decree specific performance, except in cases where it would be strictly equitable to make such a decree"; and Mr. Pomeroy, by saying that, "if the con-

tract is unfair, one-sided, unjust, unconscionable, or affected by any other inequitable feature, or its enforcement would be oppressive or hard on the defendant, * * * or would work any injustice, * * * its specific performance will be refused." 1 Story, Eq. Jur. § 750; 3 Pom. Eq. Jur. § 1405.

It must be conceded that any court charged with such a wide discretion must look carefully to the legal principles that control it, and relieve it of all arbitrariness and capriciousness, lest we descend into a mere substitution of irregular and desultory judgment for that which is guided by "the established doctrine and settled principles of equity," as mentioned by Mr. Justice Bradley in Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501. But, on the preceding page, he cites approvingly Lord Hardwicke's judgment, which refused to compel a tenant, under a covenant to repair, to pull down and rebuild houses which did not comply with the covenant. London v. Nash, 1 Ves. Sr. 12.

It was not, in my judgment, within the contemplation of the parties, or either of them, to provide by the covenants of this lease against the calamity that came upon this lessor and lessee by the extraordinary and unprecedented destruction of the banks of the river in front of this city,—a violence of nature which at one time threatened to carry away a considerable portion of the city itself, by undermining its foundations and establishing the channels of the river where streets and houses had been, which thing has been done before under our eyes in front of this very city, where the ground for the houses and streets is now again restored after years of submersion. The unconscionable character of the demand does not arise out of the covenants themselves, but out of the construction that is now put upon them, and the demand for damages for the not doing of things which it is not certain would have stopped the ravages if they had been done; and this, in lieu of a specific performance which might not have been decreed if the covenants for it had existed. If the very demand now made had been expressed in the words of the covenant, under the principles and cases cited, it would be inequitable to grant it and it would be refused.

We have seen how the courts have struggled against the attempt to introduce hardship as an equitable relief in favor of the lessee, as against the lessor's demand for rent, when the property has been partially or wholly destroyed without his fault. Surely, a court of equity will not superadd to the burden of the rent that of damages and compensation for the value of the property, upon either improvident covenants so binding him, or by implication upon words not expressing that especial and particular obligation; certainly not, if it have any discretion in the matter.

Decree for the rent and interest, with reference to fix amount, if necessary.

## HOPE v. WALTER.

(Chancery Division. [1900] 1 Ch. 257.)

Appeal by the defendant from a decision of Cozens-Hardy, J. [1899] 1 Ch. 879.

LINDLEY, M. R. I feel rather strongly that this is a case in which it would be wrong to decree specific performance. It would be little short of a scandal, to my mind, if the court, having the power of refusing the extraordinary remedy of specific performance, were to thrust down the throat of an innocent buyer the obligation of becoming the landlord of a brothel. I acquit the plaintiffs of anything like deception. They are the trustees for sale, and they were perfectly ignorant of the nature of the house which they put up for sale; but they did put up for sale property which they described as "an eligible freehold house fit and proper for investment"—I do not attach any importance to the word "eligible": it is the ordinary auctioneer's language; but still, there it is—"subject to a quarterly tenancy of £55 a year." They did not know of anything which would make it oppressive or objectionable to require specific performance of that contract when that contract was made. They did not know that the person who was in possession of the house, and who was their tenant subject to the term of a quarter's notice, had been convicted of keeping a brothel, and that he was still keeping it. I do not say that they ought to have known. They probably were gentlemen living at a distance, and knew nothing at all about it. That observation also applies to the purchaser. When he entered into the contract to buy this house he had no notion that he was entering into a contract which would put him in the position of a person buying a brothel. That never entered into his mind, and he was no more to blame for not finding it out than the vendors. But before the time came for completion he did find it out, and he refused to complete.

Now it is said that, having regard to the authorities, the objection he has raised is one which ought not to prevail. I am not prepared to say that his counterclaim by which he asks to set aside the contract on this ground can be supported. I am of opinion that it cannot. Neither am I prepared to say that the plaintiffs could not maintain an action for damages, if any were sustained, for breach of contract. As to that I say nothing. But, when the court is asked to exercise the extraordinary jurisdiction it possesses in the way of specific performance, then I say that the objection which has been raised is one which ought to induce the court to hold its hand. Just consider the position quite apart from the legal aspect of the case, to which I will refer presently. A man who becomes the landlord of a brothel is not in an agreeable position as regards character: there is an obloquy, a stigma attaching to it which he ought not to be called upon to bear. Then, looking at his legal liability, we find that under the Criminal Law Amendment Act,

1885, although he does not let the house as a brothel, still, knowing the facts, he will be liable as the lessor of a brothel to be fined unless he evicts the tenant. Is that the position in which this court ought to put an innocent man who buys a house described as an eligible freehold investment? I say, No. I do not say we have not jurisdiction to do it; but I say it would be contrary to those principles of justice and fairness by which this court is always guided in exercising that extraordinary jurisdiction.

We have been referred to several authorities, but the only one of any importance is the case of Lucas v. James, 7 Hare, 410, which to my mind is distinguishable. There a house in Curzon Street was put up for sale, and a gentleman bought it. Then he found out, not that that house was a brothel, or that there was anything amiss with it, but that some few doors off there was a disreputable house, and, not liking the neighbourhood, he refused to complete. It is unnecessary to say whether the decision in that case was right or wrong, and I express no opinion upon it; but it was a totally different case from this, and the ground on which I wish to put my judgment is this: that this court will not compel a man to buy a property which, if he takes no steps to prevent it, will expose him, as owner, to criminal proceedings by reason of its state at the time of the sale. If he knows or ought to know the state of the property, that proposition may not apply; but to force that position upon an innocent purchaser would be wrong.

VAUGHAN WILLIAMS, L. J. I am of the same opinion. I do not think it necessary to add anything.

ROMER, L. J. I feel more doubt about the case than the Master of the Rolls, but I do not differ from his judgment.

LINDLEY, M. R. The action and the counter-claim will be dismissed without costs. The appellant will have the costs of the appeal.

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## FITZPATRICK v. DORLAND.

(Supreme Court of New York, 1882. 27 Hun, 291.)

Appeal from a judgment refusing a decree of specific performance.

BRADY, J.[96] This action was brought to compel the specific performance of a contract in writing dated the 14th day of July, 1866, by which the defendant agreed to sell to one Philip Fitzpatrick, and the latter agreed to purchase, three lots of land in this city for the sum of $18,000.

On the day before the contract was signed, one Patrick Cuff commenced an action in this court against the respondent to compel her to convey the same lots to him, claiming that under an agreement therefor made between him and her she agreed to sell him the lots for a sum named.

[96] Parts of the opinions are omitted.

By an arrangement between the parties a provision was made in regard to that, and it was in terms that if Cuff succeeded in obtaining a decree for the conveyance of the lots to him the respondent should return to Fitzpatrick all the money he had paid under the contract with interest, and on the other hand that the deed should be delivered by her to Fitzpatrick as soon as the Cuff suit was decided in her favor and upon ten days' notice. The contract with Fitzpatrick was duly assigned by him to the plaintiff.

The action brought by Cuff was tried before Judge Clerke, who dismissed the complaint, and judgment was entered in favor of the defendant in October, 1867. Cuff appealed to the General Term and the judgment below was reversed. An appeal was then taken to the Court of Appeals, and in September, 1874, the case was sent back for a new trial, and was again tried before Judge Lawrence, who in 1880 denied Cuff's claim for a specific performance, but directed judgment in his favor for damages and costs. This judgment was entered in February, 1880. That action being thus ended in favor of the respondent, the plaintiff, on the seventeenth of May following, delivered to her a letter, stating that he was prepared to carry out the contract that had been made with his assignor. He seems, indeed, to have done everything that was necessary to entitle him to the benefit and advantage of the contract, whatever they may have done.

It also appeared that at the time the contract in question was made the defendant was an invalid, very infirm, and pecuniarily embarrassed, and that the main inducement to the making of the contract was the receipt of the money which would have been paid to her had the contract been performed within the time expected. It further appeared that between the time of the execution of the contract and the trial of this case the premises had increased largely in value; that a large amount of taxes and assessments had accumulated and remained unpaid; and that large sums were due for mortgages, judgments and interest, which also remained unpaid, although much had been paid by the defendant for principal and interest of mortgages and judgments. It also appears that during the intervening period named the premises remained vacant; that no income was derived from them except during the last year or two and then in an amount almost nominal. * * *

The learned justice in the court below delivered the following opinion:

"LABREMORE, J. * * * After fifteen years of litigation on defendant's part to protect her title to the property, the plaintiff now asks specific performance of the contract, according to its original terms. It is evident that the parties to the contract in question never contemplated so long a delay in its consummation. That the vendor should bear all the burdens of the property for fifteen years, and then be compelled to convey it for the contract price, would seem inequitable, especially when the value has increased threefold. The amount paid for taxes, assessments and interest on the premises, nearly equals, if it does not exceed, said contract price. 'Equity will not decree specific performance of a contract when it would work injustice, and

where (as in this case) it is obvious that the contracting parties never expected or intended the results that have followed their action. Margraf v. Muir, 57 N. Y. 158; Peters v. Delaplaine, 49 N. Y. 362; Cuff v. Dorland, 55 Barb. 481.

"Nor was the tender of May 27, 1880, even if in valid form, good in substance. The plaintiff offered for execution a full warranty deed, whereby defendant was obliged to pay all existing liens upon the premises for taxes and assessments, thus giving him the full benefit of the large increase in value, and depriving her of the full consideration of the contract.

"It was no fault of defendant's that the Cuff suit was not earlier determined. Plaintiff's assignor contracted in view of that event, which finds the relations of the parties changed, the rights of third parties intervening and performance of the contract impracticable.

"This action was brought for strict equitable relief; no other was sought. This must be denied for the reasons above stated, but according to our present practice this action must be held to enable the plaintiff, if he so elect, to prove and recover his damages. Sternberger v. McGovern, 56 N. Y. 12. * * *

"Judgment is therefore ordered in conformity with the views above expressed, and we think that this conclusion should be sustained."

In Peters v. Delaplaine, 49 N. Y. 362, to which he refers it was said by Chief Justice Church, as the result of the cases bearing upon the question, the granting or withholding specific performances was within the discretion of the court, and would not be granted when it would be against conscience and justice to direct it. In that case the property had increased in value from $30,000 to $300,000 and during all the time the vendor, and those who from time to time succeeded to this estate, had received large sums of rents, issues and profits and necessarily paid the taxes and assessments upon the property; and the specific performance of the contract, it was said, would necessarily require the statement of an account with the several parties and with respect to the receipts and expenditures connected with the premises. So in this case the lots in question were in the possession of grantor and yielded a very insignificant income for a short period, but were subject to taxes and assessments and other incumbrances, an account of which must necessarily be taken in order to show the correct relations of the parties to each other under this contract if a specific performance were to be decreed. It would indeed seem to be against conscience and justice to allow the plaintiff to succeed in obtaining a decree of this court directing a specific performance of the contract when the property had increased to a sum in value more than double the amount he was to pay for it, and with sums due for taxes and assessments exceeding more than one-half of the price to be paid originally, the result of which would be that the defendant would receive comparatively nothing for her property.

It is not necessary to state the numerous reasons why the contract should not be enforced after such a lapse of time, and after the intervention of the facts and circumstances affecting the relation of the parties which are disclosed by the evidence in the case. It cannot be entertained for a moment that any court of equity, in the exercise of a discretion vested in it, would grant a decree for a specific performance in such a case.

The judgment, however, provides for the payment of the costs and disbursements by the plaintiff upon the decree for a specific performance of the contract rendered against him, whilst the action is continued to enable him, if he so elects, to pursue his legal remedy for damages, if any, that he may have sustained. We do not understand upon what authority such a judgment is entered. The case was not terminated by the judgment interlocutory, for such it must be regarded, but, as we have seen, the action was continued to enable the plaintiff to obtain relief in damages, if any he should have sustained. The provision in regard to the costs, therefore, is erroneous and the judgment must be modified by relieving the plaintiff from liability for any costs until the determination of the action, in case he should elect to proceed to recover damages, which he has the right to do under the judgment. It is ordered, therefore, that the judgment be modified in the respect named, and affirmed as to the remainder, without costs of this appeal to either party.

DAVIS, P. J., and INGALLS, J., concurred.

Judgment modified as directed in opinion.

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## MORLEY v. CLAVERING.

(In Chancery, 1860. 29 Beav. 84, 54 E. R. 558.)

The Plaintiffs, being possessed of three leasehold houses in Pimlico, instructed an auctioneer to sell them. On the 25th of November, 1859, the Defendant, Mr. Clavering, offered to purchase them. The leases were examined on the 8th of December, by the clerk of the Defendant's solicitor, who took notes of the contents, and on the same day the Defendant's solicitor wrote to the auctioneer, that—

"on looking over the lease, he found the contents of so special a nature that he could not advise his client to take the premises, and that he had written for instructions."

On the 13th of December the Defendant's solicitor himself inspected the leases, and he afterwards signed an agreement on behalf of the Defendant to purchase the leases for £600. On the 24th of December the Defendant declined to complete, because the covenants—

"were most restrictive and against the trades which would be carried on on the premises."

The vendors filed their bill in February, 1860, for the specific performance of the contract.

The Defendant resisted the performance. He said that the premises had been taken for the purpose of opening an establishment for lectures on dancing and music, and as a place of public amusement, similar to St. James' Hall, Piccadilly, under the title of "St. James' Hall and Restaurant."

That the partition between the three houses had been taken down for the purpose of uniting them into one, and that the landlord had given notice to reinstate them, and to put the premises into repair; and that if not done before the 25th of March, an eviction would take place, and the leases be forfeited.

He said that the covenants in the leases entirely prevented the premises being used for the purposes of the establishment intended (meaning used for the trade of a victualler).

The Defendant attempted to make out that the auctioneer and the Plaintiffs knew that the Defendant made the purchase with the intention of carrying on the restaurant, which was prohibited by the lease; they, however, said that they understood it was to be used as "a dancing academy and a concert room." The Court, however, decided on the assumption of their knowledge.[97] * * *

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. I think there is no defence to this suit, and that the Plaintiff is entitled to a decree for specific performance. The case is this: Three leases of three houses in Pimlico were advertized to be sold by the Plaintiff. The purchaser, by his agent, carefully inspected all the leases, knew what the covenants were, and the amount of knowledge in this respect was common to both parties. Knowing the contents of the leases, the Defendant, by his solicitor, executes a contract for purchasing them, and now he asks that he may not be compelled to perform his contract, on the ground that the covenants of the leases are different from what he thought, and do not enable him to effect the object he had in view, and that the vendor knew to what purpose it was his intention of using the premises.

Suppose this to be so, still both parties were on an equal footing, each knew the contents of the deeds and the effect of the covenants contained in them. It is not the duty of the vendor to say to the purchaser, "You will not be able under these covenants to effect your object;" it is for the purchaser to ascertain for himself whether what he purchases will answer his purpose. It is impossible to get out of a contract by saying, "I told the vendor what my intention was, and he failed to give me his opinion, derived from information which was common to both, that I could not carry my intention into effect." In every case, a purchaser has some private reason for purchasing and also for changing his mind afterwards, when he does so.

The purchaser says that he may be prevented carrying his intentions into effect, by reason of being compelled to build party walls, which will prevent the premises being used for purposes he intended. He knew, when he entered into the contract, that he might be called on at any time to do so; it is just as remote at present as it was then, and it is probable that, if the rent be paid and the premises put in repair, he will not be interfered with. It is impossible to say, "I misunder-

[97] **The statement of facts is abridged.**

stood the matter," he may have made a mistake in law, but if he has, it will not affect his liability to perform his contract.

He says, that one covenant prohibits the sale of provisions as a victualler, but his own solicitor himself examines the leases, and after that he enters into contract. Flight v. Barton, 3 Myl. & K. 282, and the other cases, where the purchaser did not inspect the deed, but relied on the statement of strangers, have, therefore, no application. I am of opinion that the Plaintiff is entitled to a decree for specific performance.

On a motion to add to the decree, on the 24th of January, 1861, it was ordered that the assignment of the leases should bear date the 10th of January, 1860, the day on which, according to the terms of the contract, it ought to have been completed.

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## HAYWOOD v. COPE.

(In Chancery, 1858. 25 Beav. 140, 53 E. R. 589.)

The Plaintiff was seised of a farm called the Bank End Farm, situate in the parish of Norton in the moors, in Staffordshire, and of the coals and minerals under it, and for working which shafts had been previously sunk, which had been visibly abandoned. The farm consisted of about twenty-seven acres, two roods, and two perches.

The Defendant applied to the Plaintiff for a lease of the coal mines, and after some negotiations, and after the Defendant, accompanied by some friends, had examined the shaft, as far as was possible (see 25 Beav. p. 148), the Plaintiff and Defendant, on the 15th of January, 1855, signed the following agreement:

"Mr. Charles Cope agrees with Howard Haywood, Esq., for those two seams of coals known as the two-feet coal and three-feet coal, lying under lands to be hereafter defined in the Bank End estate, near Norton in the county of Stafford, at the rate of ninepence per ton for all coals and slack going over a weighing machine, 112 lbs. to cwt., or 2240 lbs. per ton, minimum rent £100 per annum, on lease of fourteen years. Mr. Cope to pay for all surface trespass, at the rate of £5 per acre, to commence paying minimum rent within eighteen months from date of agreement, all coals and slack sold or raised in the intermediate time to be paid for, at the rate of 9d. per ton. Howard Haywood, Esq., agrees to let to Mr. Charles Cope the before-mentioned two seams of coals at the price before mentioned."

Shortly after the agreement had been signed the Defendant entered into possession. He commenced working the coal mines, and he continued to work them regularly until July, 1855, and off and on until October, 1856.

On the 26th of May, 1855, the Plaintiff's solicitor forwarded to the Defendant, for his approval, a draft lease, in which the particulars of the land under which the mines lay were defined and scheduled. The Defendant made no objection to the draft, and retained it, notwithstanding various applications made to him to return it. At Christmas, 1856, the Defendant first objected that the coals had not turned out so

well as he expected, and in January, 1857, he declined to accept a lease—

"on the ground that the mines were not (as he alleged) what they were represented to be, either as to thickness or quality; and that his surveyor had stated that the coal was absolutely not worth getting."

The Defendant afterwards returned the draft lease.

On the 26th of March, 1857, the Plaintiff filed this bill, for a specific performance of the contract; for an account of the coal worked, and for payment by the Defendant of the royalty and rent.

The Defendant resisted the specific performance on the ground of the uncertainty of the contract, of the misrepresentation and concealment of the Plaintiff, of the delay which had occurred, and of the hardship of being obliged to pay £100 a year during the remainder of the time, without receiving any benefit from the mines.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY].[98] I am of opinion that the Plaintiff is entitled to a decree for specific performance. * * *

Then it is said that this is an extremely hard case, that, in point of fact, the Plaintiff is insisting upon the Defendant paying him £1400 for a thing that has turned out to be literally worth nothing, and that according to the discretion which the Court exercises in such cases, it cannot compel specific performance of the contract. Upon this subject, which is one upon which I have before made several observations, I will refer again to a passage which I have always considered binding upon me, for it is most important that the profession, and those who have to advise in reference to this subject, should understand the rule which is adopted in this and the other Courts, which is, that the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. Lord Eldon observes, in the case of White v. Damon, 7 Ves. 35:

"I agree with Lord Rosselyn, that giving specific performance is matter of discretion; but that is not an arbitrary capricious discretion. It must be regulated upon grounds that will make it judicial."

I also refer, as I believe I have upon former occasions, to a passage in the celebrated argument of the Master of the Rolls in Burgess v. Wheate, 1 Eden, 214, where, at the conclusion, he cites a well-known passage from Sir Joseph Jekyll's judgment (in Cowper v. Earl Cowper, 2 Peere W. 752, 753), upon the subject of the discretion of the Court, and gives his own opinion. He says:

"And though proceedings in equity are said to be Secundum discretionem boni viri, yet, when it is asked vir bonus est quis, the answer is, qui consulta patrum, qui leges juraque servat. And as it is said in Rooke's case, 5 Rep.

[98] Parts of the opinion are omitted.

99b, that discretion is a science, not to act arbitrarily according to men's wills and private affections, so the discretion which is to be exercised here is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it and advances the remedy; in others, again, it relieves against the abuse or allays the rigour of it; but in no case does it contradict or overturn the grounds and principles thereof, as have been sometimes ignorantly imputed to this Court. That is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with. This description is full and judicious, and what ought to be imprinted upon the mind of every Judge." 1 Eden, 214.

If, therefore, in a case of this description, I were to say that according to my discretion I ought to leave these persons to their action at law, upon what principle or ground could I do it, except that in a matter of speculation it has turned out very favourable to one party, and very unfavourable to the other. It is obvious that in the case of a sale by auction, if the property is sold for an extremely inadequate value, it is impossible for the person to repudiate the contract. The mere principle of what might have been fair, or what might have been a right thing to do between the parties, had all the elements of value been known which have since transpired, cannot be a ground for exercising or regulating the discretion of the Court when all the facts which were then in existence were known to both parties. I can understand that the Court will exercise a discretion, and will not enforce the specific performance of a contract, where to decree the performance of the contract will be to compel a person, who has entered inadvertently into it, to commit a breach of duty, such as where trustees have entered into a contract, the performance of which would be a breach of trust. Those are cases where, by a fixed and settled rule, the Court is enabled to exercise its discretion; but the mere inadequacy or excess of value is not in my opinion a ground for exercising any such discretion as that which is suggested in this case. That this is a very hard case there is no doubt, and it may be extremely proper for the Plaintiff to make an abatement in respect of it, but that is a totally different matter, one which is in the forum of his own conscience, but not one which I can notice judicially. In my opinion, this is a contract which was fairly entered into between the parties; there is nothing to invalidate it, and the usual decree must therefore be made for the specific performance of the contract, with costs to the present time. A reference must be directed to Chambers to settle the lease in case the parties differ. * * *

## REVELL v. HUSSEY.

**(In Chancery in Ireland before Lord Manners, 1813. 2 Ball & B. 280.)**

The Bill prayed, that the Defendant James Hussey might be decreed to execute a Renewal of the Lease granted by him to Thomas Hussey, the other Defendant, pursuant to a Covenant for that Purpose contained in the Lease; and that the Defendant Thomas Hussey might then execute a Renewal of the Plaintiff's Lease; who offered to pay all the Expenses.

In 1793, the Archbishop of Dublin granted a Lease of four hundred and ninety-seven Acres of the See Lands, for twenty-one years, at a yearly Rent, to the Defendant James Hussey; who soon after demised seventy Acres of the same lands to the Defendant Thomas for a Term of Years, reserving an annual rent; he covenanted, That he, James Hussey, would, from Time to Time, use his best Endeavours to obtain a Renewal from the Archbishop, and that so often as he should obtain a Renewal of his Lease, that he would execute a Renewal to Thomas, without Fine or Consideration.

On the 17th of November, 1798, Thomas Hussey executed a Lease of twenty-nine Acres of those Lands to Henry Pentland, for sixteen years, at £37 Rent: the Lease contained the following covenant:

**"That the said Thomas Hussey, his Heirs, &c., shall (as often as the Lord Archbishop of Dublin shall renew for James Hussey, Esquire, his Heirs, &c.) renew for him the said Henry Pentland, his Executors, &c., without Fine or any other Expense whatever, except that of the Leases."**

In 1803, Henry Pentland, in Consideration of £1200, assigned his interest in this Lease to the Plaintiff.

In March, 1809, the Archbishop of Dublin granted a Renewal of James Hussey's Lease, for which James Hussey was obliged to pay a Fine of £3000, instead of £90, the Fine formerly paid on each Renewal; James Hussey then applied to the several Persons holding those Lands under him, to contribute rateably to reimburse him; with this Application the Plaintiff would not comply; the Defendants thereupon refused to grant him a Renewal of his Lease. It appeared, that in several of the Leases granted by James Hussey of the See Lands, there were Covenants of Renewal similar to that contained in the Lease to Thomas Hussey, and in others there were Covenants, that on the Tenant paying a Fine Certain, he, James Hussey, would grant him a Renewal.

THE LORD CHANCELLOR.[99] * * * But on Behalf of the Defendants, it is contended, that the Situation of the Parties has been materially altered since the entering into this Contract; that although it was advantageous to James at the Time to grant this Lease to Thomas Hussey at a Rent certain, and without any Fine of Renewal, yet, by subsequent Events, and from the immense Fine that has been

[99] **Parts of the opinion are omitted.**

exacted from James Hussey, by the Archbishop of Dublin, the Nature of the Property has been so changed, that unless the Tenants deriving under him would contribute proportionally to the Fine, it would now be attended with great Loss to him to renew; and the case of Davis v. Hone, 2 Scho. & Lef. 341, has been relied on in Support of this Argument: and indeed had it not been for that Case, I do not believe that the Plaintiff's Right of Renewal would have been resisted. It is always unsatisfactory to abstract altogether the Reasoning of the Court in any Reported Case, from the Facts to which that Reasoning is meant to apply; it has a Tendency only to misrepresent one Judge, and to mislead another. * * *

When this Case was first stated, I thought it very very much resembled, in Principle, those Cases of Contracts, where a material Change in the Value of the Property had happened after the equitable Title was complete, and before the legal Conveyance was executed: in which Cases, whether it be to enhance or to reduce the Value of the Property, it falls upon the Purchaser; as for Instance, if a Reversion be contracted for, with one or more good Lives upon it, and after the Contract is entered into, but before the Conveyance is executed, all the Lives fall in, the Purchaser may enforce the Agreement in Equity, although the Estate, by the Events that had happened, had become worth double the Sum agreed upon for it (see White v. Nutt, 1 P. Wms. 61); so on the other Hand, if the Estate be depreciated, the Contract will be enforced against the Purchaser. The Defendant's Counsel have referred to a Dictum of Sir Joseph Jekyll, in the case of Stent v. Baylis, 2 P. Wms. 217, but that Dictum of Sir Joseph Jekyll was declared by Lord Eldon, in Mellor v. Paine, 6 Ves. 349, to be unsupported; and indeed, the Case of Mellor v. Paine, and that of Mortimer v. Capper, 2 Bro. Ch. Ca. 154, have established the Principle, that subsequent Events will not vary a Contract fairly entered into. (See 2 Ves. & Bea. 387.)

Mr. Radcliffe referred to the Case of Faine v. Browne, 2 Ves. Sen. 307, where a Man being entitled to an Estate under his Father's Will, with a Provision, that if he sold it within a certain Period, Half the Purchase-money should go to another; he being a drunken Fellow, had agreed to sell it, and refused to Execute the Contract, and a Bill was brought to compel the Performance; but Lord Hardwicke dismissed the Bill; and why? Because the Contract, at the time of entering into it, was unreasonable, as the Vendor was in effect selling his Patrimony for one half its Value. The Point that has been considered in all the Cases, and on which they all turn, is, was the Transaction, when originally entered into, fair and reasonable? Was there no undue Advantage taken; nothing suppressed, nothing mistaken; if it were so, I do not know what Authority this Court has to vary Men's Contracts, because eventually they have become more advantageous to one Party, or more prejudicial to the other, than was contemplated by either. Lord Redesdale, in Evans v. Walshe, says, if the Defendant

will not renew, let him permit the Plaintiff to stand in his Situation; the same Offer is made in this Case.

Another Topic has been insisted upon by the Counsel for the Defendant; and that is, that it is in the Discretion of the Court to decree or refuse the Specific Execution of a Contract. It is so; but that Discretion is regulated and restrained by Principles as well known and established, as any other Branch of the Law of this Court (see Goring v. Nash, 3 Atk. 187); and the Period at which the Court is to examine the Agreement between the Parties, is the Time when they contracted; for if the Court were, as is contended for, to vary an Agreement, deliberately entered into by the Parties, from the happening of subsequent Circumstances, I do not know when it would stop. * * *

It is then said, the Plaintiff has no Remedy at Law; why, that is perhaps additional Reason for granting Relief here. Since then it happens that in this Case there is a Hardship, or an Inconvenience, where ought it to fall? On him who has taken it upon himself, or on him who is expressly indemnified against it, and who has purchased his Interest at full Value? Surely, to refuse Relief in this Case, would be to give the Defendant James Hussey the Benefit of a Fraud, which he has enabled the other Defendant to practise upon the Plaintiff.

For these Reasons, I think the Plaintiff entitled to the Relief he prays; but it being a fair Question, and one raised by the Decision of Davis v. Hone, I decree the Renewal, without Costs.

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## SOUTHERN RY. CO. v. FRANKLIN & P. R. CO.

(Supreme Court of Appeals of Virginia, 1899. 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.)

Appeal from circuit court, Franklin County. Suit by the Franklin & Pittsylvania Railroad Company against the Southern Railway Company. From a decree for plaintiff, defendant appeals.

RIELY, J.,[1] delivered the opinion of the court. The Franklin & Pittsylvania Railroad Company (hereinafter called the "Franklin Company") was incorporated by an act of the general assembly of Virginia of March 12, 1878, and authorized to construct a railroad from some point on the main line of the Washington City, Virginia Midland & Great Southern Railroad Company (hereinafter called the "Midland Company"), or any branch thereof, in the county of Pittsylvania, to Rocky Mount, the county seat of Franklin county.

On September 19, 1878, it made a lease of its road, to take effect when the same was completed, to John S. Barbour, receiver, in the chancery suit of Graham against the Washington City, Virginia Midland & Great Southern Railroad Company, pending in the circuit court

[1] Parts of the opinion are omitted.

of the city of Alexandria, for the term of 34 years, at the annual rental of $7,000. The lease was made subject to the ratification of the stockholders of the Franklin Company and the approval and confirmation of the said court. It was duly ratified by the former, and approved and confirmed by the latter. The road was constructed and equipped by the lessor, and delivered to the lessee on April 15, 1880, from which date the lease was to run for 34 years.

The Southern Railway Company having, on June 18, 1894, duly acquired, by purchase and conveyance, the road owned by the Midland Company when the lease was made, and along with it the lease to Barbour, receiver, by the Franklin Company, plainly manifested an intention, in the summer of 1897, to abandon and cease to operate the leased road. In anticipation of such action by the Southern Railway Company, and to prevent the consequences that would result from it, the Franklin Company brought its suit in equity in the circuit court of Franklin county, charging in its bill that the Southern Railway Company intended to abandon and cease to operate under the lease the road of the complainant after July 1, 1897, and asking that it be enjoined and restrained from doing so. The Southern Railway Company filed its answer to the bill, and admitted the charge of the complainant.

Is the defendant company bound to operate the leased road during the term of the lease, or may it rightfully abandon and cease to operate it? This is the first question presented for our determination. Its solution depends upon the provisions of the lease. * * *

It is apparent that a principal object of the incorporators of the Franklin Company was to furnish railroad facilities to the citizens of Franklin county by connecting by rail Rocky Mount, the county seat, with the main line of the Midland Company, and thereby secure railroad communication with all sections of the state and country reached by that road and its connections. It was to this end that the county of Franklin subscribed to and paid for in its bonds $200,000 of the capital stock of the Franklin Company. And the consummation of this object was the main inducement on the part of the Franklin Company to enter into the lease with the Midland Company; while the inducement to enter into it on the part of John S. Barbour, receiver, was, as expressed in his reports to the circuit court of Alexandria, to obtain, as he believed, a valuable feeder to his line of railroad. That the lease was in the contemplation of the parties thereto at the time the Franklin Company obtained its charter is shown by the eighth section thereof, whereby it is expressly made—

"lawful for said company to lease its road, or any part thereof, to the Washington City, Virginia Midland & Great Southern Railroad Company, or any other railroad company chartered by the commonwealth."

It is apparent, upon a fair construction of the whole instrument, considered in the light of the circumstances under which it was made, that it was within the contemplation of the parties and their intention that the road should be maintained and operated during the entire term

of the lease; and, when we come to examine its provisions critically, the obligation to do so, though not expressed in words, is plainly implied. * * *

The enforcement of the contract is also objected to on the ground of hardship. It is not pretended that the lease was induced by fraud or false representations of facts. On the contrary, it was entered into after due deliberation, was reasonable and fair when made, and, as declared in the preamble, "deemed judicious and beneficial" to both parties. Operation under it has demonstrated that the Franklin Company, instead of becoming "a valuable feeder" to the main line of the lessee, has proved to be an unprofitable adjunct. The hardship is due, in the main, to miscalculation in making the contract, and in part to subsequent events and a change of circumstances in no wise attributable to the lessor.

It is not doubted that there are adjudged cases which hold that a court of equity will not decree specific performance of the agreement where it would entail great hardship, and the hardship was due, in some measure, at least, to the conduct of the other party. Booten v. Scheffer, 21 Grat. 474; Gish's Ex'r v. Jamison, 96 Va. 312, 31 S. E. 521; and Willard v. Tayloe, 8 Wall. 564, 19 L. Ed. 501.

But we question whether a court of equity ever refuses specific performance upon the sole objection of hardship, where the contract in its inception was fairly and justly made, and the hardship is the result of miscalculation, or is caused by subsequent events or a change of circumstances, and the party seeking performance is wholly without fault. In Marble Co. v. Ripley, 10 Wall. 356, 19 L. Ed. 955, Mr. Justice Strong, in speaking of contracts that were supposed to be fair and equal when made, but in the lapse of time have become bad bargains, said:

"Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances and changing events."

The element of risk enters more or less into every contract, and the obligation to perform it cannot be allowed to depend upon the question whether it has proved to be advantageous or disadvantageous. It would be a travesty upon justice, and the reputed sanctity of contracts would be of little avail, if parties could refuse the performance of contracts having some years to run, which were fairly entered into, and believed to be just and equal when made, merely because from contingencies, whose possibility might have been foreseen, they had turned out, in the course of execution, to be a losing, instead of a profitable, bargain.

In Schmidtz v. Railroad Co. [101 Ky. 441, 41 S. W. 1015, 38 L. R. A. 809], supra, it appeared that the lessor was largely indebted to the defendant company, the assignee of the lease, for moneys furnished for it under the contract of lease, and to be repaid by it; that judg-

ment had been recovered for the amount, and an effort made to sell the leased road to pay it, but nothing could be made, because no one would give anything for the road subject to the mortgage subsisting upon it. It also appeared that the leased road was being run at a heavy loss, the necessary cost of operating having exceeded the receipts in the sum of $199,411.70. The defendant claimed that it would be harsh and inequitable, under these circumstances, to require it to continue to operate the road; but the court held that the facts in the case were not such as to release the defendant from performing the contract. Nor can the objection of hardship, made in the case before us, avail to stay the hands of the court.

Objection is made to the decree appealed from that it enjoins the appellant from abandoning or ceasing to operate the road as it was then operating it, without regard to the exigencies of the case. The decree simply requires the same train service as the appellant had deemed to be proper and necessary during the three years it had been in control and operation of the road. It is to be presumed that it was then running only such trains, and with such cars, as its experience showed were required. This would seem to be reasonable and proper, and to furnish no good ground of complaint.

The further objection is made to the decree that it requires the appellant to operate the entire line from Rocky Mount to Franklin Junction, which includes seven miles not belonging to the appellee, but is the property of the appellant. This seven miles is a branch road of the Midland Company, running out from its main line to a place called Pittsville, and was in existence when the lease was made; and the provisions of the lease clearly show that it was the understanding and agreement of the parties thereto that the Franklin Company was to construct its road to the western terminus of the branch road, so as to obtain connection with the main line. Without the branch road, there would be no connection between the new road and the main line. It was by means of the branch road that the new road was to become "a valuable feeder to the traffic of the main line." It is plainly implied in the lease that the branch road was to be operated in conjunction with the new road. The two have been operated together as one line ever since the beginning of the lease. They were so operated by the original lessee and all of his successors, and were being so operated by the appellant when this controversy arose. The branch road is essential to the use and enjoyment of the road of the Franklin Company, and the court committed no error in the respect complained of.

We find no error in the decree appealed from, except in dismissing the case from the docket. The court should have reserved the right to make additional orders from time to time, as circumstances might require, and kept the case on the docket for that purpose. The decree will be amended in this respect, and as so amended will be affirmed.

KEITH, P., dissenting.

Amended and affirmed.

## HART v. BROWN et al.

(Supreme Court of New York, Special Term, Monroe County, 1893. 6 Misc. Rep. 238, 27 N. Y. Supp. 74.)

Action by Hart against Mrs. Brown and another for the specific performance of a contract by defendant Brown to open a street.

RUMSEY, J.[2] The defendant Brown, in the month of November, 1888, conveyed to the plaintiff a lot of land extending 51 feet on Mt. Hope avenue, and running back a distance of about 119 feet. At the time of the conveyance Mrs. Brown was the owner of a considerable tract of land, out of which this lot was carved. She covenanted in her deed to the plaintiff to open a street along the north side of his lot, and extending beyond it to South avenue, which was several hundred feet east of the rear of his lot. By her contract this street was to be opened within two years from the 1st of April, 1889. Before that time, however, she conveyed the whole tract of land to the Oak Hill Cemetery Association, which is also made a party to this action, but which has not appeared or served any answer. Consequently, that association does not object to the granting of the judgment which is asked for in the plaintiff's complaint. Indeed, it is not in a condition to object, for the deed from Mrs. Brown to the association is made subject to all the covenants contained in her deed to the plaintiff, and consequently the cemetery association takes subject to the plaintiff's deed, and cannot prevent the performance of the contract by Mrs. Brown if she were to be compelled to perform it. Pom. Spec. Perf. Cont. § 465. It appears by the proofs in the case that, after the action had been commenced, the interest of the Oak Hill Cemetery Association in the property was sold and purchased by one John B. Y. Warner. As a notice of pendency of this action was filed, however, before that sale was made, Mr. Warner took subject to whatever rights the plaintiff should be adjudged to possess.

The plaintiff, for this property, paid the sum of $2,340. He bought for the purpose of setting up a factory for the manufacture of tombstones and monuments, which he might sell to people who buried their dead in the Mt. Hope Cemetery, the entrance to which was directly across the street from the lot that he bought. To fit the premises for that use, he built upon them a building adapted to his business, but which was so placed that, in connection with another building then upon the land, it occupied the whole width of the lot, leaving him no means of access for wagons to the rear of his lot, except over the new street which was to be opened immediately upon the north side of it, in pursuance of Mrs. Brown's agreement. He testifies (and his evidence is amply sustained) that it would be practically impossible for him to carry on his business upon this lot unless he should be able to deliver weighty masses of stone upon the rear part of his lot, where

[2] Parts of the opinion are omitted.

he can do such work as is necessary upon them to fit them for monuments, and that this can only be done if he has access to the rear of his lot for wagons and trucks along this new street. For this reason it will be seen that it is of some considerable importance to him to have this contract performed, at least so far as to give him a right of way to the rear of his lot. He testifies, also, that the street, if opened, will become a considerable thoroughfare for persons having occasion to visit Mt. Hope Cemetery, and that it would be of considerable advantage to him, and add greatly to the value of his business, if he could display his goods on the north side of his lot in the same way that he does now upon the front of his lot. This advantage, however, is somewhat fanciful, and can, I think, hardly be made to serve, by itself, as a reason for requiring the specific performance of the contract, although I have no doubt it would be a proper matter to consider in the assessment of damages.

It appears from the evidence, and is practically undisputed, that in 1888, when this property was sold to the plaintiff, Mrs. Brown was preparing to lay it out into lots, and to open streets upon it, which she intended to put upon the market. One of these streets was delineated upon a map directly north of the plaintiff's premises, and extending from Mt. Hope avenue to South avenue. It was this street which the plaintiff expected to have opened, and which he now desires the court to require her to open. For some reason Mrs. Brown did not open the street by the 1st of April, 1891, as she agreed, and in September of that year her time to do so was extended until July, 1892, and for that extension, and the damages accruing to the plaintiff for her failure to open the street before, she paid the plaintiff $399. At the time when she made the original contract, and for a considerable time afterwards, there was a good market for city lots upon the outskirts of the city of Rochester, where this land lay, and, if her land had then been put upon the market, she would undoubtedly have been able to pay the expense of performing her contract, and have sold the lots at remunerative prices. Before the time, however, within which she was, by the extension, to perform the contract, the sale of lots in all the outskirts of the city of Rochester had fallen off very considerably, and it had become practically impossible to put this property on the market in that way. The expense of opening this street from Mt. Hope avenue to South avenue, and of completing the grading of it, would be about $6,000. Before the lots which were to be laid out on each side of it could be sold, it would be necessary to grade them to the level of the street at considerable expense, or else the expense of doing the necessary grading would have to come out of the purchase price of the lots. In either event a very considerable loss would accrue to the owner of the premises. The defendant claims that this new condition of affairs, which was unforeseen at the time the contract was entered into, has rendered the contract excessively burdensome to her, so that it would be a great hardship to require her to perform it, and for that

reason she claims that a judgment for specific performance should not be ordered.

It is a well-settled rule, in actions of this nature, that not only must the agreement, the performance of which is sought, be fair and reasonable, but that its specific execution must not be oppressive; that is, it must not be such that its performance will work a great hardship to the parties. Pom. Spec. Perf. Cont. § 185. While this general rule is well settled, it has always been a serious question whether the unfairness and hardship which will stand in the way of a judgment for specific performance must exist at the time of the making of the contract, or whether it is sufficient if, by subsequent events and changing circumstances, a contract which was originally fair and unexceptional has become so onerous that specific performance will be denied, although, if there had been no change in circumstances, the defendant would have been compelled to perform it. Mr. Fry, in his work on Specific Performance, says:

"That the question of the hardship of a contract is generally to be judged of at the time at which it is entered into. If it be then fair and just, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, except where these subsequent events have been in some way due to the party who seeks the performance of the contract." Fry, Spec. Perf. 182.

However accurate this may be as a statement of the law interpreted by the English courts, as to which I have not examined, it cannot, I think, be said to be the law in this country, and certainly not in this state. Judge Story says that courts of equity will not proceed to decree a specific performance of a contract where, from a change of circumstances or otherwise, it would be unconscientious to enforce it. Story, Eq. Jur. § 750a. Mr. Pomeroy discusses the question at considerable length, and comes to the conclusion that, although agreements may be fair and just when made, their enforcement may be interfered with and prevented by subsequent unforeseen events, which introduced a sufficient element of inequality, unfairness, or hardship. Pom. Spec. Perf. Cont. §§ 178, 187. The leading case on that subject in this country, outside of the state of New York, is Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501, which was decided by the supreme court of the United States in 1869. * * * The court laid down the rule that the discretionary power of the court in ordering a specific performance of the contract will not be exercised, although the contract may have been originally fair and equal in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties. * * *

There can be no doubt, I think, in this case, that it would be exceedingly oppressive upon the defendant to be compelled to perform this contract to open this street at the present time. The expense of it is large,—almost three times the amount that was paid by the plaintiff for his land. It is certain that the defendant cannot, for many years at least, receive any profit from the sales of lots along this street, which

she had expected to sell at a profit immediately on the street being opened. The opening of the street further back than the rear of his lot would be of comparatively small importance to the plaintiff. Certainly, any injury which he would suffer by not opening it could be very easily compensated for in damages. For this reason, I think the case is one where specific performance should be denied.

But the complaint should not, I think, be dismissed. It is well settled now, in this state, that in actions of this kind, where the plaintiff fails to show himself entitled to equitable relief, the court may retain the action for the purpose of giving him compensation by way of damages. It was always within the power of the court to give damages instead of specific performance, where the case was such that that course was proper. It would have been competent in this case for the court at the special term to have taken evidence upon the question of damages, and awarded the damages if no specific performance should have been given. But a better way, I think, is to deny the application for relief by way of specific performance, and to direct the question of damages to be tried by a jury at the circuit. This course was approved by the court of appeals, and is the one which I think should be followed in this case. Sternberger v. McGovern, 56 N. Y. 12. The contract between the parties is entire,—simply to open this street from one end to the other,—and for that reason the defendant cannot, I think, be required to open a part of the street, and to pay damages for a failure to perform the rest of her contract. Martin v. Colby, 42 Hun, 1.

But the defendant Brown in this case offered, upon the trial, to stipulate that specific performance might be adjudged of this contract so far as to require her to open the street from Mt. Hope avenue to the rear of the plaintiff's premises, thereby giving him the right of way into the rear of his land, and that the damages which he suffered, if any, by reason of the failure to open the street clear through to South avenue, might be assessed by a jury. While I would not feel at liberty, I think, to order such a judgment except upon the stipulation of the parties, yet I have no doubt that a judgment to that effect would come nearer than any other to working out a right result. For that reason, as the defendant is willing that such judgment should be rendered against her, the findings will provide for such a judgment if the plaintiff sees fit to accept it. If he does not, the only judgment can be that the case be sent to a jury for trial upon the question of damages. Judgment accordingly.

## TRUSTEES OF COLUMBIA COLLEGE v. THACHER.

(Court of Appeals of New York, 1882. 87 N. Y. 311, 41 Am. Rep. 365.)

Appeal from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June, 1880, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The action was brought to enforce the observance of certain covenants in an agreement made on the 25th of July, 1859, between the plaintiffs and Joseph D. Beers, who then owned adjacent portions of the block of land between Fifth and Sixth avenues and Fiftieth and Fifty-First streets, New York, in respect to the mode of improvement and the future occupation of their respective portions.

The case upon a former appeal is reported in 70 N. Y. 440, 26 Am. Rep. 615. Beers owned the portion of the block on the westerly or Sixth avenue side, and the plaintiffs the land adjoining on the east. The property was then vacant. The general object of the agreement as stated therein, was "to provide for the better improvement of the said lands, and to secure their permanent value," which was to be accomplished by the erection, by both parties, of dwelling houses of a superior class, which were to be set back eight feet, and to be used exclusively as dwelling houses, the covenant of Beers for himself, his heirs and assigns being not to erect, establish or carry on—

"in any manner, on any part of the said lands, any stable, school-house, engine-house, tenement or community house, or any kind of manufactory, trade or business whatsoever, or erect or build, or commence to erect or build, any building or edifice with intent to use the same, or any part thereof, for any of the purposes aforesaid."

The covenant of the plaintiffs was, that they would insert similar restrictions in all leases executed by them. The defendant Lynch acquired title to the lot on the corner of Fiftieth street and Sixth avenue by sundry mesne conveyances from Beers, each of which expressed that it was made subject to this agreement. She erected a four-story brown-stone front dwelling-house upon the premises, of the full width thereof, fronting on and entered by a high stoop from Fiftieth street; having, in the basement story in front, by the side of the stoop, and on the side opening on Sixth avenue, French windows, two of which, on Sixth avenue, and one on Fiftieth street, were used as entrance doors to the basement and offices hereinafter mentioned. At the time of the commencement of this action, defendant Yates occupied a portion of the basement as a dwelling for himself and family, having in one room thereof a real estate office, and using it for that business, with a business sign; and the defendant Blaisdell occupied a room in said office for receiving orders for painting, having also a business sign. During the pendency of this action the defendant Thacher became the owner of the said premises, having purchased the same with notice of said

agreement and of this action, and he was made a defendant herein by an order of the court, upon his own application. The court found:

That said "Thacher permits certain parts of the house upon said premises to be occupied by his tenants for the purpose of trade and business; that is to say, apartments in the first story of said house for the business of a tailor and for that of a milliner, and apartments in the basement of said house for the business of an insurance agent, of a newspaper dealer, of two express carriers, and of a tobacconist, which trades or business were carried on in the said house at the time of the trial. That the several trades or business carried on as aforesaid by the defendants, Yates and Blaisdell, at the time of the commencement of the action, and by the tenants of the defendant Thacher at the time of the trial, were violations of the agreement above set forth, and of the spirit as well as the letter thereof. That since the action was begun an elevated railway has been built in the Sixth avenue, running by the said premises, and a station thereof established at the intersection of Fiftieth street and the Sixth avenue, in front of said premises, and that the said railway and station affect the said premises injuriously, and render them less profitable for the purpose of a dwelling-house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation. The said railway and station, however, do not injuriously affect all the property fronting on Fiftieth street and included in the said covenant, but only a comparatively small part thereof."

DANFORTH, J.[8] The validity and binding obligation of the covenant cannot be questioned by the defendant Thacher. Trustees of Columbia College v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615. Moreover it appears that he bought with notice, not only of the agreement, but of this action. He therefore could not take the property without performing the obligation attached to it, and must be deemed to have taken it at his own peril, to the extent of such judgment as might be rendered in the action. It is claimed in his behalf that the business charged in the complaint to have been carried on does not come within the prohibition of the covenant. This question was not raised upon the former trial, and of course there is nothing in our decision (70 N. Y., supra) to prevent its litigation upon the trial then ordered, and now under review. The words are very plain; they include "any kind of manufactory, trade or business whatsoever," upon the premises. The complaint shows their occupation in part by "a real estate and insurance broker or agent," and in part by "sign and fresco painters," while the finding of the trial judge—and this is somewhat more important—shows that "the business of a tailor and milliner, of a newspaper agent, express carriers, a tobacconist, as well as that of an insurance agent," were carried on by permission of the defendant at the time of the trial. It would be a useless waste of time to argue that these vocations—for employment or profit, whether described in the complaint, or found by the court—have no relation to the exclusive use to which the premises were set apart. In such a suit as this, the relief which the court can give must depend upon the condition of things at the time of the trial. We have no doubt that the conclusion of the trial judge was right upon the point presented, and agree with him, that these several trades or oc-

[8] Parts of the opinion are omitted.

cupations were violations, not only of the spirit, but also of the letter of the covenant.

Now having before us a covenant binding the defendant, and his breach of it, if there is nothing more, the usual result must follow, viz.: an injunction to keep within the terms of the agreement. * * * It is now claimed by the appellant that there has been such an entire change in the character of the neighborhood of the premises as to defeat the object and purpose of the agreement, and that it would be inequitable to deprive the defendant of the privilege of conforming his property to that character, so that he could use it to his greater advantage, and in no respect to the detriment of the plaintiff. The agreement before us recites that the object which the parties to the covenant had in view was "to provide for the better improvement of the lands, and to secure their permanent value." It certainly is not the doctrine of courts of equity to enforce by its peculiar mandate, every contract in all cases even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where under those circumstances the relief he seeks would be inequitable. Peters v. Delaplaine, 49 N. Y. 362; Margraf v. Muir, 57 N. Y. 155; Mathews v. Terwilliger, 3 Barb. 51; Radcliffe v. Warrington, 12 Vesey, 331. If for any reason therefore not referable to the defendant, an enforcement of the covenant would defeat either of the ends contemplated by the parties, a court of equity might well refuse to interfere, or if in fact the condition of the property by which the premises are surrounded has been so altered "that the terms and restrictions" of the covenant are no longer applicable to the existing state of things. 1 Story Eq. Jur. (10th ed.), § 750. And so though the contract was fair and just when made, the interference of the court should be denied if subsequent events have made performance by the defendant so onerous that its enforcement would impose great hardship upon him, and cause little or no benefit to the plaintiff. Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Thomson v. Harcourt, 2 Brown Parl. 415; Davis v. Hone, 2 Sch. & Lef. 340; Baily v. De Crespigny, L. R., 4 Q. B. 180; Clarke v. Rochester, Lockport & Niagara Falls R. Co., 18 Barb. 350. * * *

In the case before us the plaintiffs rely upon no circumstance of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established by their complaint and proof, a clear legal cause of action. If damages have been sustained they must, in any proper action, be allowed. But on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference, if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled. The general current of business affairs has reached and covered the entire premises fronting on Sixth avenue,

both above and below the lot in question. If this was all however the plaintiffs would be justified in their claim, for it is apparent from the agreement that such encroachment was anticipated, and that the parties to it intended to secure the property in question from the disturbance which business would necessarily produce. But the trial court has found that since the action was begun an elevated railway has been built in the Sixth avenue. It runs past the premises, and a station has been established in front of them, at the intersection of Fiftieth street. He finds that:

"The railway and station affect the premises injuriously and render them less profitable for the purpose of a dwelling-house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation."

The evidence sustains the finding. The premises may still be used for dwellings, but the occupants are not likely to be those whose convenience and wishes were to be promoted by the covenant, persons of less pecuniary ability, and willing to sacrifice some degree of comfort for economy, transient tenants of still another class, whose presence would be more offensive to quiet and orderly people who might reside in the neighborhood. Not only large depreciation in rents when occupied, but also frequent vacancies have followed the construction of the road. Its trains, propelled by steam, run at intervals of a few minutes until midnight. The station covers from fifteen to twenty feet of the street opposite the defendant's premises. Half the width of the sidewalk is occupied by its elevated platform. From it, persons waiting for the trains, or there for other purposes, can look directly into the windows. Noise from its trains can be heard from one avenue to the other.

It is obvious, without further detail, that the construction of this road and its management have rendered privacy and quiet in the adjacent buildings impossible, and so affected the premises of the defendant, and all those originally owned by him, who, with the plaintiff, entered into the covenant, that neither their better improvement nor permanent value can be promoted by enforcing its observance. Nor are the causes of this depreciation transient. The platform of the railroad station, which renders inspection of the interior of the house easy to all observers; the stairs, which render the road accessible, must remain so long as the road is operated; and the noise and smoke are now, at least, an apparent necessity, consequent upon its operation. It is true, the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the Legislature, and by reason of it there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected, in various ways and degrees, the uses of property in its neighborhood, and property

values. It has made the defendant's property unsuitable for the use to which, by the covenant of his grantor, it was appropriated, and if, in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity. The land in question furnishes an ill seat for dwelling-houses, and it cannot be supposed that the parties to the covenant would now select it for a residence, or expect others to prefer it for that purpose. And although the land has not itself been taken as in Baily v. De Crespigny, supra, for actual occupation by the railroad, the railroad has incumbered the walks and streets about it, and taken away those advantages of situation which induced its owners to dedicate it to dwellings instead of stores, and to retirement rather than to the bustle of business. Submission to this is necessary, because it is authorized by the Legislature, and so the defendant is made incapable of carrying out, if he should desire it, the wishes of those by whose agreement he would otherwise be bound.

There is, I think, no merit in the respondent's suggestion that the change in the character of the neighborhood is insufficient so long as it does not extend to all the property affected by the agreement. If this assumption is well founded—if the influence of the road is felt only by the portion of land owned by the defendant, it is still apparent that the original design of the parties has been broken up by acts for which neither the defendant nor his grantors are responsible, that the object of the covenant has been, so far as the defendant is concerned, defeated, and that to enforce it would work oppression, and not equity.

To avoid this result the judgment appealed from should be reversed, and the complaint dismissed, but as this result is made necessary by reason of events occurring since the commencement of the action, it should be without costs.

All concur.

Judgment reversed and complaint dismissed.

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## TURLEY v. NOWELL.

(Supreme Court of North Carolina, 1868. 62 N. C. 301.)

Bill for a specific performance of a contract to convey land, filed to Spring Term, 1866, of the Court of Equity for Cleveland, and set for hearing and transferred to this court at Fall Term, 1867.

The bill sought a specific performance of the following contract:

"Received, Shelby, N. C., December 1, 1864, from T. W. Turley, six thousand dollars in Confederate notes, in full of the house and lot in the town of Shelby, being the same on which I now reside, which I have sold to the said Turley and for which I will execute a warranty deed as soon as presented.

"J. P. Nowell."

The contract was admitted by the defendant, but he declined to perform it upon the ground that at the time when the property was sold

it was worth at least one thousand dollars "in good money," and that the scrip received by him under the contract was not worth, by the *scale,* more than one hundred and seventy dollars; and that very soon after the contract was made he became satisfied of this, and offered to the plaintiff to pay back what he had received, also to make a deed if he would pay him a reasonable sum for the same, etc.

There was a replication, but no proofs; and the cause was set down upon bill, answer and exhibits.

PEARSON, C. J. The plaintiff is entitled to a specific performance of the contract. The parties were their own judges as to the value of the property and the value of Confederate notes, and there is no allegation of fraud or imposition. Indeed the only ground on which the defendant resists the equity of the plaintiff is the fact that by the result of the war Confederate notes became of no value, but he needed such notes at the time he made the contract, accepted them in payment for the land, and must abide the loss.

That the contract was not illegal is settled. Phillips v. Hooker, 62 N. C. 193.

PER CURIAM. Decree for the plaintiff.

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## HALE v. WILKINSON.

(Supreme Court of Appeals of Virginia, 1871. 21 Grat. 75.)

This was a suit in the Circuit Court of Carroll county, brought in March, 1866, by James Wilkinson, against Fielding L. Hale, to enforce the specific execution of a contract for the sale and purchase of land. It appears that on the 14th of August, 1863, by agreement under seal, Hale sold to Wilkinson a house and lot, including about fourteen acres of land, for ten thousand dollars, payable in Confederate money, one half to be paid in three, and the other half in six months, from the date. Wilkinson did not pay all the purchase money as it fell due, but paid it during the months of November, 1863, March, May and December, 1864, and in January, 1865, Hale receiving it, and giving receipts for the nominal amounts paid as so much paid in part of the purchase money.

In September, 1865, Hale put Wilkinson into possession of the property, under a written agreement, by which Wilkinson was to rent it; and if it should be determined that Wilkinson was entitled to have the contract executed, then he was not to pay the rent.

Hale in his answer, filed on the day the bill was filed, insisted: That the contract, when it was made, was utterly null and void, and in open and plain defiance of law: That the contract wholly failed for want of consideration, which was Confederate money, and, at the time the contract was made, it was a highly penal crime to pass or receive it, and the circulation of it forbidden by law: That the plaintiff did not per-

form his contract by paying the purchase money when it fell due, but the payments were made long after it was due, and when the money had greatly depreciated, and was in fact worthless; that the receipts were not intended to express the receipt by the defendant of so much of the purchase money as was stated therein, but only so many dollars of Confederate money, to be estimated at the value when it should have been paid; that they all express to be "in part payment," or "towards," etc.: That his sole object in selling was to remove to Alabama, which was defeated by the delay of the plaintiff in paying the money, though he had removed since the war: That if he had been paid promptly he could have purchased property then that would have suited him; and that the property he sold was worth, in gold, at the time $6,000, for which he had in fact received not more than $425 at the utmost.

There is proof that at the time of the contract, and since the war, the property was worth $6,000 in gold, and that Hale talked of moving South, and was making arrangements to do so about the time of the sale of the property, and that he complained frequently of Wilkinson's failure to make the payments for it. The value in gold of the money received by Hale, at the time of the receipt, a witness fixed from a table in his possession, at $384.98⅔.

On the 22d of March, 1866, the cause came on by consent to be heard, when the court decreed that Hale should convey the property to Wilkinson; and by a decree of the 24th of August, 1866, Hale having failed to make the deed, a commissioner was appointed to do it. And from this decree Hale applied for and obtained an appeal to the late District court at Abingdon, by which court, on the 18th of July, 1868, the decree of the Circuit court of the 24th of August, 1866, was affirmed. From this decree Hale applied to this court for an appeal, which was allowed.

MONCURE, P.,[4] delivered the opinion of the court. * * *

To determine whether the consideration was adequate, and whether the court can now refuse to decree specific performance of the contract on the ground of inadequacy of consideration, we must carry ourselves back to the date of the contract, and the time when the purchase money was paid. If, at that time, the consideration would have been deemed adequate; if the court would then have decreed a specific execution of the contract, had this suit then been brought, it follows, I think, necessarily, that the consideration must now be deemed adequate, and the court must now decree such specific execution. Can there be a doubt, that if this suit had then been brought, the consideration would then have been considered adequate, and the court would then have decreed specific execution? I think none whatever. Here is a case in which parties sui juris, perfectly competent to make a contract, fairly enter into one with each other for the sale and purchase of a tract of land, at a price agreed upon between them, payable in

[4] Parts of the opinion are omitted.

Confederate money, the only currency of the country at the time, and for a long time before and afterwards; and the purchase money is fully paid. Had not the vendee, then, a right to have the title to the land? Could the vendor, then, have lawfully withheld the title? Would not a court of equity, then, have compelled the vendor to convey the title to the vendee? Why not? Was not the money for which the parties contracted, and which was received in payment, lawful money? Even the Supreme Court of the United States, we have seen, has decided that it was, for all the purposes of money, in the business transactions of the country. * * *

We must therefore consider this case as we would consider it if the payments had been duly made at maturity. And so considering it, I cannot conceive of any ground on which a suit by the vendee for specific execution of the contract after such payment and during the war could have been resisted.

If I be right in that, as I think I certainly am, does it not inevitably follow, that the consideration must now be deemed adequate, and the court must now decree such specific execution? Can the continued default of the vendor until after the war, in not executing a contract which he ought, and might have been compelled to have executed during the war, give him any advantage over the vendee? * * *

If the present value of Confederate money is to be considered in determining whether a consideration paid in it during the war was adequate, instead of the value at that time, then we must not only refuse to compel the specific performance of a contract founded on such consideration, but we must undo and set aside every executed contract or transaction which was founded on such consideration; because, if there be any inadequacy at all on account of the present value of Confederate money, which is utterly worthless, it must of necessity be so great as to shock the moral sense; and that is a sufficient ground for setting aside an executed contract. The establishment of such a doctrine would produce incalculable evils in our southern country, and make it almost a pandemonium.

Upon the whole, I am of opinion that there is no error in the decree, and that it ought to be affirmed.

Decree affirmed.

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## WILLARD v. TAYLOE.

**(Supreme Court of the United States, 1869. 8 Wall. (75 U. S.) 557, 19 L. Ed. 501.)**

Appeal from the Supreme Court of the District of Columbia.

This was a suit in equity for the specific performance of a contract for the sale of certain real property situated in the city of Washington, in the District of Columbia, and adjoining the hotel owned by the complainant, Willard, and known as Willard's Hotel.

The facts out of which the case arose were as follows:

In April, 1854, the defendant leased to the complainant the property in question, which was generally known in Washington as "The Mansion House," for the period of ten years from the 1st of May following, at the yearly rent of twelve hundred dollars. The lease contained a covenant that the lessee should have the right or option of purchasing the premises, with the buildings and improvements thereon, at any time before the expiration of the lease, for the sum of twenty-two thousand and five hundred dollars, payable as follows: two thousand dollars in cash, and two thousand dollars, together with the interest on all the deferred instalments, each year thereafter until the whole was paid; the deferred payments to be secured by a deed of trust on the property, and the vendor to execute to the purchaser a warranty deed of the premises, subject to a yearly ground-rent of three hundred and ninety dollars.

At the time of this lease gold and silver, or bank bills convertible on demand into it, were the ordinary money of the country, and the standard of values. In 1861 the rebellion broke out, lasting till 1865. In the interval, owing to the influx of people, property in the metropolis used for hotels greatly increased in value, and as was alleged by Tayloe, who produced what he deemed a record to show the fact, the complainant, Willard, assigned an undivided half of the property which had been leased to him as above mentioned to a brother of his. In December, 1861, the banks throughout the country suspended payments in specie, and in 1862 and 1863, the Federal Government issued some hundred millions of notes, to be used as money, and which Congress declared should be a tender in the payment of debts. Coin soon ceased to circulate generally, and people used, in a great degree, the notes of the government to pay what they owed.

On the 15th of April, 1864, two weeks before the expiration of the period allowed the complainant for his election to purchase—the property having greatly increased in value since 1854, the year in which the lease was made—the complainant addressed a letter to the defendant, inclosing a check, payable to his order, on the Bank of America, in New York, for two thousand dollars, as the amount due on the 1st of May following on the purchase of the property, with a blank receipt for the money, and requesting the defendant to sign and return the receipt, and stating that if it were agreeable to the defendant he would have the deed of the property, and the trust deed to be executed by himself, prepared between that date and the 1st of May. To this letter the defendant, on the same day, replied that he had no time then to look into the business, and returned the check, expressing a wish to see the complainant for explanations before closing the matter.

On the following morning the complainant called on the defendant and informed him that he had two thousand dollars to make the first payment for the property, and offered the money to him. The money

thus offered consisted of notes of the United States, made by act of Congress a legal tender for debts. These the defendant refused to accept, stating that he understood the purchase-money was to be paid in gold, and that gold he would accept, but not the notes, and give the receipt desired. It was admitted that these notes were at the time greatly depreciated in the market below their nominal value.[5] * * *

On the 29th of April the complainant, finding that the defendant had left the city, and perceiving that the purchase was not about to be completed within the period prescribed by the covenant in the lease, and apprehensive that unless legal proceedings were taken by him to enforce its execution his rights thereunder might be lost, instituted the present suit. * * *

The bill concluded with a prayer that the court decree a specific performance of the agreement by the defendant, and the execution of a deed of the premises to the complainant; the latter offering to perform the agreement on his part according to its true intent and meaning. * * *

MR. JUSTICE FIELD.[6] * * * This contract is plain and certain in its terms, and in its nature and in the circumstances attending its execution appears to be free from objection. The price stipulated for the property was a fair one. At the time its market value was under fifteen thousand dollars, and a greater increase than one-half in value during the period of ten years could not then have been reasonably anticipated.

When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord Erskine, "is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under [the] circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it." * * * It is the advantage of a court of equity, as observed by Lord Redesdale in Davis v. Hone [2 Sch. & Lef. 348], that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally

[5] Between the 15th of April and May 1, 1864, $1 in gold was worth from $1.73 to $1.80 in United States notes.

[6] The statement of facts is abridged and parts of the opinion are omitted.

amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party.

In the present case objection is taken to the action of the complainant in offering, in payment of the first instalment stipulated, notes of the United States. It was insisted by the defendant at the time, and it is contended by his counsel now, that the covenant in the lease required payment for the property to be made in gold. The covenant does not in terms specify gold as the currency in which payment is to be made; but gold, it is said, must have been in the contemplation of the parties, as no other currency, except for small amounts, which could be discharged in silver, was at the time recognized by law as a legal tender for private debts.

Although the contract in this case was not completed until the proposition of the defendant was accepted in April, 1864, after the passage of the act of Congress making notes of the United States a legal tender for private debts, yet as the proposition containing the terms of the contract was previously made, the contract itself must be construed as if it had been then concluded to take effect subsequently. * * *

We proceed to consider whether any other circumstances have arisen since the covenant in the lease was made, which renders the enforcement of the contract of sale, subsequently completed between the parties, inequitable. * * *

It is true, the property has greatly increased in value since April, 1854. Some increase was anticipated by the parties, for the covenant exacts, in case of the lessee's election to purchase, the payment of one-half more than its then estimated value. If the actual increase has exceeded the estimate then made, that circumstance furnished no ground for interference with the arrangement of the parties. The question, in such cases, always is, was the contract, at the time it was made, a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement. Here the contract, as already stated, was, when made, a fair one, and in all its attendant circumstances, free from objection. The rent reserved largely exceeded the rent then paid, and the sum stipulated for the property largely exceeded its then market value. * * *

Upon a full consideration of the positions of the defendant we perceive none which should preclude the complainant from claiming a specific performance of the contract.

The only question remaining is, upon what terms shall the decree be made? and upon this we have no doubt.

The parties, at the time the proposition to sell, embodied in the covenant of the lease, was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made, and it strikes one at once as inequitable

to compel a transfer of the property for notes, worth when tendered in the market only a little more than one-half of the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution. The complainant must, therefore, take his decree upon payment of the stipulated price in gold and silver coin. Whilst he seeks equity he must do equity.

The decree of the court below will, therefore, be reversed, and the cause remanded with directions to enter a decree for the execution, by the defendant to the complainant, of a conveyance of the premises with warranty, subject to the yearly ground-rent specified in the covenant in the lease, upon the payment by the latter of the instalments past due, with legal interest thereon, in gold and silver coin of the United States, and upon the execution of a trust deed of the premises to the defendant as security for the payment of the remaining instalments as they respectively become due, with legal interest thereon, in like coin; the amounts to be paid and secured to be stated, and the form of the deeds to be settled, by a master; the costs to be paid by the complainant.

THE CHIEF JUSTICE, with NELSON, J., concurred in the conclusion as above announced—that the complainant was entitled to specific performance on payment of the price of the land in gold and silver coin—but expressed their inability to yield their assent to the argument by which, in this case, it was supported.

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## GODING v. BANGOR & A. R. CO.

**(Supreme Judicial Court of Maine, 1901. 94 Me. 542, 48 Atl. 114.)**

Report from supreme judicial court, Aroostook county.

Action by Llewellyn Goding against the Bangor & Aroostook Railroad Company.

Bill in equity praying for specific performance, heard on bill, answer, and proofs.

From the allegations in the plaintiff's bill it appears that on the 10th of December, 1895, he executed and delivered to the defendant company, in consideration of $150, a warranty deed of a strip of land in Masardis, containing 2½ acres, for a right of way; that the defendant company agreed to construct and maintain a farm crossing on this strip of land. He also alleged in his bill that prior to the delivery of this deed, and at the date of its delivery, also, the person to whom he delivered the deed, and from whom he received the money consideration therein named, as agent of the company, agreed that the company would construct such farm crossing, and that relying upon such agreement he delivered the deed of the right of way; and he prayed the

court to decree that this alleged oral contract be specifically performed. The answer denied the contract to construct the farm crossing.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, and FOGLER, JJ.

WISWELL, C. J. The defendant's railroad extends through the plaintiff's farm. The right of way therefor was obtained by a deed from the plaintiff to the railroad company for a consideration named therein, of $150. But the plaintiff claims that there was an additional consideration; that the defendant's agent who procured the conveyance of the right of way, and who agreed with the plaintiff in relation to the terms for such conveyance, promised, in behalf of the company, as a further consideration therefor, that the railroad company should build and maintain a farm crossing on the plaintiff's farm across the railroad track. In this bill in equity the plaintiff seeks a decree for a specific performance of this alleged contract. The case comes to the law court upon report.

The plaintiff's contention is denied by the defendant, and there consequently arises an issue of fact, about which there is considerable controversy between the parties. But we do not deem it necessary to determine this question. Assuming, without deciding, that the alleged agreement was made as part of the consideration for the conveyance, we do not think that specific performance should be decreed.

The granting of a decree for specific performance is always discretionary with the court. The contract relied upon in any case may be proved in the most satisfactory manner, and still there may be reasons why the court, in the exercise of its discretion, should not compel the specific performance of that contract. We think that such reasons exist in this case, and that before a court should compel a railroad company to build and maintain a grade crossing over its track, excepting cases where public convenience may require it, or perhaps where there might be very great individual inconvenience if it were not ordered, the court should be satisfied that the danger to public travel will not thereby be much increased, or that the additional burden placed upon the railroad company would not be greatly disproportionate to the benefit that would be derived by the individual.

Very much is required of railroads to meet the demands of the public for the rapid transportation of passengers and freight, to comply with which the utmost diligence must be exercised, and everything that affords unnecessary opportunities for danger must be done away with. A grade crossing over a railroad track is a place of recognized danger, and every additional crossing necessarily increases to some extent that danger. The time has not yet arrived when such crossings can be dispensed with altogether, at least in sparsely-settled communities, but they should not be unnecessarily increased for the mere convenience of an individual. At least, we think the court should not compel the maintenance of such a crossing unless good and sufficient reasons exist therefor.

In this case, in the opinion of the court, the benefit that would be derived by the plaintiff if a decree were granted would be slight in comparison with the additional burden placed upon the railroad company, and the danger to travel upon the railroad would be considerably increased. It appears that just north of the place of the proposed crossing there is a cut for a distance of 870 feet, through which the railroad track runs on a curve, so that a train coming south would enter this cut near the northerly limit of the plaintiff's land, and continue on a curve all the way through this cut until it reached the place of the proposed farm crossing, which, because of the curve and cut, would be shut out from the view of the approaching train. It is argued, and it seems to us with much force, that upon this account the proposed crossing would be much more dangerous than under other conditions. South of the place of the proposed crossing, and only 230 feet distant therefrom, there is already a highway crossing over the track, so that if this crossing were ordered there would be two grade crossings within a distance of 230 feet. And by reason of this highway crossing over the railroad track the plaintiff can, with slight inconvenience, use that crossing for his purpose.

For these reasons, we do not think that the relief asked for should be granted. We are, perhaps, more ready to come to this conclusion because of the fact that the plaintiff is not without ample remedy. If he is right in his contention, he may recover adequate pecuniary compensation for any and all damages that he has sustained by reason of the failure of the company to perform the contract made by its authorized agent in this respect.

As we have come to this conclusion for the reasons above stated, and not because of a decision adverse to the plaintiff upon the issue of fact, the bill should be dismissed, without costs.

So ordered.

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## HAMLIN v. STEVENS.

(Court of Appeals of New York, 1903. 177 N. Y. 39, 69 N. E. 118.)

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Charles A. Hamlin, administrator of Lyman Stevens, against Julia E. Stevens and others. From a judgment of the Appellate Division, affirming a judgment of the Special Term (78 App. Div. 629, 79 N. Y. Supp. 1133), construing the will of Lyman Stevens, Lyman A. Stevens appeals.

VANN, J.[1] This action was brought for the construction of the will of Lyman Stevens, deceased, with reference to certain questions not material on this appeal. The appellant was not made a party in the

[1] Parts of the opinion are omitted.

first instance, but he was permitted to come in as a defendant, and to raise two issues: (1) That according to the terms of the will, when considered in the light of surrounding circumstances, he was one of the residuary legatees; (2) that he was entitled to one-third of the residuary estate by virtue of a contract alleged to have been made in his interest between his father and the testator when he was an infant. The Special Term found against him upon both issues, and the judgment entered accordingly was affirmed by the Appellate Division, one of the justices dissenting. From the judgment of affirmance Lyman A. Stevens appealed to this court.

The will was drawn by the testator himself but two days before his death. He first bequeathed to Lyman A. Stevens, whom he described as his "nephew," the sum of $6,000, and by the next clause he devised to his "oldest daughter Mary L. Hamlin" a house and lot in confirmation of a former informal gift, and gave her a legacy of $2,000. He then devised to his "second daughter Grace S. Loomis," also in confirmation of a former informal gift, a house and lot, and bequeathed her $2,000 in money. His fourth gift, of $1,000, for the benefit of a religious organization, was followed by the residuary clause, whereby he instructed his executors—

"to administer, execute and keep employed all that remains of my estate for the use, benefit and comfort of my beloved wife Julia E. Stevens during her natural life, * * * and at the decease of my wife the residue remaining of my estate shall be divided equally between our children or their heirs."

* * * * * * * * * *

The main reliance of the appellant is upon the alleged contract. The trial judge found that the testator—

"never made a contract with the defendant Lyman A. Stevens, or with his parents, whereby and wherein he agreed to give to the said Lyman A. Stevens any share of his property at his decease, and that there is no clear and convincing evidence establishing such a contract."

As this finding was based on conflicting evidence, we are not asked to review it, but we are asked to set it aside and grant a new trial, because incompetent evidence was received by the trial court, although duly objected to by the appellant. In order to decide the points raised, it becomes necessary to state the leading facts. The testator died on the 16th of October, 1891, leaving a widow, said two daughters, and an estate valued at $65,000. The appellant is the son of Leonard Stevens, a brother of the testator, and his wife, Sarah, who lived in Huron county, Ohio. He resided with his parents until April, 1869, when, at the age of 11 years, he came to Syracuse, and lived with his uncle, the testator.

"From that time onward," as the trial justice said in his opinion, "he formed a part of the family of Lyman Stevens, and seems to have been treated with all the regard and affection of a son. He was reared, educated, and clothed by his uncle, and on his part seems to have repaid the latter for his care by affection and gratitude and by services similar to those which a child would have rendered to a father. He helped his uncle about his farms and about his business, and the uncle often referred to him as his righthand man and as

his son. On several occasions he stated that he knew no difference between Lyman and his other children, and that he should make no difference between him and them when he came to divide his estate."

When he was 19 or 20 years old, the testator paid him wages at the rate of $10 a month, and after he became of age $15 a month, and charged him with all sums paid to him or for his benefit. His board was without charge. Leonard Stevens, his father, died a good many years ago, but his mother, who was 77 years old when her deposition was taken before the trial, testified that in the fall of 1868 the testator, while on a visit to his brother in Ohio,

"asked if we were willing that Lyman, his namesake, should come to live with him as his own son. He said that, if we would allow him to come and live with him until he was twenty-one, he would educate him, and he should share in whatever earthly wealth he had at his death. The subject was then dropped. In January, next year (1869), brother Lyman came to visit us again. * * * My husband suggested that in such a matter we should have some legal papers. My brother-in-law stated that he could not see the necessity of any such a thing; that he considered his word just as binding as any papers that could be drawn up. He said: 'You need have no misgivings. I shall always regard him as my own son, and always treat him as such.' He said that whatever worldly wealth that he should have to dispose of at the time of his death they should share and share alike, his two daughters and Lyman."

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The appellant testified that when he was 20 or 21 years of age his father showed these letters to him, and he remembered that each contained the statement:

"That, if I was allowed to come and live with my uncle until I was twenty-one years old, I should share equally with Mary and Grace in whatever property he had to dispose of at the time of his death."

He could not state anything else that the letters contained, except that they were signed by his uncle, and addressed to his father, and possibly to his mother. * * *

After probate of the will the amount due the appellant for unpaid wages according to the books of the testator was paid him, and he gave a receipt—

"in full for all demands of every kind and nature against the estate of Lyman Stevens, deceased, except the legacy as stated in the will."

He accepted the bequest of $6,000 without objection, and without notice of any claim by virtue of the contract. About nine years after the probate of the will this action was commenced to obtain a construction thereof with reference to subjects not now material. In the meantime the executors had advertised for claims, but none was presented by the appellant, who does not appear to have given any notice of the existence of a contract until after this action was commenced.

Contracts of the character in question have become so frequent in recent years as to cause alarm, and the courts have grown conservative as to the nature of the evidence required to establish them, and in enforcing them, when established, by specific performance. Such contracts are easily fabricated and hard to disprove, because the sole con-

tracting party on one side is always dead when the question arises. They are the natural resort of unscrupulous persons who wish to despoil the estates of decedents. In Shakspeare v. Markham, 72 N. Y. 400, 403, this court declared that:

"Contracts claimed to have been entered into with aged or infirm persons, to be enforced after death to the detriment and the disinheriting of lawful heirs, who otherwise would be entitled to their estates, are properly regarded with grave suspicion by courts of justice) and should be closely scrutinized, and only allowed to stand when established by the strongest evidence."

While such contracts are sometimes enforced by the courts, it is only when they have been established by evidence so strong and clear as to leave no doubt, and when the result of enforcing them would not be inequitable or unjust. Thus, in a recent case the agreement was in writing, there were no children to be disinherited, and no will to show the understanding of the decedent. Winne v. Winne, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647. In deciding that case we said:

"In cases of this character, where it appears for any reason that the enforcement of an agreement would be unfair, inequitable, or unjust, the remedy should be denied. * * *"

We are of the opinion that no view of the evidence in the case before us would warrant the conclusion that the alleged contract was made. Assuming that the trial judge believed that the appellant and his mother intended to tell the truth, still, owing to their deep interest, it would be unsafe to base a finding on their testimony when it may be followed by such grave consequences. Such contracts are dangerous. They threaten the security of estates, and throw doubt upon the power of a man to do what he wills with his own. The savings of a lifetime may be taken away from his heirs by the testimony of witnesses who speak under the strongest bias and the greatest temptation, with all the dangers which, as experience shows, surround such evidence. The truth may be in them, but it is against sound policy to accept their statements as true under the circumstances and with the results pointed out. Such contracts should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. Unless they are established clearly by satisfactory proofs, and are equitable, specific performance should not be decreed. We wish to be emphatic upon the subject, for we are impressed with the danger, and aim to protect the community from the spoliation of dead men's estates by proof of such contracts through parol evidence given by interested witnesses.

During the trial of this action certain evidence was received under the objection and exception of the appellant, which we regard as incompetent; but, in view of what has been said, it is obvious that it could not have affected the result. No competent evidence was excluded, and, if all the testimony in favor of the respondents were rejected, still the evidence in favor of the appellant would not have justified the trial court in finding that the alleged contract was made. The

error therefore was harmless, and the judgment should be affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

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## SECTION 9.—RIGHTS OF PURCHASER FOR VALUE WITHOUT NOTICE

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### POTTER v. SANDERS.

**(In Chancery, 1846. 6 Hare, 1, 67 E. R. 1057.)**

G. S. Sanders was seized in fee of three closes of land, in Byfield, in the county of Worcester, subject to a mortgage of £500, which he offered to sell at the price of £950, upon the condition that the purchaser should not require a covenant for the production of certain title-deeds which Sanders was unable to obtain. Potter, being informed of this offer, wrote to Sanders a letter, dated the 20th of April, 1844, offering £800 for the land, taking the title as it stood. In reply to this letter Sanders wrote to Potter as follows:

"Bewley Mill, Redditch, April 23, 1844.

"Sir—I received your favour this morning, and in reply beg to say that I accept of your offer of £800 for the land at Byfield. I have written to Mr. Gery by this post, who shall let you know when the deeds are ready, which I believe will be in a few days. Will that be convenient to you?

"Yours, &c., G. S. Sanders."

This letter was put into the post office on the day of its date. Sanders also wrote to Gery a letter of the same date, as follows:

"Dear Sir—I have written to Mr. Potter to say that he shall have the land at Byfield for £800. I have told him that I have no doubt but that you will have the conveyance ready in a few days. Can you do so? As I am short of cash, would you ask him if he would pay me £100 as a deposit, instanter? Perhaps it would not inconvenience him, and it would be of great service to me. You could give him a proper receipt, signed by me, and which would make our bargain more firm. I suppose, as Mr. Potter intends to pay off the mortgage, it will be necessary for the mortgagees to sign the deed; and I have no doubt but that one of them will wish to be present at the settling, to receive the £500 and interest. You need not tell Potter as from me, but hint to him, that if he does not complete the purchase without delay, his chance will be gone.

"Yours, &c., G. S. Sanders."

While this correspondence was going on with Mr. Gery and Potter, Sanders was also in communication with another party, who was willing to purchase the land. On the 8th of April S. Gardner, as the agent of William Coates, applied to Sanders' father, who lived at Daventry, for the price of the land, and the father on the same day wrote to Sanders the following letter:

"Dear George—My principal reason for writing is to know the lowest price you will take for your land at Byfield. I have had a person to inquire after it to-day. He wishes for an answer immediately; so please to send me word directly on receipt of this.

"Yours, &c., Thomas Sanders."

This communication was answered by a letter from Sanders to his father, dated the 12th of April, 1844, as follows:

"My Dear Father—Unluckily I did not send for my letters yesterday, so did not have your kind note till this morning. I hope the delay will not be of consequence. My lowest price for the Byfield land is £925; and I will pay for the conveyance, which will take the £25. I should think the timber on the land is worth £50, and that the purchaser would have into the bargain. I must admit I should be glad to sell it, and will leave it to you to dispose of it, if possible, should the parties offer even a less sum; although I think it ought not to go under the £925. Mr. Gery would be employed to convey, as he has already in his possession a draft of the deed.

"Yours, &c., G. S. Sanders."

The father thereupon wrote the following letter, dated the 13th of April, 1844, to Gardner:

"I have heard from my son this morning. He is willing to take for his land £950, the timber included, or less, if the timber be valued. I shall be glad to hear from you as soon as convenient."

On the 23d of April Sanders wrote to his father:

"My Dear Father—Potter has written to offer me £800 for the land at Byfield. Have you heard anything from the party you wrote to me about? Perhaps if the party applying to you has no connection with Potter, he would be induced to give more if he knew that I had received an offer from another party. I received Potter's letter this morning, and am now off to market, so have only time to say all are well."

In the morning of the 24th of April, 1844, an interview took place between Gardner and Sanders' father, at the house of the latter, at Daventry, at which the father, on behalf of Sanders, agreed (absolutely, as the witnesses deposed) to sell to Gardner, as the agent of Coates, the three closes of land for £900; and the timber upon it to be taken at a valuation. Sanders was informed of this contract by the following letter from his father:

"In reply to yours, received this morning, I have to say that, if you approve of it, I have sold your land at Byfield for £900; the timber upon it to be taken at a fair valuation, and the purchaser to pay for the conveyance, and you for the title. The purchaser is acquainted with the title, and will pay for the land at Midsummer or Michaelmas next; which you think proper. I have promised to give an answer on Saturday next, if I can learn from you before that time. I hope you will be pleased with what I have done."

The transactions after the 24th of April, 1844, were these:

By a letter, dated the 24th of April, but bearing the post-mark of the 26th, Sanders stated to Potter that his father had sold the land before the letter to Potter of the 23d of April was written. Sanders, in reply, was informed by Mr. Gery, in a letter of the 28th of April, that Potter insisted upon his contract, and that he (Mr. Gery) thought there was no alternative for Sanders but to submit to perform it. Sanders, in a letter to Mr. Gery of the 30th of April, acquiesced in this view, and reiterated his request for the immediate payment of £100 in part

of the purchase-money. Other communications passed with reference to the performance of the contract and preparation of the conveyance, and on the 7th of May Potter paid Sanders £100 in part of his purchase-money of £800. On the other hand Sanders, on the 26th of April, replied to his father's letter of the 24th of April thus:

"My Dear Father—I am much pleased with the bargain you have made for me. I should wish the purchase to be completed at Midsummer. As Aplin will have to make the conveyance, the title is sure to be correct. Who is the purchaser?"

On the 27th of April a memorandum of agreement was drawn up in writing and signed by Sanders' father as the agent of Sanders, and Gardner as the agent of Coates, in the terms of the contract already stated, with the additional provision that, at Midsummer, the purchase was to be completed and possession given to the purchaser.

At the time of the foregoing transactions neither Coates nor Gardner, his agent, had any notice of the contract which Sanders had made with Potter; but Gardner received notice of that contract early in May, and on the 14th of the same month formal notice thereof was given to Coates; and Coates and Sanders were informed that Potter insisted upon his right to have the contract performed.

By indentures, dated the 31st of May and the 1st of June, 1844, Sanders and the mortgagees, by his appointment, conveyed the land to Coates, in consideration of the payment by the latter of the purchase-money mentioned in the memorandum of agreement of the 27th of April.

The bill was filed by Potter against Sanders and Coates; and it prayed that Sanders might be decreed specifically to perform his contract with Potter for sale of the land, and that Coates might be declared to be a trustee for Potter, and that Coates and Sanders might be decreed to convey the premises to Potter; or if it should appear that Coates had no notice of the contract with Potter before the conveyance, then that an account might be taken of what was due to Potter from Sanders for principal and interest on the £100, and that Sanders might be ordered to pay the same and the costs of the suit to Potter.

Gardner, who was the agent of Coates, stated in his evidence that, on the 17th of April, 1844, he made an offer for the land to Sanders' father, who promised him the refusal for a week, and that he completed the contract on the 24th of April, on which day the week would expire.

THE VICE-CHANCELLOR [SIR JAMES WIGRAM], after stating the facts which took place before and on the 24th of April, and the subsequent conveyance to Coates: The above facts are, I believe, sufficient to raise the question at issue between the parties; for I lay out of the case the argument at the Bar founded upon the facts deposed to by Gardner, but not suggested in the pleadings, that the Defendant's contract of the 24th of April is to be referred to the 17th of April. The

answer is most explicit that the Defendant's contract was on the 24th and upon that issue is joined. Neither the payment of the £100, which was made after notice of the Defendant's agreement, nor the correspondence and communications which took place between the different parties after the 23d of April, appear to me to affect the question in the cause, except as they clearly show upon whom the costs of this suit ought to fall. On the 27th of April, 1844, the Plaintiff received a letter from Defendant Sanders, dated the 24th of April, but having the post office mark of the 26th, and which cannot by any possibility be correctly dated, in which he says, not very candidly, that when his letter of the 23d was written, his father had made the contract with Coates. Sanders was soon afterwards informed by a letter from Mr. Gery that the plaintiff insisted upon the performance of the contract; and from that time he apparently considered the Plaintiff entitled to the benefit of his contract. He desired Gery to proceed with the conveyance, suggested that a formal agreement in writing be prepared to make the matter safe; and on the 7th of May received from the Plaintiff £100 on account of his purchase. However, on or soon after the 14th of May his views were altered, and he appears then to have considered the Defendant Coates, entitled to a performance of the contract entered into on his behalf. None of these matters, however fertile they may have been as topics for observation upon conduct, appear to me to affect the dry legal questions to which I am bound to confine myself.

The first question is whether the Plaintiff's contract has not priority, in point of time, over the verbal contract made with Coates on the 24th of April. If that question be answered in the affirmative, it will dispose of the whole case. For the property comprised in the contract would cease to belong to the vendor from the moment that contract was concluded; and I am quite clear (in the circumstances which I have detailed) that Coates can derive no advantage from the conveyance of the legal estate taken after notice of the Plaintiff's agreement for purchase, and whilst his own position was unaltered by payment of purchase-money, or otherwise, under an agreement which, if the Plaintiff's contract had priority, would be void from the beginning.

For the purpose of answering the question whether the Plaintiff's contract had priority, I was at one moment inclined to direct an inquiry (the answer to which I felt certain I might anticipate) at what hour of the 24th of April the letter of the 23d was delivered at the Plaintiff's residence in the regular course of post. I cannot doubt that it would be delivered before the verbal contract with Coates was made; and, if so, that would decide the case. But, upon further consideration, I think it unnecessary to direct that inquiry. The delivery of the letter on the 24th was merely the completion of an act by which the vendor had bound himself on the 23d. If the vendor had died on the 23d after posting the letter of that date, I can scarcely entertain a doubt but that the Plaintiff would in this Court have been the owner of the estate

as against the heir of the vendor. But without carrying the point further, I think the vendor, when he put into the post office the letter to the Plaintiff of the 23d of April, did an act which, unless it were interrupted in its progress, concluded the contract between himself and the Plaintiff. I cannot, in short, doubt but that the letter of the 23d was a revocation of the authority which the vendor had given to his father to make a contract for him for the sale of the estate. Independently, therefore, of the consideration that the contract with Coates of the 24th of April was a verbal contract only, I think the Plaintiff is entitled to a decree.

In the preceding observations I have assumed that the agreement made with Coates on the 24th was absolute in the first instance. But from the contemporaneous letter of Sanders, the father, it may be doubted whether the agreement was not conditional; and if that were so, there can be no doubt that Sanders' letter of the 23d of April to the Plaintiff was received before Sanders could have assumed to conform to the agreement made by his father.

Mr. Romilly asked that the decree might provide for the payment by Sanders of the costs of Coates.

THE VICE CHANCELLOR [SIR JAMES WIGRAM] said that Coates was aware of the facts of the case when he took his conveyance. If Sanders had covenanted to indemnify Coates, he did not require the assistance of this Court to obtain his costs. If he had not such an express covenant, the Court would not imply one.

Decree for specific performance of the Plaintiff's contract. All necessary parties to convey. Account of the purchase-money remaining due, and of the rents and profits. Costs against both Defendants; but if any part of such costs shall be recovered against Coates, Coates to be at liberty, in the name of the Plaintiff, to recover such costs over against Sanders, Coates undertaking to indemnify the Plaintiff in respect of the costs of such proceedings as he may take for that purpose.[8]

[8] In Jerrard v. Saunders (1794) 2 Ves. 721, 723, 30 E. R. 723, Lord Chancellor Loughborough thus voices the favored position of the purchaser for value without notice: "It was laid down by [Lord Nottingham] that against a purchaser for valuable consideration this Court had no jurisdiction. Fagg's Case (1673) 6 State Trials 1121 (cited Earl of Huntington v. Greenville [1682] 1 Vern. 52), was determined by him; the Defendant had picked up from the conveyancer's table the deed, that affected his title; and though he got it in that manner, Lord Nottingham would not oblige him to set it forth. A case, that occurred to my recollection, produced many points: it is Basset v. Nosworthy (1673) Finch, 102. The Plaintiff took up the cause as heir of Lady Seymour, claiming under a legal title: the Defendant set up a purchase for a valuable consideration without notice: Lord Bridgeman had over-ruled the plea; in consequence of which a great variety of proceedings took place in this Court. It came before Lord Nottingham; he reversed Lord Bridgeman's order; and suppressed all the proceedings that took place in consequence of the production and discovery. The book does not state it amiss: 'A purchaser bona fide without notice of any defect in his title at the time, he made the purchase, may buy in a statute, or mortgage, or any other incumbrance; and if he can defend himself at law by any such incumbrance bought in, his adversary shall

## TAYLOR v. BAKER.

(Court of the Exchequer, 1818. 5 Price, 307.)

The plaintiff filed this bill in the character of a prior incumbrancer, with notice, praying, to be let in to redeem a previous mortgage subsequently assigned to the defendant Baker; and that a posterior fraudulent sale to him might be set aside; and for an injunction of a pending action of ejectment.[9] * * *

RICHARDS, LORD CHIEF BARON, having stated all the circumstances of the case with much particularity, both at the commencement, and in the other corresponding part of the judgment, observed: When Strong mortgaged the premises to the plaintiff, he was merely the owner of the equity of redemption, which he conveyed to Taylor by the deed of October, 1814. Afterwards Baker proposed to purchase the property; and he admits, that during that treaty Strong informed him, that he had given the plaintiff a judgment, or warrant of attorney, so that he clearly had notice that some sort of security had passed from Strong to Taylor, and that was certainly such notice of an existing prior incumbrance, as should have put him on further inquiry. Soon after that the plaintiff's attorney shewed the deeds to Metcalfe, Baker's attorney, so that, undoubtedly, the treaty and the purchase were completed after admitted notice. Then, Baker having procured the first mortgage to be assigned to him, the court could not interfere to restrain him from getting the possession by law, because he had clearly acquired the legal estate.

On that part of the case, the rule certainly is, that between parties who have equal equity, whoever gets the legal estate shall be preferred: but then there must be equal equity, not only in their titles, but in the transactions on which their claims are founded. Here (it is true) both parties were equitable incumbrancers, but the plaintiff was a prior

never be aided in a Court of equity for setting aside such incumbrance; for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous; viz. where the Court hath refused to give any assistance against a purchaser either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another.' I am perfectly satisfied upon the general reasoning, that this Court will never extend its jurisdiction to compel a purchaser, who has fully and in the most precise terms denied all the circumstances mentioned as circumstances, from which notice may be inferred, to go on to make a farther answer as to all the circumstances of the case, that are to blot and rip up his title. To do so would be to act against the known established principles of this Court. I think, it has been decided, that against a purchaser for valuable consideration without notice this Court will not take the least step imaginable. (See Walwyn v. Lee [1803] 9 Ves. 24.) I believe, it is decided, that you cannot even have a bill to perpetuate testimony against him. I am pretty sure, it is determined, that no advantage, the law gives him, shall be taken from him by this Court. The doctrine as to the jurisdiction of this Court is this: you cannot attach upon the conscience of the party any demand whatever, where he stands as a purchaser having paid his money, and denies all notice of the circumstances set up by the bill."

[9] The statement of facts is abridged.

mortgagee; and though the defendant Baker had acquired the legal estate, it is clear that before taking his mortgage, and thereby getting the legal estate, he knew that Taylor had, at that time, an honest charge on the estates: and even had it been but a judgment, it would still have been a lien on the land, and therefore such notice of some species of prior incumbrance as would have bound the mortgagee, and it became Baker's duty to ascertain as he might have done the true state of the fact.

In all events, then, supposing Baker to have any right at all against the plaintiff, it could only be on the ground of the money (if any) which had been actually paid by him on Strong's account, prior to the 2d of January. But he would not be entitled even to that, if he had had, in point of fact, notice of the plaintiff's prior incumbrance, which I cannot but consider that he had; and I think that there is no difference in this case, in point of law, whether it were a judgment or a mortgage, and notice of one was equivalent to notice of the other.

As to the costs, notwithstanding the rule, that a mortgagee generally is entitled to costs, yet when there has been unfair dealing, that forms an exception; therefore the defendants Baker and Strong must not be allowed costs.

The ejectment being founded on a legal right, I cannot restrain the defendant from proceeding. In all other respects I shall.

Decree for the plaintiff, with costs.

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## ATTORNEY GENERAL v. WILKINS.

(In Chancery, 1853. 17 Beav. 285, 51 E. R. 1045.)

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY].[10] * * * The information was filed to enforce a legal right to a rent charge, and the defences set up in answer are: First, a purchase for valuable consideration without notice. * * * I am of opinion that the defence of a purchase for valuable consideration without notice is a good defence to this bill. Though the earlier authorities are certainly contradictory, yet the later decisions are very strong upon this point, and support such a defence; and I think, upon principle, that it is but reasonable that it should prevail. This defence is the mere creature of a Court of Equity, and does not exist at law. There, if a person having a legal title to land or to a rent charge seeks to enforce that title, it is no defence to say I purchased that land or that rent charge; and though you may have a legal title, still, as against me, you cannot recover at law. His legal title will prevail notwithstanding. But a Court of Equity holds that it is not equitable for a person who has bought for valuable consideration without notice of any claim to be deprived of that for which he has paid his money, nor will it (as expressed by Lord

[10] Parts of the case are omitted.

Eldon in Wallwyn v. Lee, 9 Ves. 24, and as was also said in Joyce v. De Moleyns, 2 Jon. & Lat. 374) give any assistance against a purchaser for valuable consideration without notice to a party claiming against him. But it is said that this proposition, expressed in that general and extended sense, cannot be maintained, but that it must be confined within these limits, namely, that the Court will afford assistance against a purchaser for value, when the claim made against him is a legal and not an equitable claim. I am, however, unable to see why the rule should be limited only to cases where the right is merely equitable, and not be extended to the cases where it is legal. I cannot concur in the observations made in the argument in Collins v. Archer, 1 Russ. & Myl. 284, that a Defendant, in order to avail himself of a defence of being a purchaser for value without notice, must either have a legal right, or a better right than the Plaintiff to call for the outstanding legal estate, and that consequently such a defence can never be made use of against the Plaintiff who relies upon the legal title. The case of Penny v. Watts, 1 M. & G. 150, 1 H. & T. 266, is an authority against that proposition, because there was in either no legal estate, and it was not determined which of the two had the better right to call for the legal estate. The cases of Wallwyn v. Lee and Joyce v. De Moleyns expressly determine that the defence of purchase for value without notice is a good defence, where the right sought to be enforced is a legal right; and I have in vain endeavored to discover upon what ground it can be held that it is not a defence against a legal claim in this Court. This Court certainly does not favour legal any more than equitable rights, but rather the contrary; and the cases which involve the consideration of legal rights are few as compared with those involving equitable rights: but in the case of a purchase for value without notice, the principle of the Court is neither to afford assistance, nor to do anything to prejudice the rights. It will not afford assistance against the purchaser, and it will not, at his instance, restrain any person from proceeding against him, but it will leave all parties to their remedies at law.

There are many cases, amongst which are Rogers v. Seale, Freem. 84, Williams v. Lambe, 3 Bro. C. C. 264, and Collins v. Archer, in which it has been held that a defence of a purchase for value without notice is a good defence against a person seeking to enforce a legal right.

On the other hand, and opposed to these, are the cases of Parker v. Blythmore, 2 Eq. Ca. Abr. 79, pl. 1, Jerrard v. Saunders, 2 Ves. Jun. 454, Gait v. Osbaldeston, 1 Russ. 158, 5 Mad. 428, Wallwyn v. Lee, Joyce v. De Moleyns and Penny v. Watts, eight or nine cases, which more or less determine the contrary.

It is therefore necessary to consider the principle upon which the Court proceeds.

My opinion is that it proceeds on this: that when you once establish that a person is a purchaser for value without notice this Court will

give no assistance against him, but the right must be enforced at law. It is true, in this case, that the Defendant has not purchased the rent charge; but he bought the estate believing he was buying it without any rent charge upon it. If, therefore, the Plaintiffs have a legal right they must enforce it at law. The means of doing so exist in this case. Under the late statutes trustees might have been appointed of this charity and the legal estate vested in them, and they might then have proceeded effectually to enforce their rights in a Court of law. I think this information fails, and it must therefore be dismissed, but without costs.

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## MACKRETH v. SYMMONS.

(In Chancery, 1808. 15 Ves. 329.)

The Bill stated, that in the years 1783 and 1784 the Plaintiff was indebted to John Manners in several sums, amounting in the whole to £13,500; for which sums John Martindale, as surety, joined the Plaintiff in bonds. In 1790 Martindale, having upon a settlement of accounts with the Plaintiff in 1785 taken credit for payment to Manners of £3,000 undertook to discharge the remaining £10,500; and they settled an account accordingly. Other accounts were afterwards settled between them: the last in February, 1792; upon which a balance of £54,000 was due to Martindale, including £10,393. 17s. the value of annuities, granted by the Plaintiff; against which Martindale agreed to indemnify the Plaintiff in consideration of the Plaintiff's agreeing to pay him the amount. A bond for £20,000 was given accordingly: and a mortgage in fee was executed by the Plaintiff to Martindale for the balance of £54,000.

By indentures of lease and release, dated the 30th and 31st of October, 1793, reciting an agreement by the Plaintiff to sell the reversion of the mortgaged estates to Martindale, which was valued at £60,000 composed of the principal and interest, due upon the mortgage, those estates were conveyed to Henry Martindale and his heirs, to the use of the Plaintiff for life; with remainder to John Martindale in fee.

The Bill farther stated, that John Martindale did not, according to his undertaking, pay the sum of £13,500 to Manners, nor the value of the annuities; which sums constituted part of the consideration for his purchase of the reversion of the estate. In September, 1797, a Commission of Bankruptcy issued against him; under which Manners' representatives proved the debt upon the bonds; and received dividends: the Plaintiff being obliged to pay remainder of the debt on account of those bonds; being £14,128. 3s. 9d. besides costs, and several sums on account of the annuities.

John Martindale before his bankruptcy had contracted to execute a mortgage to the Defendant of the reversion, comprised in the indentures of 1793; and the Plaintiff claiming a lien upon the estate for the

payments he had made in consequence of Martindale's failure to fulfil his engagements, gave notice to the assignees under the Commission. In 1798 Symmons obtained a Decree, that the assignees should execute a mortgage of the reversion to him, expressly without prejudice to the Plaintiff's claim; and afterwards filed a Bill of foreclosure against the assignees; and obtained a Decree; Mackreth not being a party to that suit. The legal estate was vested in Coutts, as a trustee under a conveyance by Mackreth and Martindale in 1793, to secure annuities of £2,000.

The Bill, filed by Mackreth, prayed a declaration, that the Plaintiff has a lien upon the reversion of the estates, sold to Martindale, and mortgaged to Symmons, for the payments he had been obliged to make, and those sums which he may hereafter pay in respect of the annuities, &c.

The Defendant Symmons by his answer denied, that he had any notice, prior to his entering into the agreement with Martindale, that the Plaintiff had not received full consideration; and submitted, that had no lien.

Sir Samuel Romilly and Mr. Wriottesley, for the Plaintiff. The equitable lien of a vendor upon the estate sold for the purchase-money, as against the vendee, and even though a bond was taken, is established by a great number of cases, from Chapman v. Tanner, 1 Vern. 267, to Nairn v. Prowse, 6 Ves. 752. In Austen v. Halsey, 6 Ves. 475 (see 483), your Lordship considered it as clearly settled; except where upon the contract evidently the lien by implication was not intended; and the case of Hughes v. Kearney, 1 Schoales & Le Froy, 132, is another direct authority: Lord Redesdale laying down as a very clear rule, that in all cases the vendor has the lien; and that it lies upon the purchaser to shew a special agreement, excluding it: that case being decided upon that ground. It cannot be admitted certainly against a purchaser for valuable consideration without notice: but this Defendant has not that character; having merely an equitable agreement for a security, not performed, when Martindale became a bankrupt: the Plaintiff giving notice to the assignees: and the Decree, obtained by the Defendant Symmons for a mortgage to him, expressing, that it was without prejudice to the claim of this Plaintiff. * * *

Mr. Richards, Mr. Alexander, and Mr. William Agar, for the Defendant. There is nothing in the circumstances of this case, depriving this Defendant of the protection, due to a purchaser for valuable consideration without notice: his transaction with Martindale being perfectly fair: the vendor claiming a preference by way of lien for the purchase money, remaining unpaid; as an equitable charge, prior in time; though he took the security of Martindale to that extent. Under such circumstances the lien has never been established: nor can the inference, necessary to maintain it, be collected either upon principle or authority. The general case of lien, as between vendor and vendee, is admitted; where there is no special agreement: no security taken in re-

spect of the purchase-money: but this Equity has not been carried beyond that simple case of vendor and vendee. * * *

Sir Samuel Romilly, in Reply. * * *

As to this Defendant, if from the passage, appearing in the report of Pollexfen v. Moore it is supposed, that the lien cannot be extended to a purchaser from the original vendee, it would be perfectly ineffectual: but that proposition is contradicted by many authorities. In Walker v. Preswick (2 Ves. sen. 622) it is distinctly laid down, that the lien prevails against a purchaser with notice. Upon what principle can such a distinction between this and any other Equity be maintained? The point is expressly decided in the same way in Gibbons v. Baddall, 1 Eq. Ca. Ab. 682, note, viz.: if A. sells an estate, taking a promissory note for part of the purchase-money, and then the purchaser sells to B., who has notice, that A. had not received all the money, the land is in Equity chargeable with the money, due on the note. The Defendant cannot be represented as a purchaser without notice, merely as not having notice, when he advanced his money. It is true, not then having this estate in contemplation, he could not have notice at that time: but to sustain a purchase as for valuable consideration without notice, it is essential, that there should not have been notice either when the money was advanced, or, when the conveyance was executed. That doctrine has been always held from the earliest period, in More v. Mayhow, 1 Cas. in Ch. 34, to the time of Lord Hardwicke in Wigg v. Wigg, 1 Atk. 382, and Tourville v. Nash, 3 P. Will. 307, where the notice was before payment of the money; and the reason is, that some suspicion arises from not taking the legal estate, when the money is advanced. The Defendant, having the means, by acquiring the legal estate, of placing himself in a situation, in which the want of notice would avail, merely took an agreement; and, having only an equitable title, cannot maintain the plea of purchaser for valuable consideration without notice. The doctrine, that certainly prevails between mortgagees, that, the equities being equal, a subsequent mortgagee having got in the legal estate, may exclude a prior incumbrance, applies only, where the money was advanced upon the credit of the estate; not, where the estate was not in contemplation, and other securities were looked to; which is the case of this Defendant, when he advanced his money; and upon that ground a judgment creditor, taking in a prior mortgage, cannot tack. Brace v. The Duchess of Marlborough, 2 P. Will. 491. * * *

THE LORD CHANCELLOR [ELDON].[11] Upon the special circumstances of this case I shall postpone my judgment: but I should be very unwilling to leave some of the doctrine, that has been brought into controversy, with so much doubt upon it, as would be the consequence of deferring the judgment without taking some notice of it. The settled doctrine, notwithstanding the case of Fawell v. Heelis,

[11] Parts of the opinion are omitted.

Amb. 724, 1 Bro. C. C. (3d Ed.) 422, note, 2 Dick. 425, is, that, unless there are circumstances, such as we have been reasoning upon, where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt, indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons, claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case for the whole consideration; in the other for that part of the money, which was not paid. I take that to have been the settled doctrine at the time of the decision of Blackburn v. Gregson, 1 Bro. C. C. 420; which case so far shook the authority of Fawell v. Heelis as to relieve me from any apprehension, that Lord Bathurst's doctrine can be considered as affording the rule, to be applied as between the vendor and vendee themselves, and persons, claiming under them. * * *

This is an Equity, that in ordinary cases will affect a purchaser. Upon principle, without authority, I cannot doubt that. It goes upon this; that a person, having got the estate of another, shall not, as between them, keep it, and not pay the consideration; and there is no doubt, that a third person, having full knowledge, that the other got the estate without payment, cannot maintain, that though a Court of Equity will not permit him to keep it, he may give it to another person, without payment. It is not however necessary to discuss that upon general principles; as it has been repeatedly stated by authorities, that ought at this time to bind upon that point.

Another principle, as matter of general Law is involved in this case: what shall be sufficient to make a case, in which the lien can be said not to exist. It has always struck me, considering this subject, that it would have been better at once to have held, that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a Court, in what cases it would, and in what it would not, exist. * * *

This case remains to be considered upon its own circumstances, with reference to the points I have stated. The questions are, first, supposing the lien would have existed as to the gross sum, the debt of Manners, and the annuities, or their value, whether the circumstances of silence as to the debt, and the indemnity taken against the annuities, which is very important, amount in equity to evidence of a manifest intention to abandon the lien: if they do, another very considerable point is, whether, the lien having been abandoned, the Plaintiff can set himself up, as a mortgagee, claiming to redeem the Defendant. If the lien is to be considered as not abandoned, the question will be, not whether a purchaser with notice would be affected by the lien; which, as general doctrine, I admit; but whether under the circumstances, attending the contract with, and conveyance to, this Defendant, it shall prevail against

him. Upon the particular circumstances the case must stand for judgment.

Nov. 26th. THE LORD CHANCELLOR [ELDON], having stated the case very particularly, and observing, that the legal estate in the premises was, before the assignees of Martindale executed the agreement for a mortgage to Symmons, vested under a former conveyance by Mackreth in a trustee to secure annuities, granted by him, pronounced the following judgment:

This case, when it was argued, and since, has appeared to me to involve a question of very great importance; with regard to which I am not able to find any rule, which is satisfactory to my mind. If I had found, laid down in distinct and inflexible terms, that, where the vendor of an estate takes a security for the consideration, he has no lien, that would be satisfactory; as, when a rule, so plain, is once communicated, the vendor not taking an adequate security, loses the lien by his own fault. If, on the other hand, a rule has prevailed, as it seems to be, that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, the expressions used upon other occasions, of a purpose to rely, not any longer upon the estate, but upon the personal credit of the individual, it is obvious, that a vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he shews his purpose, cannot know the situation, in which he stands, without the judgment of a Court, how far that security does contain the evidence, manifest intention, or declaration plain, upon that point. That observation is justified by a review of the authorities; from which it is clear, that different Judges would have determined the same case differently; and, if some of the cases, that have been determined, had come before me, I should not have been satisfied, that the conclusion was right.

This Bill insists upon a lien, in respect of these annuities: to be paid all, that the Plaintiff himself has paid; and either as to the original value, or the present value, or the future payments. I state that claim in these different terms; as, to determine, what is the lien, it is necessary to point out the amount of it; and how it is to be calculated. Some doubt was thrown in the argument upon the question of lien between the vendor and vendee: but it was not carried far; and it is too late to raise a doubt upon it: but it is insisted, that the lien does not prevail against third persons, even with notice of the situation of the vendor and vendee. * * *

[THE LORD CHANCELLOR, after examining the earlier cases, continued:]

From all these authorities the inference is, first, that, generally speaking, there is such a lien; secondly, that in those general cases, in which there would be the lien, as between vendor and vendee, the vendor will have the lien against a third person; who had notice, that the money was not paid. Those two points seem to be clearly settled. I do not

hesitate to say, that, if I had found no authority, that the lien would attach upon a third person, having notice, I should have had no difficulty in deciding that upon principle; as I cannot perceive the difference between this species of lien and other Equities; by which third persons, having notice, are bound. In the case of a conveyance to B., the money being paid by A., B. is a trustee; and C. taking from him, and having notice of the payment by A., would also be a trustee; and many other instances may be put. The more modern authorities upon this subject have brought it to this inconvenient state; that the question is not a dry question upon the fact, whether a security was taken; but it depends upon the circumstances of each case, whether the Court is to infer, that the lien was intended to be reserved; or that credit was given, and exclusively given, to the person, from whom the other security was taken.

In this case, having, as other Judges have had, to determine this question of intention upon circumstances, I may mistake the fair result of the circumstances, which I have endeavoured to collect. I must say, I have felt from the first, that there is upon the part of the Plaintiff that natural Justice and Equity, which excite a wish, that I could enforce the lien throughout: but, first, as to the annuities, I am persuaded, that, with reference to that part of the case, involving the question of lien as to the consideration, or any part of it, or any sum of money, the quantum of which is to be estimated with reference to the present value, or the past, or future payments, this is a case, in which the Plaintiff intended to rely entirely upon the personal security: the bond for £20,000; and that was the conception of Martindale also; by whose default of payment therefore the estate is not now subject to the lien in respect of the consideration of the annuities, or any allowance in respect of it. See, how it stands. In 1790 the Plaintiff, as principal, and Martindale, as surety, being engaged in an obligation, which I understand to be a personal one, for these annuities, agree to change situations: Martindale to be the principal, and the Plaintiff to be surety; in consideration of which the Plaintiff agrees to give £9,000, secured by a mortgage. It rests upon that till 1793; when the transaction takes this course; that Martindale shall be, no longer a mortgagee, but owner of the reversion in fee; and, which is material, of the reversion, expectant upon the Plaintiff's life-estate. The annuities remain upon the old footing: that is, some payments were made, or arrears accrued, between 1792, and 1793; and payments were to arise from time to time. The value, given to Martindale in 1792 by the mortgage of £9,000 for taking the liability upon himself, was a value, which merely by the lapse of time between 1792 and 1793, must have varied. If the annuities had been paid, there must have been a difference in the estimation: also de Anno in Annum the value was decreasing; not only, as the annuities were wearing out; but also as the number of the annuitants was decreasing by death. It is impossible, it is not natural, to suppose, that parties, dealing for the consideration of annuities, and the purchase of

a reversion, which might not take effect in possession, until all the annuitants were dead, relied on that reversion, as security in addition to the indemnity by the bond for £20,000: in the original transaction the estate being pledged for the sum of £9,000, as if actually paid.

Then, as to the lien, for what is it? Is it for the original sum? That it cannot in justice be. Is it for future payments; that, one sum being paid, it does not attach: another sum not being paid, it does attach: a charge upon the reversion arising from time to time, accordingly as these payments are, or are not, made; and is that inference to be drawn, where a conveyance was executed without the least notice of such an intention; a security taken, not of itself sufficient to exclude the purpose of such a lien; but the nature of the subject, connected with the fact of that security taken, is decisive proof against such an intention: and it appears accordingly in the other cause, Symmons v. Rankin, that Mackreth and Martindale joined in the conveyance to Coutts, to secure an annuity of £2,000, without the least reference to such an intention. * * *

As to the other part of the case, I have considered long, whether the conclusion is just, that, not meaning to have a lien, as I think this party did not, with regard to the annuities, he should mean to have a lien as to the sum of money, due to Manners. My individual opinion is, that the intention was the same as to both: but with regard to the latter the cases authorize the lien; unless it is destroyed by particular circumstances; which do not exist here. That sum is precisely in the condition of a part of the consideration, not paid; and then the inference in equity, unless there are strong circumstances, getting over it, is, that a lien was intended. This comes very near the doctrine of Sir Thomas Clarke (1 Black. 150, Burgess v. Wheate); which is very sensible; that, where the conveyance, or the payment, has been made by surprise, there shall be a lien. This Plaintiff understood at the time of the conveyance, that this money was to be paid on his account to Manners; which is the same, as if it was to have been paid to himself; and was not paid; and then the only question is, whether, as from the special circumstances as to the value and nature of the annuities I am to infer, that a lien was not intended as to them, I must make the same inference with respect to this gross sum; as to which, if the annuities were not mixed with the transaction, the doctrine of equity is, that the lien would attach. As to that sum my judgment is, that the Plaintiff has a lien.

It is contended, that there are other circumstances in this case; that the Defendant Symmons has a conveyance of the estate without notice: or rather, a contract; as he had notice at the time of the conveyance. It is not necessary to go into the doctrine as to the effect of notice at the time of the contract, or at the time of payment of the money; though there is no doubt, the Defendant, when he took his conveyance, had notice from the recitals in his title-deed of Mackreth's rights and Martindale's obligations, as vendor and vendee. Neither is it necessary

to go into the consideration of another argument; that the Defendant's money was not originally lent upon the faith of the land. There is a great difference between the effect of a judgment, as attaching upon the land, and a special agreement by a creditor for a security upon the land. It is not however necessary to determine such questions; as neither the Plaintiff, nor the Defendant Symmons, has the legal estate; which appears in the other cause Symmons v. Rankin, to be in Coutts, under the conveyance of 1793; in which Martindale and Mackreth joined; and then between equities the rule "Qui prior est tempore potior est jure," applies.

The result of this case is, that the Bill must be dismissed as it regards the annuities; and is right as to the other part of the claim; and, being right in one point, and wrong in the other, the Decree must be without costs. * * *

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## MORE v. MAYHOW.

**(In Chancery before Lord Chancellor Clarendon, 1663. 1 Ch. Cas. 34, 22 E. R. 680.)**

The Plaintiff's Bill was to be relieved upon a Trust, and charged the Defendant with Notice of that Trust, and that he had gotten a Conveyance of the Lands upon which the Trust was had; and that at or before his taking the said Conveyance, he had Notice of the said Trust for the Plaintiff.

The Defendant, by way of Answer, denied that he had any Notice of the Trust at the Time of his Purchase or Contract, and pleaded that he was a Purchaser for a valuable Consideration. It was insisted the Plea was not good, because he did not say what the valuable Consideration was; for 5s. was a valuable Consideration; but yet no equitable Consideration.

The Court declared that the Plea in this Case was well enough.

It was further insisted, That the Plea was founded upon the Answer, viz. That the Defendant had no Notice, &c., And that the Point of Notice was not well answered, in that the Defendant denied Notice at the Time of the Purchase only, and the Word Purchase might be understood when the Contract for the Purchase was made; and it might be he had no Notice then, and might have Notice after, before, or at sealing of the Conveyance; And if there was any Notice before the Conveyance to him executed, that should charge the Defendant: And that it was so lately decreed in a Cause between Sir William Wheeler and ———, and Yarraway and Nicholas, by the Lord Chancellor. And so the Plea was over-ruled.

## HARDINGHAM v. NICHOLLS.

(In Chancery before Lord Hardwicke, 1745. 3 Atk. 304.)

A bill was brought to be let into the possession of an estate, the defendant pleaded a purchase for a valuable consideration, and that the money was paid, or is bona fide secured to be paid.

The fact is, that the consideration money was never paid, but only secured to be paid.

LORD CHANCELLOR. The defendant has not paid the money yet, and therefore, as he has notice now of the plaintiff's title, the money he has only secured to be paid, may never be paid, and consequently the plea must be over-ruled. Vide Fitzgerald v. Burk, 2 Atk. 397; Story v. Lord Windsor, 2 Atk. 630.[12]

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## HARRISON v. FORTH.

(In Chancery before Sir John Somers, Lord Keeper, 1695. Prec. Ch. 51, 24 E. R. 26.)

THE MASTER OF THE ROLLS was of opinion in this case, that if A. purchases an estate, with notice of an incumbrance, or that it is redeemable, and then sells it to B. who has no notice; who afterwards sells it to C. who has notice; that by this, the first notice to A. the first purchaser, is thereby revived, and that C. the last purchaser shall be liable to the incumbrance or redemption, as if it had never been in the hands of one who had no notice.

Afterwards, on appeal to my LORD KEEPER, it being urged, that in such case an innocent purchaser without notice may be forced to keep his estate, and cannot sell it, and shall be accountable for all the profits received ab initio, his Lordship held, that though A. and C. had notice, yet if B. had no notice, the plaintiff could not be relieved against the defendant C., and ordered C. to be examined on interrogatories, if he ever saw the conveyance from the plaintiff to her sisters, and then to be tried if the defendant C. paid any, and what consideration for the said lands; and if B. had notice at the time of his purchase that it was redeemable; for if he had not, the plaintiff could not be relieved, though A. and C. had notice.[13]

[12] See Wigg v. Wigg (1739) 1 Atkyns, 384, in which Lord Chancellor Hardwicke held: "As to the third question, of notice to the purchaser, it appears he had notice, for though he had no notice before he paid his money, yet he had notice before the execution of the conveyance, and it is all but one transaction."

In Fitzgerald v. Burk (1742) 2 Atkyns, 397, Lord Chancellor Hardwicke said: "The plaintiff claims as heir at law; the defendant's manner of swearing he had no notice is too restrained, for he does not swear at or before the execution that he had no notice, but cautiously at the time of the execution, or at the time he paid the consideration money he swears he had no notice. The plea was allowed."

[13] In Brandlyn v. Ord (1738) 1 Atkyns, 571, Lord Chancellor Hardwicke

## TRINIDAD ASPHALTE CO. v. CORYAT.

(Privy Council, [1896] App. Cas. 587.)

Appeal from an order of the Supreme Court of Trinidad and Tobago (March 12, 1895), affirming a decree of Nathan, J. (June 1, 1894).

The facts are stated in the judgment of their Lordships.

The judgment of their Lordships was delivered by

LORD HOBHOUSE.[14] The facts material for the decision of this case may be stated in a short compass. Nicola Dernier was grantee under the Crown of the land in dispute. One Alexis built a house on it, having acquired from Nicola a sufficient interest for that purpose. In the year 1881 Dulcinore Victor contracted with Alexis and Nicola for the purchase of the land, and she paid for it, and entered into possession, but without any conveyance. Nicola died in 1885. In 1888 Dulcinore agreed to sell the land to McCarthy for thirty dollars, and for that purpose executed a conveyance which was registered. Marie Dernier, a sister of Nicola, who had lived with him, joined in the conveyance, presumably with the object of passing the legal estate. She however was not Nicola's heir. McCarthy took possession, and his title has passed to the defendants, the Asphalte Company. During these transactions the land was of very small value; but the development of the Pitch Lake which it adjoins has increased its value an hundredfold or so. In the year 1892 the plaintiff obtained a conveyance from the heir of Nicola.

The plaintiff now sues for possession. The defendants claim to be equitable owners in fee, and demand that the plaintiff shall convey the legal estate to them, on the ground that he had notice of their title when he bought the legal estate. Nathan, J., at the trial and afterwards the Court of Appeal have decided in favour of the plaintiff. The defendants are now appealing against the decree of the Supreme Court.

The plaintiff's counsel at this Bar have disputed the acquisition of an equitable estate in the property by Dulcinore. It seems to have been hardly, if at all, discussed in the court below. At the trial Nathan, J., spoke of it as apparently true, and did not hint that the reality differed from the appearance. In appeal the learned judges, without

said: "That a man who purchases for a valuable consideration, with notice of a voluntary settlement from a person who bought without notice shall shelter himself under the first purchaser, yet it must be the very same interest in every respect."

In Kettlewell v. Watson (1882) 21 Ch. Div. 685, 707, the view of the court is expressed by Fry, J., as follows: "Lastly, it appears to me plain that a bona fide purchaser for value without notice may deal as he will with the estate which he has acquired, that he has a right to have the whole world as purchasers from him, and that he has a right, therefore, to convey, even to a person cognizant of the infirmity of his title, any legal or equitable interest which he has acquired, and that any person who has acquired any legal or equitable interest under such a purchaser is able to resist the claim of the plaintiffs."

[14] Part of the opinion is omitted.

intimating any doubt, simply state the fact, and conduct elaborate legal discussions on that basis. Mr. Crackanthorpe has argued that there was no evidence on which the court could found such a conclusion; but it appears to their Lordships that the evidence is quite sufficient for the purpose.

The case really made by the plaintiff below was that he is a purchaser for value without notice, and that his legal title overrides the equitable interest acquired by the defendants. The argument of his counsel at the trial, so far as reported in the judge's notes, and the judgments in his favour, all turn on the absence of notice to him.

The registered deed of conveyance to McCarthy is * * * on the face of it a very careless composition. The names are misstated. Marie is made to convey as "beneficial owner," though it is stated that she had sold to Dulcinore in the year 1881, and though it is Dulcinore and not Marie who is the contracting vendor and the recipient of the purchase-money. Another mistake is made which is not apparent from the deed itself, namely, that Dulcinore is represented as having purchased, not from Nicola as the fact was, but from Marie, who never had any interest.

On the ground of this mistake the learned judges below came to the very startling conclusion that the deed was a nullity; that because Dulcinore did not derive title from Marie therefore she conveyed nothing at all; and that McCarthy, though he contracted for the purchase, not of any particular interest in the land but of the very land, and not with Marie but with Dulcinore, received nothing at all. At best, they say, the deed took effect as between Dulcinore and McCarthy by way of estoppel. Then they proceed to discuss whether the plaintiff, finding the defendants in possession, was bound to inquire into the nature of their interest, and come to the conclusion that because a system of registration exists in Trinidad he was not so bound.

The plaintiff's counsel here have declined to attempt the hopeless task of supporting this construction of the deed. It is beyond dispute that it transferred to McCarthy whatever interest Dulcinore had. But then they argue, if their Lordships rightly understand them, that this transfer, though absolute in its terms, only operated between grantor and grantee, and that as between the grantee and all other persons, only so much interest passed as Dulcinore derived from Marie, which was nothing at all. This is extremely like a reversion to the repudiated theory of estoppel. Why the deed should be construed differently according to the person who comes to construe it has not been explained, nor can their Lordships comprehend.

The Registration Ordinance has been referred to; but its only bearing on the case is, first, that it gives legal priority to deeds according to the date of their registration instead of the date of their execution; and, secondly, that it provides a public office in which they may be seen. Here the defendants' deed was prior in every respect. Nothing turns on the system of registration. There is no question in the case beyond

the familiar one, whether the plaintiff had notice, express or other, of the defendants' equity before he bought the legal estate.

Their Lordships have not been able to understand how there can be room for doubt in answering that question. There was the deed, plain for everybody to see. Whatever was in that deed the plaintiff saw and knew. And the deed told him that in the year 1881 Dulcinore purchased the land, and took possession, and that she contracted to sell it to McCarthy, and actually conveyed it to him, and received the purchase-money. Knowing all this, the plaintiff yet asserts that he had no notice of the grantee's equity, because the deed contains an erroneous recital of the mode in which that equity became vested in the grantor.

The plaintiff seems to have imagined that he, a stranger to the deed, was entitled to treat the recitals as indisputable, and to insist that the grantee should not shew the truth of the case if it was contrary to the recitals. He has treated the matter as though some representation had been made to him on the faith of which he had acted. He did not abstain from inquiry. He inquired carefully enough to ascertain that Nicola and not Marie was the owner of the land, and that Marie was not Nicola's heir, and to trace out the heir. And then having got the legal estate he thought he might safely proceed to eject the possessors. But he never inquired in the right and obvious quarter. He must have disregarded the fact disclosed by the deed that Dulcinore purchased and took possession in 1881, when Nicola was living, as the plaintiff, who had searched out the heir, must have known. If he had made inquiry with reference to that fact and to the inference which it suggests, he would probably have avoided the error which led him to bring this suit.

Their Lordships make this remark with reference to the tone of complaint which is taken on the ground that the plaintiff has been deceived by the recitals in the deed; not as intimating that the case turns on the question whether the plaintiff ought or ought not to have made further inquiry. On that question they only think it right to say that they are not prepared to agree that the existence of a register relieves one who is dealing with a vendor out of possession from ascertaining the interest of one in possession when that possession is in accordance with a registered deed. But they do not rest their judgment on that ground. They rest it on the plain and obvious ground that the plaintiff had express notice that the defendants were transferees of Dulcinore's interest whatever it might be, and that an erroneous recital of her earlier title does not preclude her grantee from shewing what interest really passed by her grant.

The consequence is that the plaintiff's suit entirely fails; and as he has got the legal estate with notice of the defendants' title, he is bound to convey it to them. The proper course will be to discharge the decrees below; to dismiss the plaintiff's claim; to give the defendants judgment on their counter-claim, and to order the plaintiff to pay the whole costs of the suit in both courts.

Their Lordships will humbly advise her Majesty in accordance with this opinion.

The plaintiff must also pay the costs of this appeal.

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## JARED v. CLEMENTS.

(Court of Appeal. [1903] 1 Ch. 428.)

Appeal from the decision of Byrne, J. [1902] 2 Ch. 399.

The question was whether as between the plaintiff, an equitable mortgagee of leasehold property by memorandum of deposit, and the defendant, the purchaser of the property, both of whom had been defrauded by one Charles Parr, a solicitor, the legal estate and possession of the title-deeds by the defendant, the purchaser, gave him priority over the plaintiff, the equitable mortgagee and so enabled him, the defendant, to hold the property free from the mortgage. The existence of the equitable mortgage came accidentally to the knowledge of the defendant before completion of the purchase, but he accepted the assurance of Parr, who was the vendor's solicitor, that the mortgage had been paid off, that assurance being supported by the production by Parr of a document purporting to be a receipt for the mortgage money signed by the plaintiff, and which receipt Parr, on the completion of the purchase, handed to the defendant, together with the memorandum and the other title-deeds. The receipt, which was dated August 10, 1899, the date of completion, instead of stating in the usual form "This day received," stated "Received" only. The receipt turned out to be forged, and this led to the present action being brought by the equitable mortgagee against the purchaser to establish his priority. The facts are fully stated in detail in the report of the case below.

Byrne, J., at the trial of the action, held that, under the circumstances, the plaintiff, the equitable mortgagee, had priority. The defendant, the purchaser, appealed.

COLLINS, M. R.[15] In my opinion, this appeal fails. The question is between the owner of an equitable charge, who has not been paid off, and the purchaser of the property, who has got the legal estate. Here we have to deal with a case of actual notice to the purchaser's solicitor of the existing equitable charge. That notice he received prior to August 10, 1899, the date of the completion of the purchase. Having received that notice under circumstances which I need not go into, the purchaser's solicitor entered into a correspondence with the vendor's solicitor and required that this equitable charge of which he had had notice should be paid off. [His Lordship read the correspondence, and continued:]

Then came the date for completion, and there is produced and handed to the purchaser what purports to be the receipt by the person in whose

[15] Part of the opinion of Collins, M. R., is omitted.

favour the equitable charge had been given. Prima facie that appears to be a receipt dated the day of completion. It has been argued on behalf of the appellant, the purchaser, that, having regard to the form of the receipt, his solicitor, although he had had notice of the equitable charge, must be treated as having had notice, in effect, that it had been paid off, and was therefore justified in thinking it was a dead charge, and that unless he was unreasonably negligent in the way he conducted the business the legal title of the purchaser must prevail. That argument seems to me to involve a misconception of the true rights of the parties. This is not a case of constructive notice raising the question whether all reasonable diligence was exercised to find out what might have been, but was not in fact, discovered. It is true that the learned judge has held that all due diligence was used by the purchaser's solicitor, and that there was no fault on his part; but, on the other hand, there is one broad fact underlying this case—that there was, in the course of this transaction, actual notice of an existing equitable charge upon the property. After that, it seems to me that if the purchaser chooses to complete without ascertaining for himself whether the charge has been paid off, he does so at his own risk. Having found out that the charge exists, he cannot set up the legal estate as an answer unless he gets rid of the incumbrance which he knows to exist. The result is that he takes the estate with the entire obligation existing under the equitable charge. It is not necessary in this case to consider whether reasonable diligence was in fact exercised by the purchaser's solicitor, but, speaking for myself alone, I should hesitate to say, under the peculiar circumstances of this case, that the solicitor had taken all reasonable care to see whether this equitable charge had been satisfied. We start with the fact that, until the discovery by the purchaser's solicitor in searching the proceedings in the bankruptcy of the mortgagor, no disclosure of this equitable charge was made by the person whose duty it was to have disclosed it. He, on being taxed with the existence of the charge, at once admitted it, although the purchaser and his solicitor had been allowed to remain in ignorance of it; and yet that was the person upon whose assurance the purchaser's solicitor subsequently, on the completion of the purchase, was content to rely. That point, however, does not arise in this case.

The result is that the actual notice which, it turns out, was not a notice of a dead charge, makes the risk fall upon the purchaser, and therefore the appeal fails. * * *

ROMER, L. J. I am of the same opinion. This is not one of those cases which so frequently come before the court, in which the question is whether a legal mortgagee is or is not entitled to set up his legal mortgage as against an equitable mortgage on the ground of some fraud or negligence on the part of the legal mortgagee. Rightly understood, the question here is simply one of title and conveyance. The facts, put shortly, are these. A person contracts to purchase certain property.

Before completion he is told of an equitable mortgage created some time before by his vendor. What is the position of the completing purchaser when he knows of this? He knows he can not get a title from the vendor unless that outstanding equitable interest is got in or destroyed; and if he completes without that equitable interest being got in or destroyed, he can only take the property subject to that outstanding equitable interest. In order to get a good title, it is for him to see that the outstanding interest is got in or destroyed, unless indeed the owner of the interest has been guilty of some conduct which renders it inequitable or improper on his part to set up his outstanding interest against the purchaser. But that is not the case here. The owner of the equitable charge has done nothing of that sort. The purchaser might have asked that the equitable mortgagee should join in the conveyance. He might have gone himself to the equitable mortgagee and asked how matters stood; or he might have done what in fact he did, and asked the vendor to get in the equitable interest. If he chooses to leave it to his vendor to get in the equitable interest or see that it is destroyed—however reasonable that course may seem to be—and the vendor does not do it, all I can say is that, under the circumstances, the purchaser, having left it to the vendor to do that which the vendor has not done, must suffer for it. He knew of the existence of the equitable interest and has not got it in, and therefore he takes the property subject to that interest, unless he can prove that he has got it in, or that the owner of the interest has lost his right. In my opinion, therefore, the learned judge was right, and the appeal must be dismissed.

COZENS-HARDY, L. J. I am of the same opinion. The case seems to me, on the facts, to be a plain one. I do not base my judgment in the least upon any negligence on the part of the purchaser's solicitor or upon any fraud. This is one of those cases in which one of two innocent parties has to suffer for the fraud of a third person. When the facts are known, the case raises a simple question of conveyancing. There was clear notice to the purchaser of an equitable charge, and there was at that time no ground for presuming that the charge had ceased to exist; on the contrary, on completion two documents were handed over to the purchaser, one of them being the receipt dated August 10, 1899, the date of completion, and purporting to be signed by Jared, the equitable mortgagee, and the other being the memorandum of deposit that had been signed by Taylor, the vendor. It seems to me to be plain that it was the duty of the purchaser to get in or procure the discharge of the outstanding interest. The transaction does not, in its essence, differ in the least from that which the learned judge states, by way of illustration, in his judgment. [1902] 2 Ch. 403. If the equitable mortgage to Jared had been recited in the conveyance, and Jared had been made a party, and Parr had, at completion, brought to the purchaser the deed actually signed by Taylor and also purporting to be signed by Jared, but not in fact signed by him, and the purchaser

had accepted the deed on the assurance of Parr that Jared's signature was genuine, the position of the purchaser would have been clear. The present case in no way differs from that in principle. A purchaser who knows of an outstanding equitable interest which has to be got in to perfect his title, and on completion neglects to get in that interest, takes his conveyance at his own risk.

# CHAPTER III

# REFORMATION. RE-EXECUTION, RESCISSION, AND CANCELLATION

## SECTION 1.—REFORMATION AND RE-EXECUTION

### Basis and Grounds of Equity Jurisdiction

#### *A) Mutual Mistake of Fact, Fraud and Mistake*

### POLLARD v. GREENVIL.

**(In Chancery before Lord Clarendon, 1663. Cas. Ch. 10.)**

The plaintiff lent the Lady Greenvil £100 and one Culliford, as her chief agent and friend, became bound for the same; and the Lady having power to make a lease in possession for one and twenty years of her estate, makes a lease to Culliford for one and twenty years, to secure him from the debt aforesaid, and several other debts he was engaged for the said Lady; but the lease was made to commence from a time to come, which was void in law, in respect her power was but as aforesaid; and Culliford had the possession for some time, but was afterwards ousted by force by the Lady's husband; but her husband not long afterwards dying, she enjoyed it for the remainder of the term; and Culliford being dead, and leaving no assets, the plaintiff therefore preferred his bill here for the debt aforesaid. But for that it appeared to the court that the money was employed for his use who created the trust for payment of debts, and she having received the profits for thirteen years, and for that the lease was not good in strictness of law, yet the court was satisfied that the same did amount to a good declaration of her power in equity to make the lease for one and twenty years in being, and that the receipts of profits was also under that power, and subject to the trust: And although the defendant did set forth by answer that Culliford at the time of his death was indebted to her, yet the defendant was decreed to pay the debt.

## LADY CLIFFORD v. EARL OF BURLINGTON et al.

(In Chancery, 1700. 2 Vern. 379, 23 E. R. 841.)

The Lord Clifford by marriage-settlement, was made tenant for life, of several manors and lands in Ireland, with power to make a jointure not exceeding £1000 per ann. Upon his marriage with the Lord Berkeley's daughter, he covenanted to settle a jointure on her of £1000 per ann., and pursuant thereunto a settlement was made, and a particular of lands mentioned, and set out for the jointure, and which in the particular given him, were computed at £1000 per ann., but in truth fell short, and were not above £600 per ann., the bill was to have the jointure made up £1000 per ann.

It was insisted for the defendant, that he claimed under the marriage-settlement as a purchaser, and the late Lord Clifford had only a power to have charged the estate with £1000 per ann., if he had not done it at all, and had died without executing of his power, a court of equity could not have done it for him, and have raised a jointure of £1000 per ann. upon the estate, though it had been reasonable and just for him to have done it in his life-time. So if he had executed his power but in part, that cannot be extended or carried further in equity. If tenant in tail covenants to make a jointure, although he might have done it by a fine or common recovery, a court of equity cannot relieve, or decree a jointure.

But the court in this case decreed the jointure to be made up £1000 per ann. against the issue in tail, who was not privy to the marriage-treaty, nor guilty of any fraud.

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## MURPHY v. ROONEY.

(Supreme Court of California, 1872. 45 Cal. R. 78.)

By the Court.[1] * * * The Court, having found the fact that by mistake of the draftsman some of the terms of the agreement had been omitted in drawing it up, should have entered a decree reforming the instrument in those particulars, and specifically enforcing it as reformed.

Judgment reversed, and cause remanded for further proceeding, not inconsistent with this opinion.

[1] The statement of facts and part of the opinion are omitted.

## TYLER v. BEVERSHAM.

(In Chancery before Sir Heneage Finch, 1673. Rep. Temp. Finch, 80, 23 E. R. 42.)

This Bill was to be relieved against a Verdict and Judgment in Ejectment for a Messuage and Lands called Jenner's Farm, held of the Manor of Holbrook, for which Manor the Defendant agreed to give £4000, and for which Purpose Articles were sealed and a Particular delivered by the Plaintiff of every Parcel of the Lands, with the Abuttals and Boundaries, and afterwards a Conveyance was executed thereof, and £4000 was paid and the said Manors and Lands were quietly enjoyed by the Defendant, and Jenner's Farm by the Plaintiff.

But the Defendant, complaining by a former Bill in this Court, that the now Plaintiff had infranchised some Part of the Copyholds held of the same Manor, of which he was seised before the now Defendant had purchased the Manor, and the now Plaintiff, by his Answer to that Bill, said, that he, in the Rental given by him to the now Defendant, had made himself Tenant for 4s. 8d. Quit-Rent, and that he bought Jenner's Farm two Years before he bought the Manor, and did infranchise the same, but he was ignorant thereof until he was informed by the Defendant, and therefore offered to become Tenant to him at the same Rent, or in the same Quality, or to make him any other Satisfaction for the same, in which Cause the now Defendant did not think fit to proceed.

But taking advantage of the general Words in the Conveyance made to him of the said Manor, viz. with all its Rights, Members, and Appurtenances, would thereupon include Jenner's Farm, or at least so much thereof as was Copyhold and held of the said Manor, tho' the same was never agreed or intended to be sold and conveyed with the said Manor, nor mentioned in the Particular, and yet the Plaintiff hath offered to make any reasonable Satisfaction for the said Infranchisement, with Costs and Charges at Law in obtaining that Verdict in Ejectment; but the Defendant pretends, that he was circumvented, and that the Particulars of his Purchase were not true, but the Plaintiff, by his Counsel insisted, that tho' there might be a Mistake, and the Defendant not well used in this Purchase by relying on the Particular given in by the Plaintiff, and by trusting too much to him; yet it appeared by the Confession of the Defendant himself, and by the Particular, and by the Deed of Purchase itself, that there was no Contract made for Jenner's Farm, neither was it valued, or intended to be sold, or mentioned in the said Particular or Purchase-Deed, and it being fully proved, that the Plaintiff enjoyed the said Farm (being £24 per Annum) above 6 Years after the said Purchase of the Manor.

THE COURT was of Opinion, that the said Farm could not, in Reason or Justice, be accounted Part of the Manor, and thereof declared, that the Plaintiff was intitled to Relief; and decreed, that he should en-

joy Jenner's Farm, with the Appurtenances and that the Defendant regrant the same to the Plaintiff in such Manner, as such Part of it which is Freehold, may be held by the Plaintiff and his Heirs, and such Part of it, which is Copyhold, may likewise be held by him and his Heirs, but subject to such Rents, Duties, and Services, as before the Plaintiff purchased the said Manor, and that the Plaintiff shall pay to the Defendant all Arrears of Rent for the said Farm, since the Purchase of the Manor by the Defendant, and a perpetual Injunction to stay the Defendant's Proceedings at Law, &c.[2]

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## PAGET v. MARSHALL.

(Chancery Division, 1884. 28 Ch. Div. 255.)

After negotiation, and shortly before the date of the next-mentioned letter, an agreement was made between Richard William Paget, acting as agent for the Plaintiff, Caroline Matilda Paget, and the Defendant, Wesley Marshall, that the Plaintiff should make, and the Defendant should accept, a lease for twenty-one years from the 25th of December, 1883, at the yearly rent of £500, of certain portions of three warehouses, known as 48, 49 and 50, Aldersgate Street, in the city of London, namely, as the Plaintiff alleged, the second, third and fourth floors of No. 48, and the first, second, third and fourth floors of Nos. 49 and 50.

On the 13th of November, 1883, the following letter was addressed by R. G. Paget & Son, a firm of marquee and tent manufacturers, of which the Plaintiff and her sons, R. W. Paget and John Paget, were members, to the Defendant, Marshall:

"We will let you on lease for seven, fourteen, or twenty-one years, the upper part of Nos. 48, 49 and 50. Aldersgate Street, consisting of first, second, third, and fourth floors (reserving for our own use one of the closets on the second floor landing; also the right of passage to roof) for the sum of £500 per annum and taxes. We await your acceptance of the above terms."

On the following day, the 14th of November, 1883, the Defendant wrote in answer to R. G. Paget & Son, as follows:

"In reply to your memorandum of Nov. 13th, re premises Nos. 48, 49, and 50, Aldersgate Street, I accept your offer contained therein."

The Plaintiff alleged that "by inadvertence and contrary to the intention of the Plaintiff and her agent, and contrary to the true intent of the agreement," the first floor of No. 48, Aldersgate Street was included in the letter of the 13th, and that the Defendant knew that the same

[2] In Beauchamp v. Winn (1873) L. R. 6 E. & I. App. 223, at 233, Lord Chelmsford said: "The cases in which equity interferes to set aside contracts are those in which either there has been mutual mistake or ignorance in both parties affecting the essence of the contracts, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party."

had been included by inadvertence when he wrote the answer of the 14th.

By a lease dated the 21st of December, 1883, and made between the Plaintiff of the one part and the Defendant of the other part, the Plaintiff demised to the Defendant, "all those the first, second, third, and fourth floors of and in the messuages or warehouses and premises situate on the east side of Aldersgate Street, in the City of London * * * and known as Nos. 48, 49, and 50, Aldersgate Street aforesaid," for twenty-one years from the 25th of December, 1883, "except and reserved out of the said demise the lavatory between the first and second floors of the said premises and the sole right of passage to the roof" (which said lavatory and right of passage it was thereby declared were for the exclusive use of the Plaintiff) at the yearly rent of £500. * * *

The claim was for a declaration that the lease ought not to have comprised more than the second, third, and fourth floors of No. 48, and the first, second, third, and fourth floors of Nos. 49 and 50, Aldersgate Street, and that the Defendant might be ordered to elect between the annulment of the indenture and its ratification in accordance with the declaration; and that if he should refuse to consent to rectification, that the lease might be ordered to be cancelled. * * *

BACON, V. C.[3] In all these cases on the law of mistake it is very difficult to apply a principle, because you have to rely upon the statements of parties interested, and upon not very accurate recollections of what took place between them. But the law I take to be as stated this morning by Mr. Hemming. If it is a case of common mistake—a common mistake as to one stipulation out of many provisions contained in a settlement or any other deed, that upon proper evidence may be rectified—the Court has the power to rectify, and that power is very often exercised. The other class of cases is one of what is called unilateral mistake, and there, if the Court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into. That I take to be the clear conclusion to be drawn from the authorities. The old law is very much as was stated in that very excellent treatise by Mr. Kerr, as to which anybody who has read it must be well satisfied with the diligence and industry, the intelligence and sagacity with which he has acquitted himself of his task, but which of course one cannot suppose is an authority upon which I can rely, although I listen to it with interest and respect.

The case before me is in a very narrow compass. The Plaintiff had taken the lease of a site from the Goldsmiths' Company upon a contract to build upon it a very valuable and commodious structure. He did so,

[3] The statement of facts is abridged and parts of the opinion are omitted.

and his plans are in evidence; it is quite clear what his intention was. He built two separate ground-floor tenements, Nos. 49 and 50, to be let to two separate tenants. He kept a third, No. 48, including ground and first floors, intending to occupy it himself, and the fourth part, that coloured blue on the model, he had to let when the negotiation commenced with the Defendant. So that the subject in dispute is beyond all question. The two shops, Nos. 49 and 50, were separate and distinct things—as separate as if they had been in some other street—and the third, No. 48, was equally separate and distinct—built by the Plaintiff for his own occupation, and for carrying on his own business, and constructed so that those objects might be conveniently performed by him. * * *

Under these circumstances, the facts being as I have stated, am I, because the lease has been executed under seal, demising to the Defendant that which the Plaintiff never meant to let him have, that which the Defendant says he knew at one time the Plaintiff intended to keep for himself, that which he has never claimed at any period prior to the letter—am I to say that the agreement is to be held to be irrevocable? It would be against every principle that regulates the law relating to mistakes, and it would be directly at variance with the proved facts in this case. On the evidence, it looks very like a common mistake. The Defendant, it is true, says in his defence, that he took it on the faith that the first floor of No. 48 was intentionally included in the letter of the 13th of November, 1883. Certainly he never said so until it is said in the defence, which I am looking at now; but he has not said so in his evidence. He has never said that he intended to take that. * * *

But without being certain, as I cannot be certain on the facts before me, whether the mistake was what is called a common mistake—that is, such a common mistake as would induce the Court to strike out of a marriage settlement a provision or limitation—that there was to some extent a common mistake I must in charity and justice to the Defendant believe, because I cannot impute to him the intention of taking advantage of any incorrect expression in this letter. He may have persuaded himself that the letter was right; but if there was not a common mistake it is plain and palpable that the Plaintiff was mistaken, and that he had no intention of letting his own shop, which he had built and carefully constructed for his own purposes.

Upon that ground, therefore, I must say that the contract ought to be annulled. I think it would be right and just and perfectly consistent with other decisions that the Defendant should have an opportunity of choosing whether he will submit, as the Plaintiff asks that he should submit, to have the lease rectified by excluding from it the first floor of No. 48, whether he will choose to take his lease with that rectification, or whether he will choose to throw up the thing entirely, because the object of the Court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not hap-

pened. Therefore I give the Defendant an opportunity of saying whether he will or will not submit to rectification. If he does not, then I shall declare that the agreement is annulled. Then we shall have to settle the terms on which it should be annulled. * * *

Then the decree will be, the Defendant electing to have rectification instead of cancellation of the lease, let the lease be rectified by omitting from it all mention of the first floor of No. 48. Then as to the costs of the action, the Plaintiff is not entitled to costs, because he has made a mistake, and the Defendant ought not to have any costs, because his opposition to the Plaintiff's demand has been unreasonable, unjust, and unlawful.

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## WARATAH OIL CO. v. REWARD OIL CO.

**(District Court of Appeal of California, First District, 1914. 23 Cal. App. 638, 139 Pac. 91.)**

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Waratah Oil Company against the Reward Oil Company, with cross-complaint by defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

KERRIGAN, J.[4] This is an appeal from a judgment in favor of the plaintiff for the sum of $43,200, reforming the contract upon which the recovery was had as prayed for by the plaintiff, and denying the defendant the relief asked in its cross-complaint, and comes here upon a bill of exceptions.

The action is based upon a contract that was made by the parties in November, 1909, for the purchase and sale of certain land in Coalinga, Fresno county, supposed to contain oil. It was agreed that the defendant would purchase the land from the plaintiff for $1,800 per acre; one-quarter of the purchase price was to be paid down, and the other three-quarters were, by the terms of the contract, to be paid, respectively, 6, 10, and 14 months from the date thereof. Defendant paid the first and second installments, but refused to pay the third and fourth, amounting to $43,200. Demand was made for the payment of these installments, and a deed to the property was duly tendered the defendant, but defendant declined to accept the deed or to pay the amount demanded. The contract was not dated, although the provisions relating to the deferred payments therein provided for assume that it was. * * *

Defendant, in addition to answering, filed a cross-complaint, by which it sought the return of the money paid by it, upon the ground that there was a total lack of consideration for the making of the contract upon its part, and also that the plaintiff had never been bound by the contract for the reason that its officers who signed it on behalf of the company were not authorized so to do. * * *

[4] Parts of the opinion are omitted.

Through an oversight the parties neglected to date the contract; and the defendant contends that the court committed error in permitting the contract to be reformed on the showing made, by inserting the date on which it was executed. The contract was made and entered into on the 13th day of November, but defendant, if we follow his argument, asserts that the parties merely neglected to agree upon a date, and that it is only when parties have actually agreed in their oral negotiations upon the date when a contract shall take effect, or upon other essential features thereof which have been omitted from the written contract, that it will be reformed; that to reform a contract when the parties have failed to address their minds to the omitted provision would be in effect to make a contract for the parties, which of course is outside of the province of courts.

The evidence abundantly shows—and the court goes no further than to find—that the contract was in fact made on the 13th day of November, 1909, and intended to bear that date. It is clear that the failure to insert the date in the contract was a mutual mistake, the result of inadvertence and "unconscious forgetfulness" (Civ. Code, § 1577), under which circumstances the trial court was not only warranted, but compelled, to decree reformation. House v. McMullen, 9 Cal. App. 664, 100 Pac. 344; Los Angeles v. New Liverpool, 150 Cal. 21, 27, 87 Pac. 1029; Owsley v. Matson, 156 Cal. 401, 104 Pac. 983; 24 Am. & Eng. Ency. of Law, 648. * * *

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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## DANIELSON et al. v. NEAL.

**(Supreme Court of California, 1913. 164 Cal. 748, 130 Pac. 716.)**

HENSHAW, J.[5] Plaintiffs seek by their action the correction of two deeds made to them by defendant, the one for three acres of land, the other for one acre of land. The facts touching the first deed sufficiently indicate the character of the mutual mistake which it is alleged existed in the making of both deeds. Those facts are that plaintiff Hattie C. Danielson bought of defendant three acres of land. * * * By mutual mistake, ignorance, and oversight, the courses and distances actually given in the deed fell short of containing three acres; the allegation in this respect being the following:

**"That the mistake in the amount of acreage as aforesaid, arose from the fact that the distances given in the deed and the length of the boundary lines would, if run at right angles, include the three (3) acres, but the lines and courses were not run at right angles to each other, and not being so run at right angles to each other, decreased the amount of acreage. * * *"**

In support of the judgment respondent contends that this action for reformation will not lie without a demand previously made, which de-

[5] Parts of the opinion are omitted.

mand is not here alleged. There is authority supporting this view, but such is not the rule of decision in this state, nor is it the rule of general adoption. * * *

There was omitted from the deeds about one twenty-seventh of an acre. The value of the omitted land, upon the basis of the purchase price, respondent points out is $83; but we cannot agree with respondent that, because these are the facts, equity will treat the omitted land as a minute discrepancy of no material importance. The price or value of omitted lands is, of course, an element in determining whether or not equity will take cognizance of a suit to recover the omitted portion. Backus v. Jeffrey, 47 Mich. 127, 10 N. W. 138. But in a suit for land, it is by no means the all-controlling and determinative consideration. The omitted land may be of great importance to the value of plaintiff's remaining land. It may have a peculiar value, pretium affectionis, in plaintiff's eyes. Many other considerations may enter into the matter, making it of importance to plaintiffs to recover that which is rightfully theirs. * * *

It is therefore ordered that the judgment is reversed, and the cause remanded; defendant to be permitted to answer to the merits.

We concur: MELVIN, J.; LORIGAN, J.

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## COURTRIGHT v. COURTRIGHT et al.

(Supreme Court of Iowa, 1884. 63 Iowa, 356, 19 N. W. 255.)

Appeal from Lee district court.

This is an action in equity by which it is sought to correct a conveyance of certain real estate, which, it is alleged, did not express the real contract of the parties thereto, by reason of fraud or mistake in reducing the contract to writing. There was a trial by the court and a decree for the plaintiff. Defendants appeal.

ROTHROCK, C. J. The plaintiff is the widow of Edward Courtright, deceased. Before her marriage she was the absolute owner of certain land in Lee county. Margaret J. Barnes, the wife of Morgan Barnes, was the absolute owner of certain other lands. It was agreed between Margaret Barnes and Emily Courtright, the plaintiff, that they would exchange the lands so held by them. The land owned by one was the consideration to be given for the land owned by the other, and there was no money to be paid by either. They procured the services of a justice of the peace to draw the conveyances, and they were prepared and executed by them and their husbands, and acknowledged and recorded. The names of each of their husbands were inserted in the respective deeds as grantees, so that each husband appeared to be the owner of an undivided half of the land conveyed. Some years afterwards, Mrs. Barnes and her husband discovered that, by the record, he was a tenant in common with his wife, and he conveyed his interest

back to her. Edward Courtright died in 1877, and this action was brought by his widow against his children and heirs, to reform the deed by striking out the name of Edward Courtright as the grantee, upon the ground that it was inserted by mistake or by fraud. This constitutes the only controverted question in the case.

We think the evidence very satisfactorily shows that the contract for the exchange of lands was made by Mrs. Courtright and Mrs. Barnes. Morgan Barnes testified that the "women did all the trading;" and both Barnes and his wife testify that they intended to convey the whole title to Mrs. Courtright, and that they had no intention to convey to Mr. Courtright; and although the testimony of the justice of the peace, and of Barnes and his wife, is not very clear in some particulars, yet we think the fact that there was no intention on the part of the grantors, or on the part of the plaintiff, to convey any interest in the land to plaintiff's husband, is so clearly proven as to require a reformation of the conveyance. The case is like Nowlin v. Pyne, 47 Iowa, 293. The parties made a contract, employed a scrivener, and the scrivener by mistake failed to express the contract in apt words and terms. It appears that he used the words he intended to use, and he thought he should name the wife first as a grantee, to show that she owned the land. In such cases equity will reform the writing, making it conform to the agreement previously entered into between the parties. Nowlin v. Pyne, supra; Stafford v. Fetters, 55 Iowa, 484; S. C. 8 N. W. 322; Reed v. Root, 59 Iowa, 359; S. C. 13 N. W. 323.

We need not set out or discuss the evidence in detail. It is enough to say that, regard being had to the well-established rule that the proof necessary to reform a written instrument must be clear, satisfactory, and conclusive, we think the decree of the district court is correct. Affirmed.

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## ALBRO v. GOWLAND.

(Supreme Court of New York, Appellate Division, Fourth Department, 1904. 98 App. Div. 474, 90 N. Y. Supp. 796.)

Appeal from Special Term, Cayuga County.

Suit by Ellen Amelia Albro against Elizabeth Gowland for the reformation of a contract for the sale of real estate, and to compel specific performance thereof. From a judgment in favor of plaintiff, defendant appeals.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, HISCOCK, and STOVER, JJ.

HISCOCK, J. This action was brought to procure reformation of a contract for the sale of a lot in the city of Auburn from plaintiff to defendant, and to compel performance by said defendant of the contract when so reformed. The differences between the parties have been precipitated by an alleged shortage in the depth of the lot contracted to be

sold, of about 23 feet. Plaintiff, through a real estate agent, having effected a sale of her lot to the defendant, executed a written contract of sale, whereby, amongst other things, in consideration of a purchase price of $10,500, she agreed, "by a good warranty deed with search showing clear and unincumbered title," to convey "all that piece or parcel of land situated on the east side of William Street, in the City of Auburn, N. Y., known as No. 18 William Street, and being a lot about four rods front by two hundred feet in depth." When execution of said contract was attempted, a deed was offered conveying the land with a depth of 176 feet and a fraction of a foot, which defendant refused to accept; making proper and sufficient objections that the deed did not comply with the contract.

The learned trial justice, as we understand it, in general rather than specific language, directed that the contract should be reformed so as to comply with the deed, and directed judgment compelling defendant to carry out her purchase. We think that such decision involved findings of fact which were against the weight of evidence, and that the judgment should be reversed.

We do not think it is necessary, under the circumstances of this case, to spend time in discussing the proposition that a shortage of 23 feet and over upon a city lot like the one in question was a substantial defect, and would excuse performance of a contract by a proposed purchaser. If, under the language used in the contract, describing the lot as being "about four rods front by two hundred feet in depth," we should hold that the word "about" qualified the dimension of 200 feet as well as that of the 4 rods, we should still find no difficulty, upon well-established principles of law, in holding that such qualification would not excuse such a deficiency as is alleged here. The plaintiff doubtless appreciated the force of the rules applicable to a conveyance of this kind, in seeking to have her contract reformed so as to state the lesser rather than the greater depth of lot, and her success upon this appeal must be measured by her right to have such reformation made.

Plaintiff introduced what we may characterize as three lines of evidence for the purpose of sustaining her demand for relief in the respect mentioned, and the pertinency of which, as bearing upon the contract of sale, will be apparent:

In the first place, evidence was given tending to show that, before the contract was executed, defendant went upon and viewed the lot in question, from which it is argued that she knew or ought to have known the depth of the lot, and that the dimensions stated in the contract were not correct, but a mistake. When we read the description of the back of the lot, and of the trees and shrubbery thereon, and of the various buildings surrounding it, and also the evidence of the surveyor, in which he attempts to describe the boundaries of the lot, we are not inclined to the opinion that defendant ever knew, or theoretically was to be charged with having known, the approximate depth of the lot.

Evidence was given by the real estate agent who represented plaintiff, by his assistant, and by the plaintiff and her husband, tending to show that, before the contract was executed, plaintiff was informed, in substance, that the lot was not 200 feet, but about 10 rods, in depth. Opposed to this evidence, however, is the fact that concededly the real estate agent who was active in this transaction carried upon his regular register this lot with a description of 200 feet as its depth, and that this entry was shown or read to plaintiff before the contract was executed; also that, when the parties came to embody their language in the solemn form of a contract, the agent who prepared it, by and with the consent of the plaintiff, inserted therein the greater depth of 200 feet. We do not lose sight of the fact that an attempted explanation is given of this, to which we shall refer later.

Opposed to this evidence, all of which is by interested witnesses, is that of the defendant and her husband and an apparently disinterested witness, in various forms contradicting the proposition that defendant knew or was informed that the lot was less than 200 feet in depth; but this testimony is to the effect, upon the contrary, that she was told repeatedly in various ways and at various times that the lot did have the depth stated in the contract.

This is the issue, briefly stated, raised by the testimony of opposing witnesses, and we pass now to a farther consideration of some of the evidence given in behalf of plaintiff by her own witnesses:

As already stated, the agent who effected the sale of the property prepared the contract for it. There were present at the time, amongst others, the plaintiff and the defendant. The agent states that, as he progressed with the preparation of the contract, each provision was fully discussed and considered; that, when it came to a description of the lot, it was stated and agreed that the lot was not 200 feet in depth, and that the description in this respect was erroneous, and that the proper description would be made when the deed was executed. At this time the plaintiff and her agent either did or did not know that the lot was not 200 feet in depth, but only about 10 rods. If they did not know that it was only about 10 rods in depth, then, of course, their evidence that they had from time to time informed defendant of this smaller depth, and thereby contradicted the entry in the agent's register showing a depth of 200 feet, of which she knew, was false. If, upon the other hand, the agent knew, as he testifies in one or more places when seeking to charge the defendant with like knowledge, that the lot was only about 10 rods in depth, then voluntarily he and the plaintiff have made a contract with full knowledge, and under no circumstances, as disclosed by the evidence upon this appeal, at least, of either mistake or fraud. We do not lose sight of the fact that the agent attempts to sustain the proposition that there was some uncertainty about what the exact depth was, and that for this reason the description in question was used in the contract. The only question, however, which appears ever to have been mooted, was whether the depth was 200

feet, or 10 rods and a fraction; and the agent insists that he clearly and distinctly informed the defendant during the negotiations, and while they were upon the lot, that the depth was only 10 rods.

In order to secure the reformation of the contract in question, it was necessary for the plaintiff to establish that there had been a mutual mistake, for it was not suggested that any fraud had been perpetrated by the defendant upon the plaintiff. In order to secure such a judgment, it was incumbent upon her to establish her right thereto by evidence which was "clear, strong, and satisfactory." A party "must show that the material stipulation which he claims should be omitted or inserted in the instrument was omitted or inserted contrary to the intention of both parties, and under a mutual mistake." Nevius v. Dunlap, 33 N. Y. 676, 680.

In Curtis v. Albee, 167 N. Y. 360, 60 N. E. 660, it is stated:

"Equity will not make a new agreement for the parties, nor, under color of reforming one made by them, add a provision which they never agreed upon, and did not want when the contract was written, although it may afterward appear very expedient or proper that it should have been incorporated. When the writing expresses the actual agreement, it cannot be reformed, and a stipulation not assented to can never be added."

Plaintiff's success is dependent upon her establishing the proposition that the description of 200 feet was a mutual mistake, and that by the contract understood and agreed to by each party the lesser depth should have been inserted. As suggested, it seems to us that the evidence in behalf of plaintiff herself establishes either that the defendant did not understand what is now claimed to be the true dimension, or else that plaintiff knew that the description used was erroneous, but still inserted it in the contract with some sort of an understanding upon her part that the contract should not amount to anything or be binding. Neither upon this theory, nor upon the very conflicting evidence in the case viewed as a whole, does she seem to us to have established her right to the judgment which she procured.

Other questions have been presented upon this appeal, which, in view of the foregoing conclusions, we do not deem it necessary to consider or pass upon. The judgment should be reversed, and a new trial granted.

Judgment reversed, and new trial granted, with costs to appellant to abide event, upon the law and the facts.

McLENNAN, P. J., and SPRING and STOVER, JJ., concur. WILLIAMS, J., dissents.[6]

[6] The dissenting opinion of Williams, J., is omitted.

## WISE et al. v. BROOKS et al. ✓

(Supreme Court of Mississippi, 1892. 69 Miss. 891, 13 South. 836.)

* * * This bill is filed by Wise Bros., who allege that in all the conveyances above mentioned, including the sheriff's deed, and in the partition proceedings, where the excepted tract of land is described as "one hundred acres north of Piney," the intention of the parties was to convey and describe the same tract originally conveyed by John Everett to Rowe, trustee; in other words, that the land excepted from the conveyances, instead of being one hundred acres lying north of Piney creek, was intended to be only so much thereof as was included in the metes and bounds of the deed to Rowe, which embraced, as stated, only about seventy acres. Geo. W. and James E. Everett, and heirs of John Everett, and of Mrs. Rowe, and also Mrs. Bedwell and Henry E. Miller are made parties defendant to the bill, which prays for a reformation of all the foregoing deeds, including the sheriff's deed, and the partition proceedings, so as to carry out the alleged true intention.[7] * * *

CAMPBELL, C. J. The bill makes a very proper case for the remedial power of a court of chancery, which may, in proper cases, rectify mistakes either in sheriffs' deeds or court proceedings; but, unfortunately for the complainants, they have failed to maintain their bill by sufficient evidence. It is doubtless true that, but for misapprehension as to the extent of the operation of the deed to Rowe, the parties would have proceeded differently; but that is not the question for equity to consider in a proceeding to reform contracts. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were. Affirmed.

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## BETTS v. GUNN. ✓

(Supreme Court of Alabama, 1857. 31 Ala. 219.)

Appeal from the Chancery Court of Macon.

Heard before the Hon. A. J. Walker.

This bill was filed by George W. Gunn, against Elisha Betts. Its primary object was to obtain the rescission of a contract, by which Gunn, in consideration of a conveyance to him by Betts of certain real and personal property, bound himself to pay the outstanding debts of Betts, and also to allow him $200 per annum for his support. The contract was made in 1843, and the bill filed in October, 1850. The written instrument signed by Gunn only bound him to pay the annuity; but the bill alleged, that it did not truly express the contract of the parties. The bill alleged, also, in substance, that Betts represented his

[7] The statement of facts is abridged.

debts as amounting to not more than $1,000, while complainant was compelled to pay more than $2,000 on account of them; that he also misrepresented the value of the property conveyed; that complainant was unable to reduce some of the property to possession, because of conflicting and superior claims of title to it, and was much involved in litigation concerning it; that he supplied Betts with money for traveling, and furnished him with board and other necessaries. The prayer of the bill was, that the contract might be rescinded, and the plaintiff's obligation canceled, or so reformed as to express the true contract of the parties; that an action at law, instituted by Betts on the obligation, might be perpetually enjoined; that an account might be taken of all the moneys advanced or paid out by the plaintiff for Betts, and of the value of the services rendered by plaintiff in lawsuits concerning the property conveyed to him by defendant; and for other and further relief.

The cause was heard before Chancellor Clark, on motion to dismiss the bill for want of equity, and to dissolve the injunction on the coming in of the answer; and before Chancellor Walker on pleadings and proof. Each chancellor held, that the bill presented no case for a rescission or reformation of the contract, but might be retained to establish an equitable set-off in favor of the plaintiff, on account of the insolvency of the defendant; and, on final hearing, a reference of the matters of account was ordered.

Errors are here assigned, by consent, by each party. The assignments of error for the defendant are, the overruling of the demurrer to the bill for want of equity, and the final decree in favor of the complainant; for the plaintiff, the refusal of the chancellor to grant a rescission or reformation of the contract, and to allow plaintiff's claim for damages resulting from defendant's fraud as a part of his equitable set-off.

WALKER, J.[8] * * * There is plainly no equity in the bill, as an application for the reformation of the contract; because the bill shows that the contract was drawn precisely as both parties intended it should be drawn. The complaint is, not that a mistake was committed in the drawing of the instrument, but that the defendant has not performed a part of the antecedent verbal agreement, which was designedly left out of the written contract, and trusted to the defendant's honor. It is desired to add to the contract a stipulation which, according to the complainant's bill, was intentionally left out, under the influence of a confidence in defendant, which subsequent events prove to have been misplaced. The bill says that the subject was called to the attention of the defendant, and he avoided giving his consent to the insertion of the stipulation in question, saying, "the complainant certainly had enough confidence in him to trust to his honor in that particular." It is thus manifest from the bill itself, that the defendant did not consent,

[8] Parts of the opinion are omitted.

but designedly omitted to consent, that such a stipulation should be in the contract. Before we can grant the relief asked, it is necessary, therefore, that we should make a contract for the parties, instead of reforming one actually made.[9] * * *

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## LADD et al. v. PLEASANTS.

(Supreme Court of Texas, 1873. 39 Tex. 415.)

Appeal from De Witt. Tried below before the Hon. Henry Maney.

This suit was brought by H. C. Pleasants, administrator of the estate of John York, deceased, to quiet the title to three hundred and eighty acres of land. Pleasants, under an order of the county court of De Witt county, sold, in 1869, to James Ladd, a tract of land as the property of the estate, believed at the time of sale to contain about two hundred acres. The land was bid for at public auction by the acre, and so paid for. Two hundred acres only were paid for. It was discovered after the execution of the deed that the tract really contained five hundred and eighty acres. It was described in the order of sale, in the order of confirmation, and in the deed to Ladd, as "containing two hundred acres, more or less." It appears that the administrator, at the time of executing the deed, believed that the tract contained but two hundred acres. Ladd inquired of him when the deed was made whether he could hold the land under his deed if there should be more than two hundred acres, and was told that if the excess was large it would not be conveyed, but would remain the property of York's estate. Newsom was interested in the purchase made by Ladd, and Andrews paid for that portion of the land claimed by him after he knew that the administrator asserted claim to the excess over two hundred acres.

Verdict for Pleasants, administrator, and judgment in his favor for all the land exceeding two hundred acres which was conveyed by the deed.

WALKER, J. The mistake which is shown to have been made in the sale—made by the administrator of York's estate—is so gross that no court of equity could uphold it. The parties supposed the tract might contain no more than two hundred acres, whereas it is shown to have contained five hundred and eighty acres. The vendee purchased at a given price per acre. If he had wanted to hold this land equity would require him to have tendered the money at the price paid, or at least a fair value, for the remainder of the land.

Equity will not interfere to correct slight and immaterial mistakes in the quantity of land sold, where the parties, both vendor and vendee, are ignorant of the true quantity contained in the tract.

[9] The court finally granted plaintiff relief by way of equitable set-off.

Some notice may be taken of the fact that the vendor in this case was the administrator of an estate, which courts of equity are peculiarly bound to protect from mistakes and frauds.

But had all the parties been acting in this case sui juris, equity would correct so ruinous a mistake, as where the vendee claims almost three times as much land as he actually purchased. Smith v. Fly, 24 Tex. 349, 76 Am. Dec. 109; O'Connell v. Duke, 29 Tex. 309, 94 Am. Dec. 282; Story, Eq. §§ 144a, 149.

The judgment in this case is affirmed.

Affirmed.

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## HOLT v. HOLT et al.

**(Supreme Court of California, 1898. 120 Cal. 67, 52 Pac. 119.)**

Appeal from a judgment of the superior court of Los Angeles county and from an order denying a new trial; Waldo M. York, Judge.

McFARLAND, J. This action was brought to reform a deed executed by the plaintiff to the defendant Frances M. Holt, Tyler being made a defendant as a subsequent mortgagee with notice. The court rendered judgment for plaintiff, and the defendants appeal from the judgment and from an order denying their motion for a new trial.

The findings of the court were warranted by the evidence. The plaintiff and the defendant Frances were at one time husband and wife, and had been divorced before the occurrences out of which this litigation arises. The land involved here, designated as lot 7 of a certain tract, was separate property of the plaintiff, though defendant Frances had filed a homestead thereon, the plaintiff not joining therein. By the decree of divorce the lot was set apart to the defendant Frances "for a limited period, to wit, the term of fifteen years," but it contained the following provision:

**"Provided, that if the plaintiff will convey to the defendant an undivided and unincumbered one-half interest in said homestead, then said term will be shortened to five months."**

For the purpose of complying with this provision the plaintiff executed a deed to the defendant Frances, which was intended to be of an undivided half of said lot, but by mistake of the conveyancer in following a printed form the deed was made to convey the whole of said lot. When the deed was delivered to the defendant Frances by the plaintiff she was informed that it conveyed only an undivided one-half of the lot, in accordance with the provisions of the decree. The defendant Frances made some objection at first to receiving the deed; but a day or two afterwards, upon learning that it conveyed the whole lot, she accepted it and put it upon record. She knew that the plaintiff supposed that the deed conveyed only the undivided one-half, and that the language in the deed purporting to convey the whole lot was a mistake. Shortly afterwards the defendant Tyler took a mortgage from

the defendant Frances upon the whole of said lot, the mortgage purporting to be security for $500; but the court found, and we think upon sufficient evidence, that at the time of the execution of the mortgage Tyler knew all the facts and the mistake.

The only point made by appellants which needs special notice is that there is a variance between the complaint and the findings, because, as contended by appellants, the complaint avers a "mutual" mistake, while the findings are that the mistake was that of the plaintiff, and that the defendant Frances knew of such mistake at the time. We do not think that this position is tenable. It is true that in the complaint it is averred that the said Frances, at the time she accepted the deed, supposed that it conveyed only the undivided one-half of the property; but it is also averred that:

"Said defendant Frances M. Holt knew at the time of such acceptance that the plaintiff also supposed that said deed described and conveyed only the undivided one-half of said homestead property."

This averment clearly brought the case within section 3399 of the Civil Code (Cleghorn v. Zumwalt, 83 Cal. 158, 23 Pac. 294); and under no view was there such a variance as "actually misled the adverse party to his prejudice" (Code Civ. Proc. § 469). We do not think that the pleadings in this case raise any issues growing out of the decree of divorce, or that any rights growing out of said decree are herein determined. The purpose of this action and the effect of this judgment are merely to reform the deed. Whatever rights the parties have under the decree of divorce after the reformation of the deed are not here to be determined. That part of the judgment in the case at bar which decrees that the plaintiff is the owner in fee of an undivided one-half of the lot, and that the defendant Frances is the owner in fee of the other undivided one-half, might as well have been left out; but, as the defendant Frances by her answer claimed the ownership of the whole lot, we do not see that she is injured by that part of the judgment which gives her an undivided half thereof. No other questions raised in the case need special notice. The judgment and order appealed from are affirmed.[10]

We concur: HENSHAW, J.; TEMPLE, J.

Hearing in Bank denied.

[10] In Stockbridge Iron Co. v. Hudson Iron Co. (1869), 102 Mass. 45, at 46, the court said: "By the common law, parties who execute written instruments are abound by them, and parol evidence is not admissible to add to or diminish or vary their terms. The rule is of great practical importance for the protection of the interests of the citizen, and it is the more so since parties and interested witnesses are permitted to testify. The writing must be regarded, prima facie, as a solemn and deliberate admission of both parties as to what the terms of the contracts actually were; and in Babcock v. Smith [(1839) 22 Pick. 61] it is said that 'the power of rectifying and reforming solemn written contracts is one which by courts of general chancery jurisdiction is exercised very sparingly, and upon the clearest and most satisfactory proof of the intention of the party.' Yet if a mistake is made out by proofs that are entirely satisfactory, equity will reform the contract, so as to make it conform to the intent of the parties. 1 Sugden on Vend. (7th Am. Ed.) 212;

## TILLIS v. SMITH.

(Supreme Court of Alabama, 1895. 108 Ala. 264, 19 South. 374.)

Appeal from Geneva Chancery Court.

Heard before the Hon. Jere N. Williams.

The facts upon which the opinion is based are sufficiently stated therein.

HEAD, J.[11] It is not denied that the instrument whose reformation is sought by the bill misdescribes the lands which the appellees agreed to convey to the appellant, and for the purpose of conveying which they went to his place of business, in the town of Geneva. It is admitted that the appellee R. T. Smith did not own any land in section 25, but that he was possessed of the corresponding subdivisions in section 28, constituting his homestead, and upon which the appellant had a first mortgage. In his testimony, Smith says that he had previously mortgaged these lands to appellant, and that he intended to deed the same lands lying in section 28, instead of section 25. There is therefore no room for doubt or controversy that a mistake was made by the scrivener in respect of the description of the lands, and that, in its present form, the instrument does not express the true intention and meaning of the parties. The jurisdiction of a court of equity to correct such mistakes, when admitted or established by the necessary measure of proof, is too well settled, and has been too often successfully invoked in this state, to require a citation of the cases to be found in our Reports upon this subject; and at this time it is no longer open to debate that reformation may be had of a conveyance designed to pass the husband's exempt homestead, but which, by mistake, fails to correctly describe it, provided the deed or mortgage is executed and acknowledged by him and wife, in conformity with the statute governing such cases. Gardner v. Moore, 75 Ala. 394, 51 Am. Rep. 454; Parker v. Parker, 88 Ala. 362, 6 South. 740, 16 Am. St. Rep. 52. The opinion in the case first cited states, arguendo, that the reformation in description which was there prayed for in the bill did not seek to locate the land in a different section, but to correct an admitted imperfection in the designation of it, by erroneous land numbers, belonging to the same section. The fact thus noted was not made the basis of the decision, which lacks much of being an adjudication that reformation will be denied if the mistake is made in respect of the section number. On principle, there is no logical foundation for such a distinction. The same results follow a mistake as to the section which accompany a mistake as to subdivisions of the same section. In either case the mistake is equally harmful, and every

**Townshend v. Stangroom (1801) 6 Ves. 328, and note. But the mistake must be of both the parties, and must be about the very subject of the contract. Fry, Spec. Perf. 225; Sawyer v. Hovey (1862) 3 Allen, 332, 81 Am. Dec. 659."**

**[11] Parts of the opinion are omitted.**

reason which exists for correcting the misdescription in the one instance applies with equal force to the other. * * *

The third plea is very meager in its statements. It does no more than aver that, before the filing of the bill, the appellant conveyed by deed to a third party, not named, the lands described in Smith's deed,—that is, the lands lying in section 25; and from this single fact, which the appellant admitted, it is argued by counsel for appellees that the appellant is not a proper party complainant. It has been ruled, and we think correctly, that, when a mistake occurs in a series of conveyances, the last vendee may have the deeds corrected. Blackburn v. Randolph, 33 Ark. 119; May v. Adams, 58 Vt. 74, 3 Atl. 187; Greeley v. De Cottes, 24 Fla. 475, 5 South. 239; Parker v. Starr, 21 Neb. 680, 33 N. W. 424. From this principle it is argued that the right of the grantee in the conveyance wherein a mistake occurs, to have it reformed, is destroyed by his deed to another, containing the same mistake. Although the second conveyance would establish a privity between the grantee therein and the grantor in the first conveyance, entitling the former to seek a correction of the first conveyance, we are by no means prepared to admit that this would, of necessity, disable the first grantee from procuring the correction to be made, upon a bill filed by him. The second grantee might not desire to do more than have a correction of the immediate conveyance to himself, leaving to the first vendee the task of protecting himself by procuring a correction of the first conveyance. We have found no case holding the proposition asserted by counsel. * * * For aught that appears therein, it was well understood between appellant and his grantee that the former was to convey to the latter the very lands, lying in section 25, which were conveyed, and, for anything to the contrary which the plea shows, appellant's grantee neither has nor claims any right or interest whatever in the lands lying in section 28. Prima facie, at least, the appellant, as a party to the conveyance made by Smith, is the proper person to seek its reformation; and, if anything has occurred whereby his right has been lost, it must be shown by appropriate pleading and proof. It is perfectly plain to us that the fact averred in the third plea furnishes no valid objection to the maintaining of this bill by appellant. * * *

The decree of the chancellor must be reversed, and a decree here rendered awarding the complainant appropriate relief. Reversed and rendered.

## RUHLING v. HACKETT et al.

(Supreme Court of Nevada, 1865. 1 Nev. 360.)

Appeal from the Second Judicial District of the State of Nevada, Ormsby County; Hon. S. H. Wright presiding.

The complaint alleges an error in the mortgage by mistake, the intention being, as alleged, to mortgage lot 6, instead of lot 9.

Opinion by LEWIS, C. J.,[12] full Bench concurring.

The bill in this case is brought to reform a mortgage, foreclose the same, and also to foreclose a vendor's lien.

The plaintiffs allege that on the 30th day of June, A. D. 1863, the defendant McKey made and delivered to one Zartman his promissory note in writing, whereby for value received he promised to pay to Henry Zartman, or order, the sum of $3,000, in United States gold coin, with interest at the rate of 5 per cent., per month; that, to secure the payment thereof, McKey made, executed and delivered to Zartman his indenture of mortgage, whereby he granted, bargained and sold to Zartman lot number 9 in block number 17, in Carson City, which conveyance was intended as a mortgage. It is further alleged that on the 4th day of August, A. D. 1863, the said Zartman, for value received, transferred and delivered the said note, and assigned and delivered the said mortgage to the said plaintiffs. It is also alleged that at the time of the execution of the note and mortgage above referred to, McKey was the owner of lot number 6 in block number 17, in Carson City; that it was the intention of McKey and Zartman, and was understood and agreed by and between them, that lot 6 instead of lot 9, should be embraced in and covered by said mortgage; that it was not intended to mortgage lot 9 at all, but only lot 6, that both parties supposed that lot 6 was the one described in the mortgage at the time of its execution, but that, by the mistake of Zartman or the draughtsman of the instrument, lot number 9 was described and embraced in said mortgage, instead of lot number 6; that at the time of the making and delivery of the note and mortgage, the defendant McKey had no interest whatever, in lot number 9; that in March, A. D. 1864, Mrs. Williamson, who owned lot number 9, conveyed the same to the defendant Clayton, and at the same time McKey, by Mrs. Williamson, acting as his attorney in fact, also conveyed all his right, title and interest in lot number 6 to defendant Clayton; that, for and in consideration of the sale to Clayton of the lots above mentioned, he agreed to pay to the plaintiff the sum of $4,450—the amount then due on the note and mortgage held by them, and which was a part of the consideration for the conveyance of the lots to him. It is also alleged that at the time, and before the conveyance of the lots to him, Clayton was informed of and had full knowledge of the mistake in the mortgage, and of the inten-

[12] Parts of the opinion are omitted.

tion of the plaintiffs to have the same reformed, so as to make it embrace and cover lot 6 instead of lot 9.

Plaintiffs allege further that though often requested, Clayton refuses to pay to them the $4,450 which he agreed and promised to pay. For the purpose of securing a lien upon lot 9, it is alleged in the complaint that the $3,000 loaned by Zartman, though borrowed by McKey, was in fact for the benefit of Mrs. Williamson, and that the entire sum so loaned, was by her expended in placing improvements on that lot, and that such improvements now constitute its chief value. Upon these facts the plaintiffs pray that the mortgage assigned to them may be reformed so as to make it embrace lot number 6; that that lot may be sold to satisfy their claim, and that they have a lien upon lot number 9.

To this complaint the defendant Clayton interposes a general demurrer. The only inquiry which can be presented upon this demurrer is, whether the complaint states facts sufficient to constitute a cause of action. Misjoinder of actions cannot be raised upon a general demurrer, and, therefore, if it were admitted that plaintiffs have united assumpsit with a bill in equity to reform a mortgage deed, it cannot be taken advantage of under the demurrer.

It is claimed by respondents' counsel that the mortgage, in this case, cannot be reformed so as to make it include land not described in it at the time of its execution, though it be admitted that it was written by fraud or mistake; that an instrument for the conveyance of land may be reformed so as to diminish the quantity conveyed, or agreed to be conveyed, but not to extend it to land not described in the deed or agreement, because it is said to order the conveyance of land which, by mistake or fraud, is omitted from the deed, is in violation of the statute of frauds which declares that no estate or interest in land shall be created, granted or assigned, unless by deed or conveyance in writing, signed by the party granting the same; but that ordering a reconveyance of land which is conveyed by fraud or mistake, is not in violation of this statute.

For this distinction we find no authority but the dictum of Weston, J., in the case of Elder v. Elder, 10 Me. 80, 25 Am. Dec. 205, who whilst acknowledging the authority of the case of Gillespie v. Moon, 2 John. Ch. [N. Y.] 585, 7 Am. Dec. 559, yet endeavors to draw the distinction above stated between the two cases. That distinction may have been clear and entirely satisfactory to the learned Judge who delivered the opinion in Elder v. Elder, but we must acknowledge it to be utterly beyond our comprehension. * * *

Can it be seriously claimed that if it be the intention of the grantor to convey, and the grantee to purchase, a valuable piece of land, and the consideration is paid, but by mistake a piece utterly worthless is described in the instrument of conveyance, that a Court of equity may not reform such instrument so as to make it conform to the admitted intention of the parties? It is the peculiar province of equity to relieve

from the consequences of fraud, surprise and mistake; but it would illy merit our commendation if it gave no adequate remedy in cases of such manifest injustice, and of such frequent occurrence. * * *

In Willis v. Henderson, supra [4 Scam. (Ill.) 13, 38 Am. Dec. 120], by mistake a tract of land described in a mortgage was not the tract intended by the parties to be mortgaged; it was held, however, that the purchasers of the land intended to be mortgaged having notice of the mistake took it subject to the mortgage, and that a Court of equity may correct the mistake and enforce it against the land in the hands of such purchasers. So in the case of Blodgett v. Hobart, where it appeared that by mistake a part of the lands agreed to be mortgaged were not included in the mortgage deed, it was held that on a bill for that purpose a Court of Chancery would correct the mistake by ordering the mortgage to be so reformed as to include the land omitted.

In Alexander v. Newton [2 Grat. (Va.) 266] it was said that a mistake of a scrivener in drawing a deed, whether in law or in fact, will be corrected by a Court of equity even against bona fide creditors.

So in Klopton v. Martin [11 Ala. 187] the Court held that where a written instrument expresses more or less than the parties intended, the Court of equity will reform it. And Mr. Justice Story, in Taylor v. Luther, 2 Sumner, 228, Fed. Cas. No. 13,796, uses the following language:

"Nothing is better settled than that the true construction of the statute of frauds does not exclude the enforcement of parol agreements respecting the sale of lands in cases of fraud; for, as it has been emphatically said, that would be to make a statute purposely made to prevent fraud the veriest instrument of fraud; and the same rule governs in case of mistake as of fraud."

Indeed, we are unable to find a single case which militates against the general rule that a Court of equity will reform a mistake in all executed contracts.

There are many cases in which it is held, and perhaps the weight of authority sustains the doctrine, that a Court of equity will not correct a mistake in an executory contract where the mistake is denied by answer, and enforce its specific performance as corrected.

But if the contract be executed, money paid and land omitted by mistake from the instrument which it was the intention of the parties to include, it would be a deplorable defect in the equity powers of our Courts if relief could not be granted. This is the distinction made in all the cases, and we think not a solitary case can be found where a Court of equity has refused to reform a material mistake in a deed or mortgage, unless there were some defense besides the statute of frauds, such, for instance, as unreasonable delay upon the part of plaintiff. All the authorities relied on by the respondents' counsel where the reformation was refused are cases of executory contracts.

But it is said that even if such a mistake can be corrected in favor of the original mortgagee, that it is a mere equitable right of action which is not assignable.

The authorities, however, are directly opposed to this position. The assignment of the mortgage usually carries with it all the equitable rights of the mortgagee growing out of it. Indeed, the assignment of a mortgage is itself but a transfer of an equitable right of action to the assignee. With respect to the right of reforming the mortgage, the assignee stands in the same position as the mortgagee. Washburn v. Merrills, 1 Day [Conn.] 139, 2 Am. Dec. 59; Gillespie v. Moon, 2 Johns. Ch. [N. Y.] 585.

The complaint alleges that Clayton had notice of the mistake, and of the intention of the plaintiffs to have the same reformed, at and before the time of his purchase of lot number 6. By demurring to the complaint, this fact is admitted, and he is therefore placed in the same position with respect to the reformation of the mortgage deed as his grantors were. Blodgett v. Hobart, 18 Vt. 414; Willis v. Henderson, 4 Scam. (Ill.) 13, 38 Am. Dec. 120. We are also of opinion that the plaintiffs may maintain an action against the defendant Clayton upon his promise to Mrs. Williamson to pay a certain proportion of the purchase money. Such a promise is not a collateral promise in the nature of a guarantee of the debt of a third party, but is an original promise upon which the beneficiary may maintain his action direct. 1 Parsons on Contracts, 390; Hind v. Holdeship, 2 Watts [Pa.] 104, 26 Am. Dec. 107; Arnold v. Lyman, 17 Mass. 400, 9 Am. Dec. 154; Jackson v. Mayo, 11 Mass. 152, 6 Am. Dec. 167. This is the generally recognized rule in the American cases; the English cases, however, do not maintain the same rule.

The judgment of the Court below reversed and cause remanded, and leave granted defendant to answer.[13]

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## MORGAN et al. v. DOD.

(Supreme Court of Colorado, 1877. 3 Colo. 551.)

Suit in equity. The defendant in error, Dod, borrowed from Morgan, one of the plaintiffs in error, two hundred and fifty dollars, giving his note therefor, payable in thirty days, Babcock, the other plaintiff in error, signing the note as surety. To indemnify Babcock, Dod gave him the possession of a mare and harness, with a bill of sale of the property. There was also delivered to Babcock by one Millspaugh,

[13] In Christensen v. Hollingsworth (1898) 6 Idaho, 87, 53 Pac. 211, 96 Am. St. Rep. 256, Sullivan, C. J., said: "It is contended that a mortgage cannot be reformed and foreclosed in the same action, and that the court erred in permitting reformation and foreclosure in the same action. There is nothing in this contention. The recognized rule, under our Code of Civil Procedure, is that a mortgage may be reformed and foreclosed in the same action. In Hutchinson v. Ainsworth (1887) 73 Cal. 453, 15 Pac. 82, 2 Am. St. Rep. 823, it is held that a complaint which seeks to reform a mortgage, and to foreclose the same as reformed, states but one cause of action."

who also signed the note as surety, a mare and colt, with a bill of sale and two promissory notes payable to Millspaugh, for one hundred and one hundred and fifty dollars respectively, and which notes were duly assigned to Babcock. This property of both Dod and Millspaugh was all conveyed and delivered to Babcock to induce him to sign the note and to indemnify him against loss therefor, since Morgan had refused to loan the money on this property itself as security, but had accepted Babcock's name. The note fell due on Thursday of the week, but the three days' grace allowed made it payable upon Saturday, since the third day of grace fell on Sunday, Morgan insisted upon payment of the note by three o'clock p. m. on Saturday, and the note not being paid at that time, he demanded payment of Babcock, who, claiming that the property was then forfeited to himself, delivered it all over to Morgan, who accepted it in satisfaction of the debt and delivered up the note to Babcock. This occurred about four o'clock. After Babcock had turned the property over to Morgan, Millspaugh complained to Dod of his own loss and the two went to see Babcock to learn if there was any way to get back Millspaugh's property. This talk was renewed on Sunday, when Dod requested Babcock to see Morgan and make terms for getting back Millspaugh's property, stating that he wuold lose or give his own mare and harness to save that of his friend Millspaugh. Babcock accordingly saw Morgan, who, on the next day, Monday, agreed to give up Millspaugh's mare and colt and the two notes upon payment of the two hundred and fifty dollars. Babcock agreed to this which was afterward assented to by Dod, and the money was paid to Morgan. About a week afterward Dod demanded his mare and harness of Morgan and upon refusal to deliver brought an action at law, and failing in this, filed his bill against both Morgan and Babcock, charging collusion to defraud the complainant, etc. Pending the suit, the mare, while still in the possession of Morgan, became injured and died. At the final hearing upon the facts, the court rendered a decree against Morgan for two hundred and fifty dollars, as the proved value of the mare and harness, and awarded costs against Morgan and Babcock jointly.

STONE, J.[14] Upon the facts in this case, and under the general assignment of error, that the complainant was not entitled to any relief whatever, the first question presented is, what was the nature of the conveyance of the goods of the defendant in error to the plaintiff Babcock? The conveyance was by a bill of sale, absolute in terms, and accompanied by actual delivery of the property. The admitted purpose of the conveyance was to indemnify Babcock, as security upon defendant's note to Morgan. This purpose determined the character of the transaction as a pledging; where one delivers a chattel to another as security for a debt or as indemnity for suretyship therein, the law regards such delivery of the property as a pledge merely. Story on Bail-

[14] Parts of the opinion are omitted.

ments, §§ 286–300. Nor does it alter the case in a court of equity that the property or chose in action is transferred to the creditor or surety by an unconditional bill of sale or assignment, nor even if the contract had stipulated that the pledge should be irredeemable. Id., § 345. As limited to cases in equity, this doctrine is well settled. Newton et al. v. Fay, 10 Allen (Mass.) 510.

The defendant then had a right to redeem the property pledged upon payment of the debt, either upon maturity of the note or even after default. Story on Bailments, §§ 318, 345, 346 and 348. * * *

This brings us to the question whether a mistake of the law will avail to discharge an obligation assumed thereunder.

The maxim "ignorantia legis neminem excusat," when applied to civil contracts, has undergone much discussion, and many exceptions have been made by the courts. And while no rule of exception of general applicability has been formulated, there is, nevertheless, ample authority, based upon sound reasons, to support such exceptions in given cases. This whole subject is fully discussed by Mr. Story in his work upon Equity Jurisprudence, and in section 121 he says:

"It has been laid down as unquestionable doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, a court of equity will relieve him from the effect of his mistake."

And in the next section he adds:

"Indeed, where a party acts upon the misapprehension that he has no title at all in the property, it seems to involve, in some measure, a mistake of fact that is, of the fact of ownership, arising from a mistake of law. A party can hardly be said to intend to part with a right or title of whose existence he is wholly ignorant; and if he does not so intend, a court of equity will, in ordinary cases, relieve him from the legal effect of instruments which surrender such unsuspected right or title."

In section 138c, the same learned author says:

"And where the result of denying relief will be to give the other party an unconscionable advantage, and the fact of such misapprehension is admitted or proved to the entire satisfaction of the court, it would be strange if it were not a sufficient ground for equitable interference. The denial of relief in such cases would seem to be at variance with the long-established doctrines of courts of equity, and a reproach to the law itself."

The same doctrine is recognized in Bispham's Principles of Equity, § 187, and in Kerr on Fraud and Mistake (Bump's Ed.) page 398. Nor is the application of this doctrine confined altogether to equity, it being distinctly recognized under the head of inadequacy of consideration by the general law writers. 1 Parsons on Contracts, 437; Chitty on Contracts, 46; Addison on Contracts, § 315.

The relinquishment by Dod of his property to Morgan was clearly without consideration. And other elements of the bargain render it unconscionable. Dod, when he made the note for two hundred and fifty dollars, received but two hundred and twenty-five, Morgan retaining twenty-five dollars as interest for thirty days, which was at the rate of about eleven per cent per month. Upon payment of the full amount

of the note, the rights of no third party had intervened to prevent the parties being placed in statu quo by the decree, yet while Morgan had received all he was entitled to by the original contract, he still held of the pledged property a portion equal in value to the amount of the debt.

We are satisfied that the facts warranted the decree, and since Babcock was not without fault in transferring the property to Morgan at the time he did, we think the equity discretion of the court in decreeing costs against him jointly with Morgan was not erroneously exercised. * * * Affirmed.

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## TUTHILL v. KATZ et al.

(Supreme Court of Michigan, 1913. 174 Mich. 217, 140 N. W. 519.)

KUHN, J.[15] This case has been here before, and is reported in 163 Mich. 618, 128 N. W. 757, where the facts are fully and clearly set forth. * * * The bill in that case was filed to correct the description of the 17½ acres in the deed from William V. Rowley and wife to Alonzo J. Rowley. This plaintiff and one of the defendants therein answered, but asked for no affirmative relief. The court found that the deed was without consideration.

It is a well-established rule that a court of equity will refuse its aid to rectify a mistake in a conveyance that is voluntary and without consideration unless all of the parties consent. Redding v. Rozell, 59 Mich. 476, 26 N. W. 677; Shears v. Westover, 110 Mich. 505, 68 N. W. 266; 34 Cyc. 928.

The court, undoubtedly basing its finding upon this rule refused to give complainant relief and dismissed the bill. In so far as the title of the property was concerned, this left the parties in statu quo. Defendants having asked for no affirmative relief, a decree could not be made determining the title to the land in question; and the language used by the judge, which it is claimed should be construed as determining this question, is of no effect and no part of the decree. Vary v. Shea, 36 Mich. 388; Vroman v. Thompson, 51 Mich. 453, 16 N. W. 808.

Judgment is affirmed, with costs.

[15] Part of the opinion is omitted.

## BERRY, DEMOVILLE & CO. v. SOWELL.

(Supreme Court of Alabama, 1882. 72 Ala. 14.)

SOMERVILLE, J.[16] It is a settled principle of equity jurisprudence, that where, by mistake, or fraud, a deed or other written contract fails to express any material term of the real agreement which the parties mutually intended to make, a court of equity will, on clear and satisfactory proof of such mistake or fraud, reform the instrument, so as to make it conform to the intention of the parties, and embody the actual or true agreement. Alexander v. Caldwell, 55 Ala. 517; Campbell v. Hatchett, 55 Ala. 548. The aim of the court, in such cases, is to place the parties, as nearly as possible, in the situation they would have occupied but for the mistake. Waterman on Specific Performance, §§ 368, 369.

And this jurisdiction to reform or rectify written instruments may be exercised as well against creditors, and purchasers having actual or constructive notice of the mistake, as between the immediate parties themselves. Dozier v. Mitchell, 65 Ala. 511; Baskins v. Calhoun, 45 Ala. 582; Williams v. Hatch, 38 Ala. 338; 1 Story's Eq. Jur. §§ 165, 166. If, however, the parties can not be placed in statu quo, or if the mistake can not be rectified without impairing the vested rights of innocent third parties, having no notice of the mistake, the aid of equity will be withheld. Waterman on Spec. Perf. § 384.

The present bill is filed to reform a deed to certain real estate, executed by the defendant, Capshaw, to the complainant, Mrs. Sowell, and dated December 19, 1873. Ancillary to this, an injunction is prayed against a writ of attachment levied upon the land by the appellants, Berry, Demoville & Co. No difficulty is presented as between the immediate parties to the deed. The bill alleges an agreement between Benjamin Sowell, complainant's husband, who is made one of the defendants to the bill, and his wife, the complainant, on the one part, and the defendant, Capshaw, on the other, that the husband should convey the property in controversy to Capshaw, in order that he might reconvey to the wife, in such manner, and with such apt words, as to constitute the property her separate estate by contract. Capshaw, who thus constituted himself a mere trustee, made this re-conveyance; but, by omission, ignorance, or mistake of the draughtsman, the consideration of the deed was recited to be mere love and affection, instead of a valuable one moving from the grantee and her husband, and the apt words necessary to describe or create the separate equitable estate were omitted. The parties are thus alleged to have executed an instrument, by common mistake, different from the one agreed on, and prejudicial to the rights of the complainant. These facts are admitted in the answers of both Capshaw, the grantor in the deed, and of Benjamin Sow-

[16] The statement of facts is omitted.

ell, the husband, who acted for his wife; and are, in our opinion, sustained by the evidence. The case is clearly one in which the equity of rectification, which is strictly in the nature of specific performance, can be invoked, unless there be some other ground of valid objection.

The remedy of Mrs. Sowell, in a court of law, was totally inadequate. The deed on its face purported to be a mere voluntary conveyance, which would be void as to the attaching creditors, whose debts existed at the time of its execution. It was incapable of being established by parol proof of a valuable consideration in a court of law, such evidence being inadmissible as tending to vary the legal effect of the instrument. The only remedy, in such cases, is a bill in equity filed with the view of its reformation. Kerr on Fraud & Mis. 191, 192; Hubbard v. Allen, 59 Ala. 283.

The levy of the attachment was no obstacle to the reformation of the deed conveying the attached property to the complainant. The equity of Mrs. Sowell, arising from the purchase of the house and lot in question with her money, was superior to the lien acquired by the levy of the attachment, whether the attaching creditors had notice of such equity or not. The attachment could only reach the actual interest of the defendant in attachment, whatever that might be, and is no impediment to the assertion of all equities previously existing as incumbrances on the property. Drake on Attachments, § 223; Freeman on Judg. §§ 356, 357. Nor can an attaching creditor claim protection as a bona fide purchaser, as he seeks to recover an old debt, and parts with no present consideration. Depeyster v. Gould [3 N. J. Eq. 474], 29 Am. Dec. 723; Rogers v. Adams, 66 Ala. 600. The same rule was applicable, in this State, to the liens of judgment creditors, until it was expressly abrogated by statute. Coster's Ex'rs v. Bank of Georgia, 24 Ala. 37; Preston & Stetson v. McMillan, 58 Ala. 84; Code of 1876, §§ 2199, 2200; Freeman on Judg. §§ 356, 357.

The evidence shows that the complainant was in possession of the premises, and that the deed from Capshaw to her, here sought to be reformed, was executed and recorded before the levy of the attachment sued out by appellants. The original vendors, Townsend and wife, conveyed to Benjamin Sowell, in March, 1870, for a consideration of two thousand dollars. Of this sum, one thousand dollars was paid in cash; and the note of Sowell was given for the balance, upon which Capshaw became one of the sureties. Capshaw afterwards became indebted to Sowell, in the sum of about six hundred dollars, for a lot of land in the town of Athens, which he paid upon the debt to Townsend; and he also paid out of his own funds the balance of the purchase-money, amounting to about four hundred dollars. It is insisted that this was a donation to the complainant, his daughter, to whom he conveyed the house and lot, as above stated, in December, 1873, and that the conveyance was, therefore, fraudulent. If the premise be true, the conclusion would follow, at least so far as to render the deed constructively fraudulent, and the grantee would be constituted a trustee in in-

vitum to the extent of the gift; such being the principle governing voluntary conveyances. Bump on Fr. Conv. 303. But we are not at liberty to regard the transaction in this light. The four hundred dollars in question was paid by Capshaw, pursuant to a previous obligation entered into as surety for Benjamin Sowell. It was not, therefore, a gift to the complainant, but money paid by request for the use of the principal, Sowell, against whom an action of assumpsit would lie at the instance of Capshaw. So, a garnishment might lie against him, as the debtor of Capshaw, in favor of the appellants. These conclusions are utterly in conflict with the theory of a gift to complainant.

The fact that the money, paid by the surety for the principal, was invested by the latter in the lands purchased for complainant, confers no right upon the appellants, as creditors, to pursue the fund into the investment. Such investment, standing alone, raises no equity in favor of the creditors of the surety, either by subrogation or otherwise. Such, at least, is the doctrine of this court as established by its past decisions. Foster v. Trustees of Athenæum, 3 Ala. 302; Knighton v. Curry, 62 Ala. 404.

The decree of the chancellor must, under these principles, be affirmed.

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## MILLER v. BEARDSLEE et al.

**(Supreme Court of Michigan, 1913. 175 Mich. 414, 141 N. W. 566.)**

OSTRANDER, J.[17] * * * The case for complainant, so far as it is now presented, is this: Complainant is heir at law of Alice Smith. Alice Smith died owner of certain land unless she had conveyed it in her lifetime. She had not conveyed it because her voluntary effort in that direction was imperfect. The instrument she executed requires correction to make it effective.

The grantor being dead, a court of equity will not correct it. Redding v. Rozell, 59 Mich. 476, 26 N. W. 677; Shears v. Westover, 110 Mich. 505, 68 N. W. 266. See, also, Tuthill v. Katz, 174 Mich. 217, 140 N. W. 519. The conveyance therefore remains ineffective, and insufficient evidence of a transfer of the land by the owner thereof in her lifetime. As the instrument and the record of the amended instrument are relied upon by defendants John Beardslee and Elizabeth Axford (the bill was taken as confessed by the defendant Mattie Sykes, an heir, and by Matthew Knight, who was in possession of the property) as evidence of their title to the land, the instrument should be canceled and the record declared to be of no effect. * * *

[17] Parts of the opinion are omitted.

## WELTON v. TIZZARD et al.

(Supreme Court of Iowa, 1864. 15 Iowa, 495.)

DILLON, J.[18] The question here presented may be concisely stated thus: Is the lien of a subsequent judgment creditor, in this State, paramount to the lien or equity of a prior mortgagee, as to lands intended to be mortgaged, but which, by accident or mistake, were misdescribed?

The general equitable jurisdiction to correct and relieve against errors and mistakes in deeds and other conveyances is not questioned, and is, indeed, recognized by statute. Rev. § 2257. The former decisions of this Court establish principles which, though arising in cases somewhat different from the present one, are, nevertheless, decisive of it. In Norton v. Williams, 9 Iowa, 529, it was adjudged, under our present laws, that an attachment or judgment lien would not have preference over a prior unrecorded deed. The statute makes "judgments a lien upon the real estate owned by the defendant." Construing this provision, Wright, C. J., in the case just cited, remarks:

"It is the property of the debtor that is bound. The judgment is a lien on the real estate owned by the debtor, not upon that owned by another, * * * and the lien only extends to the interest owned by the defendant. * * * The consequence is, that a judgment creditor is entitled to the same rights as the debtor had, and no more."

The doctrine of this case was adhered to and applied in the subsequent cases of Bell v. Evans et al., 10 Iowa, 353; Seevers v. Delashmutt, 11 Iowa, 174, 77 Am. Dec. 139; and see Jones v. Jones, 13 Iowa, 276; Blaney v. Hanks, 14 Iowa, 401; Patterson v. Linder et al., 14 Iowa, 414.

In these cases, the unrecorded deed was for the right land; in the case at bar the conveyance was intended to be for the right land, but by accident or mistake there was a misdescription, and the inquiry is, ought this to lead to a different result? * * *

The debtor was bound in conscience to correct the mistake. His obligation to correct it was such an equity as would bind his heirs, voluntary grantees, or purchasers with notice. Such are the plaintiff's rights. Now, the defendant is subsequent in point of time. He has no specific lien. He takes just what the statute gives him, for judgment liens are wholly created, and regulated by statute. Unlike the plaintiff, he had with the debtor no agreement for a lien on this property. Unlike the plaintiff, also, he has no special tie which binds, no equity which specially fastens itself upon, and clasps this specific property. He has a lien at large, a mere right to acquire a right to this property, by a levy and sale. His rights, before a sale without notice, are, as stated by Judge Wright in the opinion before quoted, co-extensive only with those of his debtor. He comes in under the debtor, that is, under one who in conscience is bound, and who in equity would be

[18] The statement of facts and parts of the opinion are omitted.

compelled to rectify the error in the antecedent conveyance. The equities of the parties are not equal, either in point of time, or point of right. Such would be our conclusion on the general principles of the law as applied to the case in hand. * * *

Chancellor Kent, in Gillespie v. Moon, 2 John. Ch. (N. Y.) 585–600 (7 Am. Dec. 559), in argu., says:

"Defects in mortgages, contrary to the intention of the parties, have also been made good against subsequent judgment creditors, coming in under the party who was bound in conscience to correct the mistake"—citing, among other authorities, the above.

The New York cases are numerous and uniform, to the effect that the general lien of a judgment upon the real estate of the debtor is subject to the equities of third persons existing against such real estate, at the date of the rendition of the judgment, and chancery will restrain and control the lien accordingly. Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Matter of Howe, 1 Paige (N. Y.) 125, 19 Am. Dec. 395. * * *

White v. Wilson, 6 Blackf. (Ind.) 448, 39 Am. Dec. 437, is in all respects like the case at bar. A tract of land intended by the parties to be included in the mortgage was by mistake omitted, and afterwards judgment was rendered against the mortgagor. The mortgage was corrected, and its priority over the judgment established.

Because the demurrer in the present case was sustained, when, in the opinion of this Court it should have been overruled, the judgment below is reversed, and this cause will be remitted to the District Court, with leave to the defendant to answer to the petition, if he is so advised.

Reversed.

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## DAMERON et ux. v. ROWLAND LUMBER CO.

(Supreme Court of North Carolina, 1913. 161 N. C. 495, 77 S. E. 694.)

BROWN, J.[19] This action is brought to correct the description in a deed for timber executed in 1892 by plaintiffs to H. L. Pope, which is as follows:

"Bounded by the lands of James Warwick, Redet Carr, Dr. Benton, and Calvin Bowden, being the same property deeded to me from J. D. Packer and wife, registered in Book 43, page 513, etc., containing 75 acres, more or less. Timber to be cut 12 inches and upwards across the stump."

The defendant acquired title by mesne conveyances, and on December 21, 1906, the timber being uncut, purchased from plaintiff an extension of time, evidenced by extension deed duly executed, and under that contract defendant has proceeded to cut the timber, not only on the 75 acres, but on the entire land described in the Packer deed.

[19] The statement of facts and part of the opinion are omitted.

The allegation of the complaint upon which the Pope deed is sought to be reformed is as follows:

"That said deed calls for only 75 acres of timber on a tract of 216 acres, said 75 acres lying on the south end of said tract, and at the time of the execution of said deed to said Pope cutting off from said 216-acre tract the 75 acres of land upon which the timber was sold. That in drawing the deed for said timber, through the inadvertence of the draftsman, the boundaries of said 75-acre tract were left out; and, while said deed calls for only 75 acres, yet the description therein covers all of the lands of the plaintiffs. Said error was not known to the plaintiffs until a few days prior to the commencement of this action, and was due to the mutual mistake of the parties thereto."

It is admitted that the deed as written covers the timber on all the land described in the Packer deed; that being the controlling description.

The defendant claims to be a bona fide purchaser for value and without notice of the alleged claim of plaintiff, and tendered this issue:

"Did the defendant, Rowland Lumber Company, at the time it purchased the timber in question from the North State Lumber Company (Pope's grantee), have notice of any mistake on the part of the plaintiff and Pope in the execution of the original timber deed? Answer: ———."

His honor erred in not submitting such issue in the present state of the pleadings.

It is not material that defendant had notice at the date of the extension deed. It had then bought and paid for the timber conveyed by the deed from plaintiffs to Pope. The defendant's rights as to the quantity of timber acquired is to be determined by the date of the purchase from the North State Company, Pope's grantee, except as hereinafter stated. If at that time the defendant had no actual or constructive notice of the plaintiff's equity, and was a bona fide purchaser for value, it acquired title to the timber in controversy, and the extension of the time of cutting by plaintiffs did not affect it.

The action is not brought to reform and correct the extension deed, as we understand the complaint. That deed refers to the deed to Pope, Book 80, p. 447, for a description of the land, and the extension by its very terms applies to all the timber covered by the Pope deed.

By proper amendment to the complaint the plaintiffs will be permitted to set out another cause of action and to prove, if they can, that the descriptive words of the extension deed were inserted by mutual mistake of the plaintiffs and the defendant, the Rowland Lumber Company, and that the extension deed was intended to apply only to the cutting of timber on the 75 acres alleged to have been marked out at the time. If the plaintiff shall succeed in properly establishing that allegation, the issue tendered by defendant, supra, would be immaterial. The rights of the defendant would then be determined by the extension deed.

As this case is to be tried again, we will repeat, what has been often decided, that a deed cannot be corrected or reformed because of the mistake of one of the parties to it, but only when the mistake is *mutual* —that is, the mistake of both parties—or else upon the mistake *of one* party brought about by the fraud of the other. * * *

New trial.

## BROWN v. FAGAN.

(Supreme Court of Missouri, 1880. 71 Mo. 563.)

NORTON, J.[20] * * * It is not claimed that this evidence shows that any fraud was practiced by plaintiff in the procurement of the execution of the note sued on; but it is insisted that it does show that the note was given under a mistake of facts which constituted the inducement for the execution of it, and in such cases equity will afford relief. It may be conceded to be established law that equity will relieve against a contract which is founded on a mutual mistake of the facts which constitute the essence and basis of the contract; but it is equally well settled that equity will not afford relief in cases of mistake of facts, when the party entering into it had the means of knowing the true state of facts, and by gross negligence failed to use such means. Though a court of equity will relieve against mistake, it will not assist a man whose condition is attributable to that want of due diligence which may be fairly expected from a reasonable person; and gross negligence is presumed when a man is ignorant of the general laws of his country or of his own affairs. * * *

Applying this principle to the facts of the case before us, we can see no ground for interfering with the judgment and extending to defendant the relief he seeks. It appears from his own evidence that he was well acquainted with the marble business, for the carrying on of which the partnerships were formed, he having been engaged in it for thirty years. It also appears that plaintiff, who had just passed from his minority to full age when he entered the partnership, was a farmer, wholly without experience or knowledge of the business upon which he was entering, and conveyed to defendant his farm, valued at $2,800, for an equal interest in the stock and business. It also appears that, at the end of fourteen months, a dissolution of said partnership was proposed by defendant, who agreed to pay plaintiff for his interest therein the amount he had put in, with ten per cent interest and commission on the sales made by plaintiff, less the amount which plaintiff had drawn out, leaving the true amount to be paid about $2,600, and that the note in suit for $1,600 was given in part payment of said sum. The evidence also tended to show that defendant over-estimated the value of plaintiff's interest, and that, in consequence of the firm having lost money, said interest was worth less than the amount he agreed to pay. Conceding that the evidence shows that defendant was mistaken in putting the value of plaintiff's interest at a greater sum than it was worth, when the facts are considered, that his thirty years' experience in the business must necessarily have familiarized him with the affairs of the partnership; that he had free and undenied access to the books, and had within his reach all the means of knowing to the fullest extent the real value

[20] Parts of the opinion are omitted.

of plaintiff's interest, and failed to use them; that he only had to look to learn, and closed his eyes, he cannot now be heard to set up his mistake to avoid the settlement or allege his ignorance of the true condition of his own affairs in order to escape liability. Especially is this so in the absence of any evidence tending to show that plaintiff in any manner induced defendant to omit making any inquiry as to the actual value of his interest, or using the means within his reach, which, had they been resorted to, would have disclosed the true state of facts. Judgment affirmed, in which all concur.

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## PALMER et al. v. HARTFORD FIRE INS. CO.

(Supreme Court of Errors of Connecticut, 1887. 54 Conn. 488, 9 Atl. 248.)

Suit for the reformation of a policy of fire insurance, and for the recovery of the amount due on the policy when reformed, brought to the Superior Court in New London county. * * *

PARDEE, J.[21] The complaint in this case is in effect as follows:

Prior to May 15, 1884, the defendant had issued to the plaintiffs a policy of insurance against loss by fire upon merchandise. On that day it expired. On that day the defendant proposed to them to renew the insurance upon the terms and conditions of the expiring policy. The plaintiffs accepted the proposition. The defendant wrote a policy, delivered it to, and received the premium from, the plaintiffs. They, relying upon the fidelity of the defendant to its promise, and supposing the last written policy to contain the same stipulations and conditions as were in the first, omitted to read it. The merchandise was damaged by fire on August 17, 1884. Subsequently the plaintiffs for the first time discovered that the last policy contained this condition, which was not in the first:

"Co-Insurance Clause. If the value of the property at the time of any fire shall be greater than the amount of the insurance thereon, the insurer shall be considered as co-insurer for such excess, and all losses shall be adjusted accordingly."

In this respect the last policy materially differs from the first. The plaintiffs would not have accepted the policy and paid the premium if they had known that it contained this clause; and, if the defendant had notified them of its refusal to perform its agreement, they could and would have obtained elsewhere, at the same price, the desired insurance upon the stipulated terms. The defendant refuses either to correct the policy or perform the agreement. The plaintiffs ask that the policy may be reformed so as to express the agreement, and that the defendant be compelled to perform the agreement, and pay the indem-

[21] The statement of facts is abridged and part of the opinion is omitted.

nity promised by it. The defendant answers by demurrer, assigning therefor the following reasons:

"That up the facts stated the plaintiffs are not entitled to the relief sought; that the complaint does not aver that there was a mutual mistake between the parties as to the terms of the policy, or as to the agreement for one; and that the plaintiffs were guilty of gross laches in not reading the policy, and in not notifying the defendant of their claim, so that it might have exercised its right of rescission before loss."

The superior court held the complaint to be insufficient. * * *

It is a matter of common knowledge that a policy of insurance against fire, at the present day, is a lengthy contract, which, after specifying the main things,—namely, the subject, its location, the owner, the amount, the time, and the price,—embodies very many stipulations and conditions for the protection of the underwriter. If a person desiring indemnity against loss applies to the underwriter, and states the main things above enumerated, and says no more, he has knowledge that he has asked for and will receive a contract which, in addition to those, will contain many limiting conditions in behalf of the party executing it; and, when he receives the policy, he cannot avoid seeing and knowing that there are many more stipulations in it than were covered by his verbal request. It may well be that a due regard for the rights of others requires him to examine those stipulations, and express a timely dissent, or be held to an acceptance thereof. Nothing which has previously transpired between him and the underwriter furnishes justification for omission to read them. The underwriter has not invited his confidence by any promise as to what the writing shall contain or omit.

But if the underwriter solicits a person to purchase of him indemnity against loss by fire, and if they unite in making a written draft of all the terms, conditions, and stipulations which are to become a part of or in any way affect the contract, and if the underwriter promises to make and sign a copy thereof, and deliver it as the evidence of the terms of his undertaking, and if a material and variant condition is by mistake inserted, and the variant contract is delivered, and the stipulated premium is received and retained, the court will not hear the claim that he is entitled to the benefit of the variant condition, where the other party had neither actual nor imputed knowledge of the change. In his promise to make and deliver an accurate copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not, for his pecuniary advantage, to impute it to another as gross negligence that the other trusted to his fidelity to a promise of that character.

The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted, is subject to this limitation, namely; that it is not to be applied in behalf of any person who by word or act has induced the omission to read. The defendant has brought to our notice a few of the many cases in which the rule has been plainly declared; but we

think that in few or none of these did the party seeking to enforce it subject himself to this limitation.

There was in the first written draft agreed upon by the plaintiffs and defendant the contract between them. In all its terms and conditions it became, and has hitherto continued to be, operative. The draft of another and variant one has not annulled or affected it, because the last has not in the eye of the law been accepted by or become obligatory upon the plaintiffs. That contract the defendant had the right to rescind,—a right which it has possessed in its fullest measure, because it was not affected by the delivery of the variant one, not accepted by the plaintiffs; and if, because of its own negligence in omitting to execute and deliver a true copy of the original agreement, it resulted that it was induced to refrain from exercising its right of rescission, it must accept the consequences, rather than cast the burden upon the plaintiffs.

There is error in the judgment complained of, and it is reversed. In this opinion the other Judges concurred.

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## WALLACE v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Iowa, 1885. 67 Iowa, 547, 25 N. W. 772.)

ROTHROCK, J. The plaintiff was the conductor of a transfer train engaged in moving cars across the Missouri river between Sioux City, Iowa, and Covington, Nebraska, by means of boats, and in making up trains and switching cars upon transfer tracks and side tracks. These transfer tracks were not permanent structures. By reason of the changing of the channel and banks of the river the landing of the boats and the transfer tracks were required to be frequently moved. The tracks were laid down in a temporary manner, and the spaces between the ties were not filled up, and the ties were not placed at uniform distances from each other. The plaintiff claims that in attempting to make a coupling on one of these tracks at Covington, and while the cars to be coupled were in motion, his foot caught between two ties, and in attempting to extricate it he involuntarily threw up his hand in such a position that it came between the draw-heads of said cars, and he was severely injured. He was in full command of the train, and the cars were moving by his direction, and he makes no complaint of any negligence of the engineer or other train-men; and he admits that he was aware of the condition of the track. But he alleges that the defendant was negligent in the construction of the track, and that he made complaint of the track to the proper officers of the company, and that they promised to repair and properly construct it, and that the injury was received by reason of the negligence of the defendant to keep its promise to make the proper repairs. The injury was such that it became necessary to amputate the third and fourth fingers of the left hand.

Soon after the injury the plaintiff resumed work for the company, and continued in said employment for several months.

It is urged by counsel for appellant that the evidence does not show that the plaintiff made any complaint of the condition of the track in question to any officer of the defendant who had any authority over repairs upon the road, and that the evidence shows, without conflict, that the injury was properly attributable to the plaintiff's own carelessness and negligence. We do not deem it necessary to determine these questions, because, in our opinion, the judgment must be reversed upon another ground, which we will now proceed to consider.

2. The defendant, as a full defense to the action, pleaded that in February, 1883, several months after the injury was received, the plaintiff and the defendant made a full and fair settlement of all claims for damages by reason of said injury, and the defendant, in pursuance of said settlement, paid the sum agreed upon, to the full satisfaction of the plaintiff. Said settlement and the release were in writing, signed by the plaintiff. These instruments were introduced in evidence. It is unnecessary to set them out here. It is sufficient to say that they are a full acquittance and discharge of the defendant for all damages for the injury complained of. The injury is so fully described therein that no one could read the writings without knowing that they were a settlement of all claims for damages on account of the cause of action upon which the suit was brought. The defendant showed, by the testimony of its station agent at Covington, that he read the release to the plaintiff, and that he affixed his signature thereto with full knowledge of its contents, and that the witness had several conversations with the plaintiff before the settlement was made, and that the amount was agreed upon and fully understood by plaintiff.

The plaintiff claimed that the release was obtained from him by fraud, and was not binding upon him for that reason. To establish the charge of fraud he testified, in substance, that when he signed the writings they were not read over to him, but that the agent who procured his signature thereto stated to him that they were vouchers for his back pay, and that he had no knowledge of the contents of the writings which he signed. The plaintiff was a man of sufficient intelligence to be a railroad conductor. He had been deputy sheriff of Woodbury county, and could read writing and make out papers and transact any kind of ordinary business. He stated in his testimony that there was nothing to hinder him from reading the papers before signing them, and nothing was done to keep him from reading them. An examination of all the facts and circumstances disclosed in the evidence leads the unprejudiced mind to the conclusion that the plaintiff was fully aware of the contents of the writings when he signed them. But that was a question for the jury. The question for us to determine is, did the plaintiff show that his signature was procured by fraud, conceding his own testimony to be true? Or, rather, did he show such a state

of facts as that a jury might properly find that the contract which he signed was procured by fraud? We think it is very clear that his testimony did not authorize the finding of the jury. He was laboring under no infirmity which prevented him from reading the writings, as by reason of defective sight or the like. He does not claim that he requested the instruments to be read to him, and that the contents were purposely misrepresented in the reading, or that he was deceived by any sleight of hand, legerdemain, or artifice. On the contrary, he admits that he could have read the papers, and that he had full opportunity to do so, and the words "release of damages," in bold faced printed letters, were at the head of the release, and could have been seen at a mere glance.

The defendant requested the court to charge the jury as follows: "(3) That if you find that the plaintiff had the capacity to read the release signed by him, and had an opportunity to do so, and no fraud was practiced upon him to prevent him from reading it, but that, having full opportunity to read it before signing, and chose to rely upon what Mr. Flint said about it, he is estopped by his own negligence from claiming that the same are not legal and binding upon him, according to its terms." This request to charge was refused. It should have been given. It is in exact accord with the cases of Bell v. Ryerson, 11 Iowa, 233, 77 Am. Dec. 142; McCormack v. Molburg, 43 Iowa, 561; and McKinney v. Herrick, 66 Iowa, 414, 23 N. W. 767. See, also, Pars. Cont. 772; Kerr, Fraud & M. 77.

Reversed.

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## WARD v. SPELTS & KLOSTERMAN.

(Supreme Court of Nebraska, 1894. 39 Neb. 809, 58 N. W. 426.)

RAGAN, C.[22] Spelts & Klosterman sued Mike Ward in the district court of Seward county for damages for his failure to deliver to them 3,000 bushels of corn, in pursuance of a contract in words and figures as follows:

"In consideration of $50.00, this day to me in hand paid by Spelts and Klosterman, and interest thereon at ten per cent. per annum until fulfillment of this contract, I hereby sell and convey unto the said Spelts and Klosterman 3,000 bushels of good, sound, dry, shelled corn, at 23½ cents a bushel, the same being now on [a certain quarter section of land], and agree to deliver the same in good order at Ulysses, Nebraska, at buyer's option, in the months of July and August, A. D. 1890.

"Dated this 31 day of June, 1890. "Mike his X mark Ward."

Spelts & Klosterman pleaded that they had on the date of the execution of said writing paid Ward the $50; that Ward had delivered them only 250 bushels of corn; that they had demanded of Ward a delivery of the corn pursuant to said contract; that he had failed and

[22] Parts of the opinion are omitted.

refused to deliver; and that the corn, at the time and place it should have been delivered, was worth 40 cents a bushel, and, by reason of Ward's failure to comply with the agreement, they had been damaged. Ward's defense, so far as material here, was that on the 1st day of July, 1890, he received from Spelts & Klosterman $52.50 in money, and at that time he agreed to sell and deliver to them, at 23½ cents per bushel, sufficient corn to repay said money, and that he further agreed that, if he had any other grain to spare, he would sell the same to Spelts & Klosterman at the same price; that the agent of Spelts & Klosterman made a memorandum in writing, which he (Ward) supposed embraced the contract between him and Spelts & Klosterman, and was his receipt for the money he had received of them; that said agent presented the memorandum to him (Ward), and informed him that it embraced the agreement to deliver sufficient grain to pay the $52.50, and any other grain that Ward might be able to spare; that he (Ward) could neither read nor write, and was induced to and did sign said memorandum believing the contract embraced the agreement actually made between him and Spelts & Klosterman. The case was tried to a jury, and a verdict returned against Ward; and he brings the judgment rendered on such verdict here for review. * * *

2. The second error alleged is the giving by the court to the jury of an instruction as follows:

"The defendant having admitted signing the contract under which the plaintiff claims, before he can avoid said written contract, on the ground of fraud practiced upon him because he could not read it, he must satisfy you that he was not negligent or careless in affixing his signature, by mark, to said writing; and that if he made his mark thereto without asking to have the contents read to him or to be told what the contents of the writing were, but so affixed his signature thereto on request of plaintiff's agent, without anything further being said or done to induce him to sign it, then, in that case, he should be held to have duly made said contract, and should be bound by the terms thereof."

The principal question litigated in the case was whether the contract sued on was the contract made between Ward and Spelts & Klosterman through their agent. * * * The instruction complained of told the jury in effect that, if the agent of Spelts & Klosterman practiced a fraud on Ward by putting into writing a different contract from the one actually made, then, if Ward signed such contract at the request of the agent, without asking to have the contract read to him, he was bound by it. This instruction was erroneous. The suit on this contract is between the original parties thereto, and Ward is liable for damages for his failure to perform the contract he made, not for his failure to perform the contract he did not make; but, by the instruction given, the jury are told that, if he neglected to have this contract read over to him, he is bound by it, simply because he signed it. * * *

The doctrine that the carelessness or negligence of a party in signing writing estops him from afterwards disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto, when the defense is that such writing, by reason of fraud, does

not embrace the contract actually made. In the case at bar, counsel for defendants in error insist that, even if the instruction complained of was erroneous, still the case should not be reversed, because they say that, under the evidence, the jury could have reached no other conclusion than that the contract is and was the contract made between Ward and Spelts & Klosterman. In other words, counsel contend that, had the jury found verdict in Ward's favor, the trial court would have been compelled to set it aside as unsupported by the evidence. We do not desire to express any opinion on the weight of the evidence or the credibility of the witnesses, or any of them; but the trouble with the contention of counsel is that, by the instruction complained of, the jury, if it obeyed such instruction, was compelled to find a verdict against Ward.

The judgment of the district court must be reversed, and the cause remanded for a new trial; and it is so ordered. Judgment accordingly.

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## HAWKINS v. PEARSON et al.

**(Supreme Court of Alabama, 1892. 96 Ala. 369, 11 South. 304.)**

The complainant, having shown by his bill that there was usury in the mortgage contract, and not having offered to do equity in releasing his claim to all interest, and accept only the principal of his debt, cannot obtain a revision of the mortgage as is prayed for in his amended bill. The chancellor sustained each of these grounds of demurrer.

McCLELLAN, J.[23] A contract which stipulates for the payment of a greater rate of interest than 8 per cent. is tainted with an evil and unlawful intent in such sort that while the payor, if he invokes equitable interposition upon it in his behalf, must do equity by offering to pay the legal rate of interest, the payee, when be becomes the actor in a court of equity, must always remove the taint by an offer to abate the whole of the interest, since the principal is all that he is entitled to recover, and without such abatement he cannot be said to come into the court with clean hands. And it is immaterial what the relief presently sought may be, whether an immediate enforcement of the debt or some collateral advantage,—as, for instance, in the case at bar, the reformation of the contract in matter of description. Whether direct and ultimate, or mediate and collateral, a court of conscience will not respond to the prayer of one who stands before it in the attitude of insisting upon any relief on a claim thus infected with this settlement of quasi criminality. The bill in this case showing that the mortgage sought to be reformed was tainted with usury, and containing no offer to abate the whole interest, complainant was not entitled to any relief upon it, and the demurrers which were addressed to this point were properly sustained. * * *

[23] The statement of facts is abridged and part of the opinion is omitted.

### *(B) Mutual Mistake of Law*

## PUSEY v. DESBOUVRIE.

(In Chancery before Lord Talbot, 1734. 3 P. Wms. 315.)

Sir Edward Desbouvrie was a freeman of London, and possessed of a very great personal estate. He had a wife, with whom he had compounded as to her customary part, and had a son (the defendant), to to whom he had given very considerable sums of money, in order to enable him to trade. He had also one daughter.

The father made his will, giving (inter al') to his daughter £10,000 upon condition, that she should release her orphanage part, together with all her claim or right to his personal estate by virtue of the custom of the City of London, or otherwise, and made his son executor, his daughter being about the age of twenty-three years.

After the father's death it was agreed between the daughter and the brother, that she should accept of her legacy of £10,000 and upon the terms whereon it was given her by her father's will, that is, she to release all her right by virtue of the custom, &c. which release was accordingly prepared, and before she executed it, her brother informed her, that she had it in her election to have an account of her father's personal estate, and to claim her orphanage part, and her uncle was then present. But the daughter at that time declared, she would accept of the legacy left her by her father, that being a sufficient provision for any young woman; and thereupon she executed the release, being then about twenty-four years old, and the brother paid to her the £10,000 and interest. The daughter afterwards married one Mr. Pusey, an attorney at law, who brought a bill to set aside this release, charging that the personal estate of which the father died possessed, was much above £100,000 the daughter's share of which by the custom would amount to upwards of £40,000 that the mother having been compounded with for her customary part, the freeman's personal estate was to be distributed as if there was no wife, consequently the dead man's part was one moiety, and the children's part the other; and that the brother, the defendant, Sir Edward Desbouvrie, had been advanced in his father's lifetime by his father at different times, with several great sums of money, the whole whereof would amount to a full advancement of the son: so that the plaintiff Pusey, in right of the daughter his wife, was entitled to a moiety of her father the freeman's personal estate.

The defendant the brother pleaded this release. * * *

LORD CHANCELLOR.[24] I do not see that any manner of fraud has been made use of in this case, but still it seems hard a young woman should suffer for her ignorance of the law, or of the custom of the City

[24] The statement of facts is abridged and part of the opinion is omitted.

of London; or that the other side should take advantage of such ignorance. * * *

It is true, it appears, the son the defendant did inform the daughter, that she was bound, either to waive the legacy given by the father, or to release her right by the custom; and so far she might know, that it was in her power to accept either the legacy, or orphanage part; but I hardly think she knew she was entitled to have an account taken of the personal estate of her father, and first to know what her orphanage part did amount to; and that, when she should be fully apprised of this, then, and not till then, she was to make her election, which very much alters the case; for probably she would not have elected to accept her legacy, had she known, or been informed, what her orphanage part amounted unto, before she waived it, and accepted the legacy.

It would give light into this cause, to know what might be the value of the father's personal estate at his death, and (if the parties think fit) what was the value thereof, when the will was made; because it has been said to have been increased by the father between the time of making his will and his death; and also to know, what the son has received in his father's lifetime from his father, for or towards his advancement.

Therefore let the plea stand for an answer, saving the benefit thereof until the hearing; and let the defendant the son answer, not as to particulars (for that I do not expect), but by way of computation in gross, as to these points.

It appears from the Register's book, that on the 8th of May, 1735, upon the defendant's motion it was alleged, that the suit was agreed between the parties; it was therefore prayed, that the plaintiff's bill might be dismissed without costs; which on consent of the plaintiff's counsel, was ordered accordingly.

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## BINGHAM v. BINGHAM.

(In Chancery before Lord Hardwicke, Chancellor, 1748. 3 Ves. Sr. Supp. 79, 28 E. R. 462.)

The material facts were as follows: One John Bingham (inter alia) devised an estate tail, in certain lands, to Daniel his eldest son and heir, limiting the reversion in fee to his own heirs. Daniel left no issue, but devised this estate to the Plaintiff in fee. The bill stated, that the latter, being ignorant of the law, and persuaded by the Defendant, and his scrivener and conveyancer, that Daniel had no power to make such devise, and being also subjected to an action of ejectment, purchased the estate of the Defendant for £80; and that it was conveyed to him by lease and release. The Bill was to have this money repaid with interest. The Defendant, by his answer, first of all insisted, that Daniel had no power to make such devise; but if he had, he urged, that

the Plaintiff should have "been better advised before he parted with his money, for that all purchases were to be at the peril of the purchaser." The Decree was for the money, with interest and costs.

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## DUPRE et al. v. THOMPSON et al.

(Supreme Court of New York, 1848. 4 Barb. 279.)

EDMONDS, J.[25] There are two reasons why I cannot grant to these plaintiffs the decree they seek, to set aside the whole of this trust deed. First. It was a voluntary conveyance on their part, and they seek to vacate it, not on the ground of a mistake as to matter of fact, but because they were ignorant what would be its legal effect, and operation and had made a mistake in a point of law. Now courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of the facts, though under a mistake of the law. Lyon v. Richmond, 2 Johns. Ch. 51; Clarke v. Dutcher, 9 Cow. 674; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589; Hunt v. Rhodes, 1 Pet. 1, 7 L. Ed. 27. This is the general rule, that a mistake of this character is not a ground for reforming a deed founded on such mistake. But I do not mean to assert that there are no exceptions to the rule, or that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of the law. The rule prevails in all cases of compromises of doubtful and perhaps in all cases of doubted rights; and especially in all cases of family arrangements; and is relaxed where there is a total ignorance of title, founded in the mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence, or surprise. And it may safely be affirmed, on the highest authority, as a well established doctrine, that a mere naked mistake of law, unattended with any such special circumstances as have been suggested, furnished no ground for relief. 1 Story's Eq. Juris. §§ 137, 138. The case under consideration appears to me clearly to come within the general rule, and not within the exception. There is no pretence of imposition, misrepresentation, undue influence, misplaced confidence, or surprise. These daughters, with the consent of their husbands, being seised of an absolute ownership of this property in severalty, saw fit to settle it upon themselves for life, and upon their children in fee after their death, so that it might be exempt from any control of, or responsibility for, any husbands which they then had or might afterwards have. So far they understood their rights, and seem to have had a due comprehension of what they desired; and so far no mistake of either law or fact is suggested. But in attempting to provide for the contingency of the daughters dying without children, it is alleged that they have made some

[25] The statement of facts and part of the opinion are omitted.

limitations over which are void, which it is supposed they would not have made if they had well understood the law.

Allowing all this to be so, (and it is the strength of the case as made out for the plaintiffs,) I see in it nothing to bring it within the exceptions of the rule, but on the other hand, so far as two of the plaintiffs are concerned, a desire to take that which belonged originally to the wives, from a very proper settlement of it upon those wives and their children, and subject it to their own control and a liability to their debts. The claim does not commend itself to the favor of the court, and I cannot allow it, unless compelled to do so by some stern rule of law, which I have not yet found, nor been referred to. * * *

The bill must be dismissed with costs.

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## ALLEN v. ELDER & SON.

**(Supreme Court of Georgia, 1886. 76 Ga. 674, 2 Am. St. Rep. 63.)**

HALL, J.[26] The complainant exhibited her bill on the equity side of the court, praying the reformation of a mortgage, which she alleged was defectively executed, in that it had no scroll attached to the signature of the mortgagors, although it was stated on its face that it was "sealed," as well as "signed and delivered;" that it was her intention, as well as that of the mortgagors, to make the instrument a good, valid and legal mortgage, and that they failed in so doing in consequence of a mutual mistake of the law upon the subject; she further prayed that, when so reformed and made to speak the intention of the parties, the paper might be foreclosed as a mortgage. Discovery was prayed as to these matters from the defendants, and for the purpose of making it full, specific interrogatories, which they were required to answer, were propounded. They filed an answer, but it was not full, and the response to the statements in the bill and to the interrogatories was evasive and insufficient. They also filed a demurrer setting up the statute of limitations to the paper, which the bill sought to have corrected, in which they insisted that in its present form it was a simple contract, and not a specialty; and that the suit on it was not brought within six years from the time it was due. They denied that its insufficiency was the result of a mutual mistake of the law, but answered that it was the result of mutual ignorance of the law. There was no denial, however, of the intention charged in the bill to make this a good, valid and sufficient deed of mortgage. This disingenuous and insufficient answer, with what appeared on the face of the instrument, admitted enough, under the rules of equity, to have entitled the complainant to the decree she prayed; and these issues on this evidence should have been submitted to the jury. When the complainant had closed her case, the court sustained the demurrer, holding that the instrument was

[26] **Parts of the opinion are omitted.**

not a deed under seal, but a simple contract, and the suit thereon was barred by the statute of limitations.

Whether, abstractly considered, this was a correct decision under the law, it is needless to inquire; it is enough that no such question was made by the pleadings and the proof. The bill admitted that this was not a contract under seal, but prayed that, inasmuch as it was the intention of the parties so to make it, and that such intention failed to be carried into effect on account of their mutual mistake as to the law, it might be made to speak their real intention, and decreed to be an instrument under seal and be foreclosed as a mortgage.

The bill made no such point as that decided by the court; it did not seek the enforcement of the contract in its present form; it conceded that this could not be done under the law, but it insisted that it should be put into the form originally intended, and that then it should be enforced in accordance with its real purport and effect.

1. Our Code, § 3117, defines a mistake relievable in equity as some unintentional act, or omission, or error, arising from ignorance, surprise, imposition or misplaced confidence. It adds that the power is exercised with caution, and to justify it, the evidence must be clear, unequivocal and decisive as to the mistake. The relief will be granted, as between the original parties, and their privies in law, in fact or estate, except bona fide purchasers for value without notice. Id. § 3119. It is further declared that mistakes may be either of law or fact. Id. § 3120.

2. And while it is true that for mere ignorance of law on the part of the party herself, where the facts were all known, and there was no misplaced confidence, and no artifice or deception, or fraudulent practice used by the other party to induce the mistake of law, or to prevent its correction, equity will not intervene and grant the relief prayed. Id. § 3121. Yet if there be an honest mistake of the law as to the effect of an instrument on the part of both contracting parties, especially where it operates as a gross injustice to one, and gives an unconscientious advantage to the other, such mistake may be relieved in equity. Id. § 3122.

A careful examination of this record might, we think, authorize a jury to conclude that the defendants, in acting as they have been shown to have done, were guilty of fraudulent practices in order to prevent the correction of the mistake of law, which they admit resulted, not only from their own ignorance of law, but likewise that of the complainant; or else that they were both honestly mistaken as to the legal effect of the instrument, and being so mistaken, gross injustice would be done the complainant, and they would be enabled to retain an unconscientious advantage, unless the relief prayed was decreed. * * *

Justice seems to require that there should be a fuller investigation of the case. * * * Judgment reversed.[27]

[27] In the case of Beauchamp v. Winn, (1873) L. R. 6 E. & I. App. 223, Lord Chelmsford said: "With regard to the objection, that the mistake (if any) was

## WELCH'S ADM'R v. WELCH.

(Superior Court of Bourbon County, Kentucky, 1892. 13 Ky. Law Rep. 639.)

Appeal from Bourbon Circuit Court. Opinion of the court by JUDGE BARBOUR.

1. Reformation of Contract for Mistake of Law.—The chancellor has power to reform a written contract where there has been a mutual mistake of law as to the effect of the terms used, as well as where there has been a mistake of fact.

2. Reformation of Insurance Policy.—Where a policy of insurance, by reason of a mutual mistake of law as to the effect of the language used, fails to express the intention of the parties, the chancellor may, either upon the application of the insured during his life, or upon the application of the beneficiary after his death, correct the mistake.

An applicant for insurance told the insurance agent that he wished to insure his life for the benefit of his wife, and the application was so filled out, but the agent, conceiving that the application made out in that way in the absence of the wife would be irregular, induced the insured to consent that the application might be rewritten and the policy made payable to himself, which was done, the agent assuring him that his wife would get the money under the second form of application as well as under the first. The insured having died, in this action his creditors insist that the insurance money should be applied to the payment of their debts, while the widow insists that the insurance was taken out for her benefit, but by mistake the policy was made payable to the insured. Held—That the chancellor has power to correct the mistake and to give the fund to the widow.

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## LARKINS et al. v. BIDDLE et al.

(Supreme Court of Alabama, 1852. 21 Ala. 252.)

Error to the Chancery Court of Lowndes.

Tried before the Hon. J. W. Lesesne.

The complainant, Eliza Larkins, filed her original bill to reform a deed of gift, which was executed and drawn by her father, James

one of law, and that the rule, 'Ignorantia juris neminem excusat' applies, I would observe upon the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake. Therefore, although when a certain construction has been put by a court of law upon a deed, it must be taken that the legal construction was clear, yet the ignorance, before the decision, of what was the true construction, cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed."

Maul, on the ground that it was his intention to settle certain slaves, specified in said deed, to her sole and separate use, free from the debts of her husband, which intention was not expressed in the deed, in consequence of the ignorance and want of skill in the draftsman. Certain judgment creditors of the husband of the complainant, who were about to levy their executions on said slaves, and the administrator of the husband, who was about to commence suit for them, were made defendants; and the prayer of the bill was, for an injunction as to such creditors and the administrator, and the reformation of the deed according to the intention of the grantor. A demurrer was filed to the original bill, for want of equity and multifariousness. An amended bill was subsequently filed, which charges that, in making the deed, it was the intention of the grantor to have secured the slaves to the separate use of the said Eliza Larkins during her life, and at her death to her children, to which amended bill a demurrer was also filed. On the hearing, a decree was rendered dismissing the bill, from which the complainants prosecuted a writ of error.

GOLDTHWAITE, J.[28] The objections to the original bill, for want of equity and multifariousness, cannot prevail. The object of the bill is, the reformation of a deed of gift, drawn by the grantor himself, but which, from his ignorance of the law, was so unskillfully drawn as not to express his intention. The general rule is, that mistakes of law cannot be relieved in equity, and while the policy and correctness of the rule are conceded, there is frequently found some difficulty in its application. There can, we apprehend, be no doubt, that where the instrument speaks the true agreement between the parties, equity cannot reform it, because one or both of them may have mistaken its legal consequences. There is in such a case nothing for equity to lay hold of. The parties have made their own contract, and a court of equity cannot change it. Hunt v. Rousmanier, 1 Pet. 1 [7 L. Ed. 27]. Thus, if, in an agreement for the purchase of land, it was stipulated that the vendor should make certain warranties, a mistake as to the legal consequences of such warranties would not authorize an application to a court of chancery for relief, however clearly the mistake was made out. But where the instrument does not express the agreement of the parties, from ignorance or want of skill on the part of the draftsman, or any other cause, it is competent for equity to correct the mistake. Hunt v. Rousmanier, supra. Thus, if, in the case of the warranties as before stated, the deed was drawn by the one party, and accepted by the other, under the impression that the language of the instrument was sufficient to create the warranties stipulated for, when the terms used were not in law sufficient for that purpose, equity would in that case reform the deed so as to express the true agreement. Although the error occurred through a mistake or ignorance of the law, the er-

[28] Part of the opinion is omitted.

ror itself might be more properly considered as a mistake of fact. This principle applies in its full force to the case under consideration, and is sustained by the decisions of this court. * * *

To the amended bill, however, there was good ground of demurrer. The bill, as originally filed, charged that it was the intention of James Maul, in making the conveyance which it is the object of the bill to reform, to settle the slaves specified therein, to the sole and separate use of the complainant, without being subject to any debts of her husband; and the prayer is, to reform it so as to give effect to the intention of the grantor. The amended bill charges that, at the time of the execution of the conveyance, it was the intention of James Maul, to secure the slaves mentioned therein to the sole and separate use of the complainant during her life, and at her death to her children. It is clear, that the amendment is inconsistent with, and makes a new case from the original bill; and the rule is, that amendments can only be granted, when the bill is found deficient in the proper parties, in the prayer for relief, or in the omission or mistake of some fact connected with the substance of the case. Lyon v. Tallmadge, 1 Johns. Ch. (N. Y.) 184; Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 46. The amendment here makes a new case, because it sets up a different agreement from that charged in the original bill. McKinley v. Irvine, 13 Ala. 681.

The decree of the Chancellor dismissing the bill, must be reversed with costs, and a decree rendered dismissing the bill without prejudice.

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## GROSS CONST. CO. v. HALES et al.

**(Supreme Court of Oklahoma, 1912. 37 Okl. 131, 129 Pac. 28.)**

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; R. H. Loofbourrow, Judge.

Action by the Gross Construction Company against George H. Hales and others. Judgment for defendants, and plaintiff brings error.

ROSSER, C.[20] * * * The building contract was upon a form used by the National Association of Architects and Builders, and into the form was written the following:

**"This contract will include all walls and party walls, which are to be paid for by the contractor."**

The plans and specification, according to which the building was constructed, were not produced at the trial. The defendant, after persistent effort to show by parol testimony what was meant by the provisions in the contract, that it was to "include all walls and party walls, which were to be paid for by the contractor," offered to amend his cross-petition by alleging that he was induced to sign the contract through fraudulent representations made to him by plaintiff with ref-

[20] Parts of the opinion are omitted.

erence to the construction that would be placed upon the contract which he signed, and that he relied upon the statements made by the plaintiff, and he believed them to be true, and signed the contract, relying upon such representations. The court refused to permit the amendment. The defendant then undertook to prove that the contract to pay for the party walls was made by the plaintiff separate and distinct from the written contract, and that there was a valid and binding agreement made between the plaintiff and defendant by which the plaintiff agreed to pay defendant's portion of the price of the construction of the wall on the east side of lot 16. When this evidence was excluded by the court, the defendant asked leave to amend his answer to the effect that the contract sued on did not express the real agreement between the parties, and that the failure to so express said agreement between the parties was a mutual mistake upon the part of the plaintiff and defendant Hales, and that it was the agreement of the parties that plaintiff should pay for that portion of the wall on the east side of lot 16, block 7, of Oklahoma City, or the price of the construction of that wall that defendant, by former agreement entered into with one S. M. Gloyd, had agreed to pay, and also that the same agreement was entered into with reference to the plaintiff paying for that portion of the party wall on the west side of lot 10 that defendant was bound to pay, and asked that the agreement be reformed to state what the actual understanding and agreement of the parties was. The court permitted this amendment, and the trial then proceeded, and there was a verdict and judgment reducing the plaintiff's claim to the extent of the amount claimed by the defendant for the party wall.

The defendant testified that before the contract was signed the plaintiff agreed to pay for half of "Sipes' wall," and "Will Hales' wall, and also the partnership walls on all the rest of the building." He said that after he had this conversation with the plaintiff that the clause, "This contract will include all walls and party walls, which are to be paid for by the contractor," was written into the contract. And then stated that he had a talk with the plaintiff's manager as to what this meant, and said:

"He (meaning plaintiff) told me would pay for the east wall, Mr. Gloyd's, and all the party walls. That is the reason that I had it put in that way. I had signed a contract with Mr. Gloyd, and Mr. Gross knew all about it. When we talked this over, Mr. Gross agreed to pay for all the walls for this contract, in this contract."

Then the examination proceeds as follows:

"Q. Did you tell him that the clause intended he should pay for all these walls in this contract? A. I told him that he would have to agree, before I would sign this contract, he would pay for all the walls, Jasper Sipes', W. T. Hales', Gloyd's wall, and Heinrich's wall, and his own wall, and he agreed to and did. That was the conversation."

Defendant was corroborated to a certain extent by the witness Heinrich. It also appears that plaintiff paid for some of the party walls

and gave defendant credit on his account for $550.50 that defendant had paid on the Sipes' wall.

The grounds urged by plaintiff for a reversal of this case are reducible to two heads: First, that the court erred in permitting the defendant to amend his answer so as to allege that through mistakes the contract failed to express the real intention of the parties. Second, that the evidence was not sufficient to support the allegations of the answer as amended.

Plaintiff's position is that the amendment permitted was inconsistent with the allegations of the original cross-petition, and that because of its inconsistency the amendment should not have been allowed, and that proof of the allegations of the amendment should not have been allowed. * * *

In this case the theory of the defendant was that both parties understood the contract, and that, by mistake as to the effect of the language used, the writing did not truly express the contract. In such cases equity will relieve. * * *

But plaintiff contends that, though defendant may have been mistaken as to the terms, he cannot have relief because plaintiff understood the effect of the language used, and cautioned the witness Heinrich not to explain to defendant its true effect. But if they made the contract as claimed in the amended answer, then, for the purpose of preparing it in written form, defendant was a mere draughtsman.

"Parties to an agreement may be mistaken as to some material fact connected therewith which formed the consideration thereof or inducement thereto, on the one side or the other, or they may simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed, it must be shown that the mistake is one of fact, and mutual; in the latter case it may be a mistake of the draftsman, or one party only, and it may be a mistake of law or of fact. Equity interferes in such a case, to compel the parties to execute the agreement which they have actually made." Pitcher v. Hennessey, 48 N. Y. 415.

If the contract actually made was that the plaintiff was to pay for the walls, and it was the intention of the parties it should be drawn that way, it should be reformed, although plaintiff may have understood its legal effect when it was presented. For the plaintiff to permit defendant to sign it believing it expressed the true contract, knowing that it did not, was a species of fraud, of which plaintiff cannot take advantage. In the case of Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559, the first paragraph of the syllabus is as follows:

"Equity will relieve against a mistake in a deed or contract in writing, upon satisfactory parol proof of such mistake, whether the relief is sought affirmatively by a suit to reform the contract, or by way of defense to a bill for specific performance, and this notwithstanding the fact that the mistake is denied by the opposite party."

In the course of the opinion, Chancellor Kent said:

"It is unnecessary to enter more minutely into the parol proof of the fact of the mistake. On that point there is no room for doubt. The only doubt with me is whether the defendant was not conscious of the error in the deed at the time he received it and executed the mortgage, and whether the deed

was not accepted by him in fraud, or with a voluntary suppression of the truth. That fraudulent views very early arose in his mind is abundantly proved. He asked Corbet, a witness, if he could not so run the line as to save the lower mill seat to himself; and he told David Brown that he meant to take counsel, and, if he found he could hold the whole lot, he intended to do so, as it was not his fault that the deed was made as it was. It would be a great defect in what Lord Eldon terms the moral jurisdiction of the court, if there was no relief for such a case. Suppose Mrs. Mann had applied for relief, instantly, on discovery of the mistake, and immediately after delivery of the deed, was no power in the whole administration of justice competent to help her? It has been the constant language of the courts of equity that parties can have relief in a contract founded in mistake as well as fraud. The rule in the courts of law is that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. But equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself."

There is no substantial error in the record, and the case should be affirmed.

PER CURIAM. Adopted in whole.[30]

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## HARRISON v. JAMESON.

(Court of Appeals of Kentucky, 1830. 3 J. J. Marsh. [26 Ky.] 232.)

Chief Justice ROBERTSON delivered the opinion of the Court.

This is a suit in chancery, for injoining a judgment at law, obtained by Jameson against Harrison.

The bill alleges that, after Harrison's marriage, Jameson presented to him an account for $104, money loaned at different times, to his wife, whilst unmarried; that not knowing any thing about the justice of the account, and being indisposed to dispute it, he executed his note for the amount charged to be due; and on which note Jameson had obtained judgment against him; that he had discovered, since the execution of the note, that the account was false, and that his wife owed only a small portion of it, the items of which part, so admitted to have been just, are stated. He, therefore, calls on Jameson to set out his account and prove its justice.

The injunction was granted, and Jameson answered. The answer does not deny the allegations of the bill, as to the consideration of the note, and the manner of its execution. Nor does it state the items of the account, but it insists that Bledsoe's heirs, of whom Harrison's wife was one, owed Jameson for various sums loaned to them, but chiefly

[30] "It is conceded that to justify the reformation of a written contract upon the ground of mistake the alleged mistake must be one of substance and of fact, and not of law; that such mistake must be proved by clear and entirely satisfactory evidence, and that a mere preponderance of evidence is not sufficient; that the mistake must be mutual and common to both parties to the instrument. Parol testimony may, however, be given to show that the written instrument does not express the real intent of the parties." Burns v. Caskey (1894) 100 Mich. 94, at 100, 58 N. W. 642.

to Mrs. Harrison, and that John Jameson, the executor of Bledsoe, had settled the account and admitted that it was just.

John Jameson proves that he settled with James Jameson, an account which he had against Bledsoe's heirs, and admitted $110 to be due to him, $30 of which he paid him, leaving a balance still due, of about $80.

This was all the testimony. The circuit court dissolved the injunction, with ten per cent. damages and dismissed the bill. This decree is erroneous.

As Jameson virtually admits the mistake in the execution of the note, and the ignorance of Harrison; and as he admits also, that the account, for money loaned, was the only consideration of the note, the onus devolved on him. He has failed to prove his account or even to exhibit its items.

John Jameson had no authority to bind Mrs. Harrison; nor could an account against the heirs, for sums loaned to them individually, be binding on her beyond the amount which she received. This amount is not ascertained, except so far as Harrison has admitted particular items in his bill.

It results, therefore, that, except for the $25, and other small items admitted by Harrison, his injunction should have been perpetuated.

Wherefore, the decree of the circuit court is reversed, and the cause remanded for a decree consistent with this opinion.

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## LUMBERT v. HILL et al.

(Supreme Judicial Court of Maine, 1856. 41 Me. 475.)

Bill in Equity. The cause was heard upon Bill, Answers and Proof.[81] * * *

HATHAWAY, J. The defendant, Joseph R. Lumbert, owned a lot of land in Bangor, on Exchange street; he was indebted to the Merchants' Bank, in Boston, and also to the defendant, Thomas A. Hill.

In June, 1840, the bank recovered judgment against Lumbert for their debt, and caused their execution thereon to be levied on land as his property, and the levy was duly returned and recorded. Subsequently, April 17, 1843, Hill commenced an action against Lumbert, to recover the debt due him, and attached Lumbert's real estate, and in due process of law, recovered judgment, upon which execution was duly issued and levied upon land as Lumbert's property, which levy was also duly returned and recorded. The land described in the levy of the bank, includes the northerly half of Lumbert's lot on Exchange street, and Hill's levy covers the southerly half of the same lot.

The plaintiff has title through sundry mesne conveyances from the Merchants' Bank, and, in his bill, alleges that the levy of the bank, in

[81] The statement of facts is abridged.

fact, covered the whole lot, including the part subsequently levied upon by Hill, and that in the appraisers' certificate, and the officer's return of his doings on the execution, there was an error in describing the easterly boundary line, as running south, seventy degrees east, instead of south, seven degrees east, by reason of which mistake, as he alleges, the levy as returned and recorded, does not describe the land upon which the execution was actually extended, but omits that part of the lot upon which Hill's execution was subsequently levied, and includes another piece of land, to which Lumbert had no title. And the plaintiff prays that the error may be corrected, and that the levy and the deeds following it, through which he derives title, may be reformed, &c.

The extent of an execution on lands, accepted by the creditor, is a statute purchase of the debtor's estate.

By R. S. c. 94, § 19, it is made the officer's duty to return the execution with a certificate of his doings thereon, into the clerk's office to which it is returnable, and within three months after the completion of the levy, to cause the execution and the return thereon to be recorded in the registry of deeds, and by section 20, if the execution and levy are not recorded, as provided in section 19, it shall be void against subsequent attaching creditors without notice; "but if the levy is recorded, though after the expiration of three months, it shall be valid and effectual against any conveyance, attachment, or levy made after such recording." The return of the officer is the *only* evidence of title by the levy.

A statute title must always be perfect; that is, every thing made necessary by the statute, to pass the property, must appear by the return of the officer; and, when recorded, it must, of course appear by the record, to have been done. Williams v. Amory, 14 Mass. 20, and Rand's notes. And when the execution and levy thereof have been returned and recorded, as was done in this case, there can be no other notice of the previous proceedings than the record, by which subsequent attaching creditors or purchasers can be affected.

"To reform an instrument in equity, is to make a decree, that a deed or other agreement shall be made or construed, as it was originally intended by the parties, when an error, as to a fact, has been committed." Bouvier, L. D. tit. Reform.

The levy of an execution on land conveys title by operation of law, not in pursuance of any agreement by which the intention of the parties was manifested, or can be ascertained. The question, however, of reforming a levy, after the execution and the officer's doings thereon, have been duly returned and recorded, and where the rights of third parties would not be affected thereby, need not be considered in this case; for if the judgment creditor, by mistake, do not make his title to the land seized on the execution, perfect by his levy, surely there can be no reason why a subsequent attaching creditor or purchaser should be prejudiced by such mistake, for the record is the statute evidence of what was done in extending his execution. Every person has a right

to rely upon the record as the evidence of title, unless he have legal notice of a subsequent conveyance.

The plaintiff cannot have the relief which he seeks, unless the officer can have leave to amend his return on the execution. To reform the levy and deeds as prayed for, and thereby change the existing legal titles of the parties, if it could be done, would render the registry of deeds of little value, as furnishing any certain evidence of title to real estate.

It is familiar law, that the Court will not allow an amendment of an officer's return, after a long time has elapsed, unless from some minutes made at the time, and also, that an officer will not be permitted to amend a defective return of an extent, if a third person have subsequently acquired title to the land.

But if the Court could grant the relief sought, in all cases of relief, by correcting mistakes in the execution of instruments, the party asking relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a court of equity is silent and passive. 1 Story's Eq. c. 5, § 176, and notes.

In this case, neither party appears to have any equity superior to the other. The plaintiff has the title of the Merchants' Bank, and nothing more. The bank and Hill were both creditors of Joseph R. Lumbert, and, of course, they both desired to collect their debts, and they had equal rights to do so. The bank levied their execution, and left a part of Lumbert's land open to attachment by his creditors, as appeared by the record. If Hill had not attached the land, Lumbert might have conveyed it, or any other of his creditors might have attached it. Hill ascertained to his satisfaction, that the levy of the bank did not include it, and he was neither legally or morally guilty of wrong in attaching it to secure his debt. There was no contract or privity between him and the bank. He was not the guardian of their interests, and if the bank neglected to take and perfect their title to the land, which they might have taken on their execution, it was not his fault, and he had a perfect legal right to attach what the bank left of Lumbert's land, and seize it on execution, in payment of his debt. It would have been requiring too much, to have asked him to be quiescent, and lose his debt, rather than disturb the plaintiff in the temporary enjoyment of property, to which he had no legal title, and which might, at any time, have been conveyed by Hill's debtor, Joseph R. Lumbert, or attached or seized on execution by any of his creditors.

The result is, that if the levy of the bank as recorded, includes the land upon which Hill subsequently extended his execution, then the plaintiff holds it by legal title; but if that levy does not include it, a court of equity can grant him no relief.

The bill is dismissed with costs for the defendants.

TENNEY, C. J., and APPLETON, GOODENOW, and MAY, JJ., concurred.

## ATHERTON v. ROCHE et al.

(Supreme Court of Illinois, 1901. 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591.)

Appeal from circuit court, Alexander county; Joseph P. Robarts, Judge.

MR. JUSTICE HAND [82] delivered the opinion of the court:

This is a bill in chancery, filed by Francis D., Leslie, and Leon Roche, minors, by their next friend, James S. Roche, in the circuit court of Alexander county, against Homer Atherton and Fannie E. Jones, to reform a certain deed bearing date March 21, 1882, executed by Francis D. Atherton and Martha E., his wife, conveying 99 acres of land off of the south side of lot 3, claim 529, survey 527, in Alexander county, Ill., to Margaret E. and Byron J. Atherton, "to them and their bodily heirs, forever," so that it would operate to vest the remainder in fee in said lands in all the heirs of said Margaret E., deceased, and that partition of the land described therein be made according to the rights and interests of the parties after such reformation of the deed should have been made. * * *

The master in chancery found that Francis D. Atherton, the grandfather of the complainants and defendants (now deceased), was, on the 21st day of March, 1882, the owner in fee simple of said land; that on said day, for the expressed consideration of $10, he, together with his wife, Martha E. Atherton, conveyed said land to his daughter, Margaret E. Atherton, and Byron J. Atherton, her husband, and their bodily heirs; that said Byron J. Atherton, the husband of Margaret E. Atherton, was not of kin or otherwise related to said Francis D. Atherton; that in said deed the party of the second part is described as "Margaret E. and Byron J. Atherton," and the granting clause therein is "to them and their bodily heirs, forever." * * *

It is averred in the bill that said Fannie E. Peeler (now Fannie E. Jones) was highly esteemed and regarded and greatly loved by her grandfather, the said Francis D. Atherton, and that it was his intention and purpose, when he made said deed, to make provision thereby for said Fannie E. and any other child or children his daughter, Margaret E., might have, either by said Byron J. or any other husband whom she might have; and that when he executed said deed he supposed that the words "and their bodily heirs," as used in said deed, did or would include the said Fannie E. and any other child or children whomsoever that might thereafter be born unto his said daughter; and that the consideration named in the deed was but nominal, and that the actual consideration was the desire of the said Francis D. Atherton to make provision for his daughter, said Margaret, and for her children; and that the word "their" in the phrase "their bodily heirs, forever," in the

[82] Parts of the opinion of Hand, J., and all of the dissenting opinion of Boggs, J. (in which dissent Wilkin, C. J., and Carter, J., concurred), are omitted.

granting and habendum clauses of the deed, was employed with the understanding and intention on the part of said grantor in said deed that it meant and included all bodily heirs of his said daughter. * * *

The deed to Margaret E. and Byron J. Atherton, "to them and their bodily heirs, forever," conveyed what would have been at common law an estate tail special. * * * Under the operation of section 6 of an act entitled "Conveyances" (Hurd's Rev. St. 1899, c. 30, p. 401), however, instead of an estate tail special a life estate was vested in Margaret E. and Byron J. Atherton, the remainder in fee going to their bodily heirs according to the course of the common law. Frazer v. Peoria Co., 74 Ill. 282; Lewis v. Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384; Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892; Kyner v. Boll, 182 Ill. 171, 54 N. E. 925. The bodily heirs referred to are not Margaret's bodily heirs, nor Byron's bodily heirs, but "their" bodily heirs,—that is, the bodily heirs of both Margaret and Byron,—which language excludes Fannie E. Jones and Francis D., Leslie and Leon Roche, and applies only to Homer Atherton, who is the only person who comes within the description of "their" bodily heir; that is, the bodily heir of both of them. The remainder in fee was contingent, but vested in Homer Atherton upon his birth. Dinwiddie v. Self, supra; Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254. The effect, therefore, of said deed was to vest in Margaret E. and Byron J. Atherton a life estate, and the remainder in fee in Homer Atherton, as their only bodily heir, who is now the sole legal owner in fee of said lands.

The legal title to said land being in Homer Atherton, was the court below warranted, upon the case made, in reforming the deed, and, after such reformation, in decreeing four-fifths of said lands to be the property of the other children of Margaret E. Roche? We think not. The mistake insisted upon and sought to be corrected consists in the use of the word "their" instead of "her," in the clause "to them and their bodily heirs, forever," found in said deed, and under which Homer Atherton takes title. There is no claim that said grantor, at the time he executed said deed, was not fully aware of its terms and language, or that he was, in any way deceived, misled, or otherwise imposed upon, or subjected to any undue or improper influence. The evidence, on the other hand, clearly shows that the deed was read to him prior to the execution thereof, and that he knew the word "their" was used, and that the word "her" was not used in said clause; that he discussed the meaning of the terms employed at the time he signed and acknowledged the deed, and insisted he knew the legal effect thereof, and that it expressed his meaning. It is therefore apparent that the mistake complained of is not a mistake as to what words were contained in the deed, but simply as to the meaning and legal effect of the word "their" when used in the clause "to them and their bodily heirs, forever." This, manifestly, is not a mistake as to any fact. It is purely a mis-

take of law, and the rule in this state, subject to certain exceptions,—among which this case does not fall,—is firmly established that courts of equity will not lend their aid to relieve against mere mistakes of law. * * *

Reversed and remanded.

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## DINWIDDIE v. SELF.

(Supreme Court of Illinois, 1893. 145 Ill. 290, 33 N. E. 892.)

BAILEY, C. J.,[88] (after stating the facts). While the evidence of the negotiations which resulted in the purchase from the defendant by the complainant of the land subsequently conveyed is not very full or circumstantial, yet we think it shows with sufficient clearness that the contract which the parties intended to make, and which they in fact made, was for the purchase and sale of the fee. Indeed, upon this question there seems to be no substantial disagreement in the testimony of the witnesses. The complainant testifies, in substance, that, shortly prior to the execution of the deed, she, with her brother, visited the defendant's farm to look at it with a view of purchasing it; that, after she had been over it, the defendant offered it to her for $9,000; that nothing was said about the reservation by the defendant of any portion of the title or of any interest in the land, her understanding being that the defendant offered to convey to her the land in fee for the price named; that she did not accept the defendant's offer at that view, but subsequently, on the same day, having concluded to accept it, she sent her brother to the defendant to notify him of such acceptance. Her testimony is substantially corroborated by that of her brother, who went with her to see the farm, and he further testifies that $9,000 was the fair cash value of the land at that time, and in this he is not disputed by any other witnesses. * * *

It is also clear that the deed which the defendant afterwards executed in performance of the contract of sale thus made was not a conveyance to the complainant of the fee. The conveyance was limited to the complainant "and her bodily heirs,"—a limitation which, at common law, would have created an estate in fee tail. But by section 6 of chapter 24 of the Revised Statutes of 1845, which was in force at the time the conveyance was made, and which has since been re-enacted as section 6 of chapter 30 of the Revised Statutes of 1874, estates in tail are abolished, and it provides that in cases where, by the common law, any person might become seised in fee tail of any lands by virtue of any conveyance, such person, instead of becoming seised in fee tail, shall be deemed and adjudged to be and become seised thereof for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on the

[88] The statement of facts and parts of the opinion are omitted.

death of the grantee, first pass, according to the course of the common law, by virtue of such conveyance. The complainant, at the time of the execution of the deed to her, was a widow, and without children or descendants. No person, therefore, was then in being who, upon her death, could have taken as heirs of her body. It is true, she was then contemplating marriage, and shortly after the execution of the deed was married to her present husband. The deed, then, by force of the statute, conveyed to her only a life estate, with a contingent remainder in fee to her children, if any such should afterwards be born, and, in default of heirs of her body, the estate in remainder necessarily lapses, and at her death the land reverts to the defendant in fee. In point of fact she has had no children, and as she claims, and as her evidence tends to show, she is now past the period of childbearing, and the probable, if not the necessary, result, if the deed is allowed to stand as it was executed, is that the estate thereby conveyed is only for the life of the complainant, with reversion in fee to the defendant and his heirs. That such is not the estate for which the complainant contracted when she purchased the land is, to our minds, too clear for controversy.

Upon these facts two questions arise: First, whether the limitation to the complainant "and her bodily heirs" was inserted in the deed by mistake; and, second, whether it is a mistake which the court of equity will correct. * * *

In view of all the evidence, then, we are of the opinion that the court was justified in finding that neither the complainant's father nor her brother had any authority from her to procure the insertion, in the deed conveying the land to her, of a limitation of the estate conveyed, to her and the heirs of her body, and that such limitation was inserted in the deed wholly without her knowledge, authority, or consent. Neither her father nor her brother is shown to have been in any proper sense her general agent. The contract of purchase was made by herself in person, except merely that she employed her brother to communicate to the defendant her acceptance of the offer which he had previously made to her. What her father and brother subsequently did by way of consummating the purchase and obtaining the conveyance seems to have been done, not by virtue of any specific employment by her, but by way of rendering such voluntary assistance as a father and brother, having a proper interest in her welfare, would naturally render under such circumstances. Their authority to act as her agents, so far as the evidence shows, was merely voluntary on their part, and permissive on hers, and extended merely to closing up the purchase as she had made it, and not to the imposition of new terms, or the insertion of limitations, to which she had not assented, and of which she knew nothing. * * * If, then, the limitation was inserted for such purpose, without the complainant's knowledge or consent, it was in the nature of a fraud upon her, of which the defendant had notice, if he did not actively participate in it. She bought the land for herself, and paid

for it with her own money, and any attempt by her father and brother, for purposes of their own, to place limitations upon the title without her knowledge or authority, were unauthorized acts, for which she should not be held responsible. * * *

If, under the circumstances supposed, she had personally requested the insertion of this limitation, or had accepted the deed with full knowledge of its terms, she would have been bound by the instrument as executed, however much she may have been mistaken as to the legal effect of the language thus employed. An illustration of this rule may be found in the case of Fowler v. Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670. The same effect would doubtless be given to the act of her agent, if his authority had extended to the adoption and acceptance on her behalf of the same clause. But, as we have seen, the evidence fails to show the existence of such authority. The general rule is that a mistake of law, pure and simple, is not adequate ground of relief. Where a party, with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights, and liabilities, under ignorance or error with respect to the rules of law controlling the case, courts will not, in general, relieve him from the consequences of his mistake. 2 Pom. Eq. Jur. § 842. Accordingly, if an agreement, or written instrument, or other transaction, expresses the thought and intention which the parties had at the time and in the act concluding it, no relief, affirmative or defensive, will be granted with respect to it, upon the assumption that their thought and intention would have been different if they had not been mistaken as to the legal meaning and effect of the terms and provisions by which such intention is embodied and expressed, even though it should be incontestably proved that their intention would have been different if they had been correctly informed as to the law. Id. § 843. But, firmly settled as are the foregoing rules, it is equally settled that there are particular instances in which equity will grant defensive and affirmative relief from mistakes of law, pure and simple, as well as from those accompanied by other equitable incidents. * * *

The present case clearly falls within the exception to the general rule thus pointed out and discussed by Mr. Pomeroy. The defendant's offer was to sell to the complainant the land,—an offer which, made, as it was, without limitation or qualification, and for a consideration equal to the fair cash value of the land, must be understood as a proposition to sell the fee,—and the offer was accepted by the complainant precisely as it was made. A contract was thereby consummated for the sale and conveyance by the defendant to the complainant, for the consideration named, of an absolute fee-simple title to the land. Both parties understood that the conveyance was to be in fee, and both intended that the contract should be so executed; but by the unauthorized act of the complainant's agent, or by the mistake of the scrivener, it matters little which, technical words were inserted, the legal effect

of which was to limit the estate conveyed to the complainant to a tenancy for her life only. Thus, through a mistake of law, the conveyance failed to express the contract into which the parties had actually entered. It follows that the case is one in respect to which a court of equity, upon principles above set forth, will grant relief. * * *

We are of the opinion that the decree is warranted by the evidence, and it will therefore be affirmed.

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## SPARKS v. PITTMAN et al.

(Supreme Court of Mississippi, 1875. 51 Miss. 197.)

TARBELL, J.[34] * * * In the case at bar, if Pittman knew the existence of the act of the legislature of April 18, 1873, and withheld this knowledge from Sparks who was ignorant of it, then a positive fraud was committed by the former upon the latter. Moreland v. Atchison, 19 Tex. 303. If both were ignorant of that act, there was a mutual mistake of law against which equity will relieve. Champlin v. Laytin, 1 Edw. Ch. [N. Y.] 467; Green v. Morris & E. R. R. Co., 1 Beasley Ch. [12 N. J. Eq.] 165.

"Equity in rescinding contracts, does not confine itself to cases of fraud. Cases likewise of plain mistake, or misapprehension, though not the effect of fraud or contrivance, are entitled to the interference of this court." Skillman v. Teeple, 1 Saxt. Ch. [1 N. J. Eq.], 232.

Discussing the question how far equity will relieve against mistakes of law and fact, the court, in Northrop v. Graves, 19 Conn. 548 [50 Am. Dec. 264], say:

"We shall have occasion to advert to some of the cases on this subject, and to some of the maxims which are supposed to apply to it, such as 'Volenti non fit injuria' (if a person consent to a wrong he cannot complain), 'Ignorantia legis non excusat,' and to the maxim often in requisition and generally false in reality, that every man is bound by, and therefore 'presumed to know the law.' These and all other general doctrines and aphorisms, when properly applied to facts and in furtherance of justice, should be carefully regarded; but the danger is that they are often pressed into the service of injustice by a misapplication of their true meaning. It is better to yield to the force of truth and conscience than to a reverence for maxims."

Referring to these maxims, in Cumberland Coal and Iron Co. v. Sherman, 20 Md. 117, and to the case of Lammot v. Bowly, 6 Har. & J. [Md.] 500, this very emphatic language is employed:

"The result of the review of the authorities was that some of the most enlightened and celebrated men whose characters are recorded in judicial history have given their sanction to the doctrine "that no man acting under a plain and acknowledged mistake of his legal rights shall forfeit those rights in consequence of such misapprehension."

"That a party may not urge his ignorance of the law as an excuse or palliation of a crime, or even of a fault, we may admit;. that he may not by reason of such ignorance or mistake, obtain any right or advantage over another, we may admit; but we do not admit that such other may obtain or

[34] The statement of facts and parts of the opinion are omitted.

secure an unjust advantage over him by reason of his ignorance or mistake even of the law." Northrop v. Graves, supra.

The subject of relief in equity against mistakes of law is very fully discussed in 1 Story's Eq. Jur. ch. 5, § 110 et seq., and see authorities cited in notes. It is also quite elaborately considered in Trigg v. Read, 5 Humph. [Tenn.] 529 [42 Am. Dec. 447]; Freeman v. Curtis, 51 Me. 140 [81 Am. Dec. 564], etc.

"A mistake of law is not ordinarily a ground of relief in equity." Mellish v. Robertson, 25 Vt. 603.

But it has never been decided "that a plain and acknowledged mistake in law is beyond the reach of equity." Marshall, C. J., in Hunt v. Rousmanier, 8 Wheat. 174 [5 L. Ed. 589]. Each case, however, must depend upon its own particular circumstances. * * *

The decree must, however, be reversed, and the cause remanded, with leave to respondents to answer in forty days from this date.

Ordered accordingly.

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### *(C) Admissibility of Parol Evidence*

### LESLIE et al. v. O'NEIL.

(Supreme Court of Arkansas, 1913. 108 Ark. 607, 156 S. W. 1017.)

This was an action by T. J. O'Neil against S. W. Leslie, John J. McManus, and J. C. Minor to recover upon a promissory note. The note is as follows:

"$350.00. Hot Springs, Ark., Jan. 8th, 1906.

"Sixty days after date we promise to pay to the order of T. J. O'Neil, three hundred and fifty dollars, for value received, negotiable and payable without defalcation and discount and with interest from date at the rate of eight per cent. per annum from date until paid, and if interest be not paid when due, to become a principal and bear the same rate of interest.

"Arkansas Acetylene Gas Co.,
"By J. C. Minor, President.
"S. W. Leslie, Secretary."

The note was signed on the back: "S. W. Leslie. John J. McManus."

The defendants Leslie and McManus in their answer admitted the execution of the note, but allege: That they were not indebted to the plaintiff, and that the note sued on was executed under the following circumstances: That in January, 1906, a corporation was formed under the name of the Arkansas Acetylene Gas Company. That the plaintiff T. J. O'Neil, and the defendants, S. W. Leslie and John J. McManus and J. C. Minor, are all members of the board of directors. That they had all paid in the full amount of the capital stock by them subscribed. That thereafter the corporation became indebted and needed money with which to continue its business. That it was agreed between the

parties to this suit to raise the sum of $350 for the corporation. That to raise this money they would cause to be executed a note of the corporation for that amount. That it was understood and agreed between the parties to this suit that they would indorse said note as individuals and raise the money on it. The defendant Minor filed an answer in which he denies that he signed the note as an individual. The defendants Leslie and McManus filed a motion to transfer the case to equity, which was done.

J. C. Minor testified that he signed the note as president of the corporation for the purpose of raising money to carry on its business, and said that it was not understood or agreed that he was to sign the note as an individual.

The defendants McManus and Leslie testified to the matters set out in their answer, as stated above, and in addition said: That the plaintiff, O'Neil, agreed to indorse the note with them. That it was understood and agreed between the parties to this suit that they should all indorse the note and that O'Neil would take the note so indorsed to his brother or to the bank and procure the money on it. That the corporation subsequently became insolvent and its affairs were wound up. That after the dissolution of the corporation, and about four years after the note was executed, the plaintiff for the first time claimed he was not liable on the note and that they were liable to him for the full amount of the note.

The plaintiff, O'Neil, testified that he never took any active part in the management and conduct of the business of the corporation, and that the defendant Leslie had almost exclusive charge of its affairs. He admitted that he was nominally treasurer of the corporation, but said that the money which was procured by the execution of the note was turned over to Leslie and by him used for the corporation. He denied that he agreed to indorse the note with the defendants Leslie and McManus, and said that, on the contrary, he expressly refused to indorse it. He said that he knew the corporation was in debt and only agreed to lend the money on condition that McManus and Leslie, whom he regarded as solvent, would indorse the note. He testified that he furnished the money himself and did not procure it from his brother or the bank.

The chancellor found that the plaintiff, O'Neil, did not agree to become jointly liable with the defendants McManus and Leslie on the note, and that he would not have loaned the money to the corporation except on the credit of the defendants Leslie and McManus. The chancellor found further that the defendant Minor was not liable on the note, and no judgment was rendered against him.

A decree was entered in favor of the plaintiff wherein it was adjudged that he should recover from the defendants Leslie and McManus the amount of the note sued on. These defendants have appealed.

HART, J. (after stating the facts as above). The cause was transferred from the circuit to the chancery court on the motion of the de-

fendants Leslie and McManus. This was presumably done in order that the chancery court might reform the note by placing thereon the name of the plaintiff as an indorser and thus make him jointly liable with the defendants Leslie and McManus, for the amount of the note. In the case of Wilson-Ward & Co. v. Farmers' Union Gin Co., 94 Ark. 200, 126 S. W. 847, the court held that, in order to reform a written instrument on the ground of fraud or mistake, the evidence of such fraud or mistake must be clear, unequivocal, and decisive. The court quoted with approval from Bishop on Contracts as follows:

"In no case will a court decree an alteration in the terms of a duly executed written contract, unless the proofs are full, clear, and decisive. Mere preponderance of evidence is not enough; the mistake must appear beyond reasonable controversy."

When tested by this rule, we do not think that the chancellor erred in finding for the plaintiff. It is true that the defendants Leslie and McManus both testified that the plaintiff, O'Neil, agreed to indorse the note with them, and that he never made any claim against them on the note until after the corporation was dissolved and until about four years after the execution of the note. On the contrary, the note itself, which is the best evidence of the contract between the parties, was introduced in evidence and shows that the name of the plaintiff does not appear thereon as an indorser. In addition to this, the note was made payable to the plaintiff, and he testified that he did not agree to indorse it.

The plaintiff, O'Neil, and the defendants Leslie and McManus were all present when the note was executed and when it was indorsed by the defendants. It would have been natural for the plaintiff, if he had agreed to indorse it, to have done so at the time the defendants indorsed it. When all the circumstances in connection with the execution and its indorsement of the note are considered, we do not think it can be said that the chancellor erred in finding for the plaintiff.

The decree will be affirmed.[35]

[35] In Jamaica Sav. Bank v. Tayler et al. (1902) 72 App. Div. 567, 76 N. Y. Supp. 790, at 791, the court held that in a suit to reform a contract for mistake, in that it does not properly describe the land to be conveyed, it is not necessary that the evidence show the mistake beyond a reasonable doubt. Jenks, J., said: "The court, having found that the scrivener, in reducing the contract to writing, wrote a description which embraced land not within the contract, and that the contract as written was thereupon executed by the parties in ignorance, adjudged reformation for mutual mistake. The learned counsel for the appellant seems to insist that the evidence which justifies such relief must be beyond a reasonable doubt, inasmuch as he quotes from the opinion in Coast v. McCaffery (1899) 46 App. Div. 436, 61 N. Y. Supp. 881: 'Courts are chary in reforming written contracts. The doctrine is thus stated in 2 Pom. Eq. Jur. (2d Ed.) § 859: "The authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and convincing,—in the language of some judges, the strongest possible,—or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a *reasonable doubt*."' As the paragraph is a quotation by the learned justice from Pomeroy's Equity Jurisprudence, which

## SILBON et ux. v. PACIFIC BREWING & MALTING CO.

(Supreme Court of Washington, 1913. 72 Wash. 13, 129 Pac. 581.)

FULLERTON, J.[36] The appellants, who were plaintiffs below, brought this action against the respondent to recover the sum of $420, alleged to be due under a certain written lease theretofore entered into between the parties. In the complaint it was alleged that the lease in question was entered into on March 15, 1911, and by its terms the appellants leased to the respondent certain premises owned by them, situated in the city of Tacoma, for a term of two years from and after April 1, 1911, at a monthly rental of $160 per month payable in advance on the 1st day of each and every month during the term of the lease; the lease being further conditioned for the payment of $100 as attorney's fees should the lessors or their agents institute proceedings in court to recover rents due thereunder. It was further alleged that the respondent entered into the possession of the property on April 1, 1911, and continued in possession thereafter under the lease, but failed and refused to pay rental for the first two months of the tenancy. The respondent in its answer admitted the execution of the lease, but plead-

is immediately followed by a quotation from Christopher & T. St. R. Co. v. Twenty-Third St. Ry. Co. (1896) 149 N. Y. 51, 58, 43 N. E. 538, that the proof must be of the most substantial and convincing character, I take it that the learned justice did not intend to state a rule in the language of Pomeroy thus italicized by the learned counsel, but meant to adhere to that indicated by Martin, J., in Christopher & T. St. R. Co.'s Case, supra, inasmuch as the authorities in this state do not require that the proof should be beyond a reasonable doubt. For Parker, J., in Southard v. Curley (1892) 134 N. Y. 148, 31 N. E. 330, 16 L. R. A. 561, 30 Am. St. Rep. 642, considers this precise question, and, after an exhaustive review of more than a score of cases, concludes that: 'They do not require us to declare that this strong rule of criminal procedure has become a part of the practice in civil actions. Certainly, this need not be done in view of the many authorities which, before and since Judge Story penned the rule that "relief will be granted in cases of written instruments only when there is a plain mistake clearly made out by satisfactory proofs," have asserted the same doctrine in terms or in substance.' Southard v. Curley, supra, is cited among the multitude of cases referred to by Martin, J., in Christopher & T. St. R. Co.'s Case, supra, who concludes, ut supra, that the proof 'must be of the most substantial and convincing character.' It is true that this court, in Weed v. Whitehead (1896) 1 App. Div. 192, 37 N. Y. Supp. 178, said that there must be 'certainty of error,' but the entire sentence reads, 'Courts of equity do not grant the remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of error,' and Southard v. Curley, supra, is cited as authority."

In West Jersey R. Co. v. Thomas et al. (1873) 23 N. J. Eq. 431, at 433, the Chancellor said: "An award cannot be reviewed and corrected or set aside, either at law or in equity, because it is erroneous, or because it is plainly excessive, unless the excess is clearly demonstrated, and is so great that it is not possible to account for it except by corruption or dishonesty in the arbitrators. It will not be set aside, as a verdict at law or a master's report in equity will be, because clearly erroneous and against the weight of evidence. * * * Although this award thus appears to me to be clearly excessive, and to a very large amount, I cannot set it aside on that account, unless under circumstances such that it must be a necessary conclusion that the arbitrators could not have made it in good faith and believing it to be correct."

[36] Part of the opinion is omitted.

ed affirmatively that the same, by reason of a mutual mistake of the parties, did not express the actual agreement entered into between them, and asked that the lease be reformed so as to conform to such agreement, setting forth wherein the written lease did not conform to the lease actually entered into, and showing that under the lease as actually entered into there was nothing due to the appellants for the two months for which the appellants sought to recover. A reply to the answer was filed and a trial entered upon, wherein the respondent, over the objection of the appellants, was allowed to introduce evidence substantiating the allegations of its answer. At the conclusion of the trial, the court made findings in favor of the respondent and entered judgment reforming the lease, and denying to the appellants the right to recover.

The appellants first assign that the court erred in permitting the introduction of evidence tending to show a mutual mistake in the execution of the lease, contending that to do so was to permit the terms of a written instrument to be varied by a contemporaneous parol agreement. But it is among the acknowledged powers of the courts to reform written instruments under circumstances such as were shown here. Where there has been an agreement actually entered into which the parties have attempted to put in writing, but have failed because of a mistake either of themseles or of the scrivener, the courts having jurisdiction in matters of equitable cognizance have power to reform the instrument in such manner as to make it express the true agreement; and this in any action or proceeding where a party to the agreement seeks to take advantage of the mistake. True, the evidence that there was such a mistake must be clear and convincing before the jurisdiction will be exercised, a mere preponderance of the evidence not being sufficient, but there is no question, in this jurisdiction at least, that the power to reform the instrument exists. * * *

The judgment is affirmed.

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## ELDER v. ELDER.

(Supreme Judicial Court of Maine, 1833. 10 Me. 80, 25 Am. Dec. 205.)

This was a bill in equity, in which the plaintiff alleged: That on the 17th of October, 1830, he contracted with Reuben Elder, now deceased, for the purchase of a certain lot of land lying in the towns of Windham and Westbrook, being one parcel, and not several, though accidentally intersected by the boundary line of those towns, said lot being the entire share of Reuben Elder in the real estate of John Elder, deceased, which had been set off according to the will of the latter. That he agreed to pay therefor the sum of $300 by instalments as follows: $100 in three months, $100 in one year, $50 in two years, and $50 in three years. That it was agreed the deed should be given on the payment of the first instalment. That $25 was paid to Reuben Elder be-

fore his decease in part of the first instalment, and after his decease, to Elizabeth Elder, his widow and administrator $75 more, being the balance of the first instalment. He further alleged that a memorandum intended to express the foregoing agreement was signed by Reuben Elder, in which the land intended to be conveyed was described as "a lot of land situated in the town of Windham, formerly owned by John Elder." That there was a mistake in writing the memorandum of agreement, inasmuch as part of the lot intended to be embraced in the description was in the town of Westbrook. That at the time of making the contract he was ignorant of this fact. That he believed if Reuben Elder was living, he would not hesitate to correct this mistake, and to fulfil his agreement by conveying the whole lot. But that the administrator and heirs at law had refused. These he prayed might be summoned in to answer the foregoing allegations, and certain inquiries put to them, with regard to conversations had with Reuben Elder, and admissions made by him.

The bill closed with a prayer that the mistake in the contract before named might be corrected, and that the administrator and heirs might be required to convey to him by deed the whole lot claimed—and also for such general relief as the Court might grant.

Elizabeth Elder, the widow and administrator of Rueben Elder, in her answer set out the written contract between her deceased husband and the plaintiff, in the words following:—

"Gorham, Aug. 17, 1830.

"I, Reuben Elder, do agree to sell to Josiah Elder a lot of land situated in Windham formerly owned by John Elder for three hundred dollars. One hundred dollars in three months—the first year one hundred dollars—the second year fifty dollars—the third year fifty dollars—the deed to be given when the first hundred dollars is paid. Reuben Elder."

She denied all knowledge of any other agreement than the above and averred her disbelief of the existence of any mistake in the contract, as alleged by the plaintiff.

The answers of the other defendants were substantially the same as the foregoing—all averring a willingness to convey the land lying in Windham according to the terms of the contract, and no more.

Several depositions were taken by the plaintiff tending to prove, by the admissions of Reuben Elder, and otherwise, that there was in fact a mistake in the contract as alleged in the bill—and the principal question in the case was upon the admissibility of this testimony.

Longfellow, for the defendants, argued that the granting the prayer of this bill would virtually be repealing the statute of frauds. This statute requires all contracts for the sale of lands to be in writing. The real contract between the parties in this case is in writing. It is plain and susceptible of a reasonable construction. But the plaintiff by this bill proposes to alter, vary and destroy it, by superadding to it matter gathered from the loose and uncertain recollections of witnesses. This, the law will not permit. It excludes all parol testimony offered to explain, alter or vary written contracts. The bill proposes to the Court

to make a contract, between the parties, and then to enforce it. But the statute of frauds is as binding upon this Court sitting as a court of chancery as if sitting as a court of law.

The rules of evidence, he contended, were the same at law as in equity, and upon no principles could this testimony be admitted. * * *

WESTON, J.,[37] delivered the opinion of the Court.

The plaintiff claims relief upon the ground of mistake in the terms of a contract, entered into between himself and Reuben Elder, deceased; and he prays for an amendment and enforcement of the contract, according to the true intent and meaning of the parties, and for such general relief as the Court may grant. All knowledge of the existence of a mistake being denied in the answers, the plaintiff has proceeded to adduce parol proof of the allegations in his bill.

This kind of proof is objected to by the counsel for the defendants, as incompetent to alter, vary, or contradict a written instrument, plain and intelligible in its terms. That this is inadmissible at law, is a principle well settled. And it is insisted that it is a rule of evidence equally binding upon courts of equity. If the inquiry was, what contract have the parties made, this is to be ascertained by the best evidence the nature of the case admits. It is the rule at law, because calculated to elicit and establish truth. And what is best adapted to produce this effect, does not depend upon the character or jurisdiction of the tribunal before whom the question may arise. It would tend to pervert, rather to establish, justice, if the rules of evidence were so varied in different courts, that in the one, facts were to be proved by the best evidence, while in the other, that of an inferior character might be received and substituted. We do not so understand the law. What contract the parties have actually made, must depend upon the same evidence, both at law and in equity. And if made in writing, what is written is the best evidence of this fact, which cannot be varied, altered or changed by parol testimony. But in both courts, it may be shown by parol evidence to have been tainted by fraud, and therefore not binding or operative upon the party attempted to be charged. But in a court of equity, other circumstances may in certain cases become the subject of inquiry, not to show what contract was made; but whether it was made or entered into by mistake or accident. Whether these inquiries have promoted the cause of justice, or whether they have not promoted the cause of justice, or whether they have not more frequently defeated it, by opening a door to fraud and perjury, or whether they may not occasion more mistakes than they correct, are questions, which it does not belong to us to decide. This branch of equity jurisdiction is of recent origin in our State; but having been conferred upon this Court, it is to be, exercised according to the rules and practice of courts of equity in that country from which we have derived our jurisprudence, except so far as they may have been changed or modified by our laws. We

[37] The statement of facts is abridged and part of the opinion is omitted.

have jurisdiction expressly given in cases of mistake. How are they to be proved? They must depend upon extraneous testimony. They are rarely apparent upon the face of the instrument to be affected. Although its terms may often lead to a conjecture that there may have been some mistake, the fact must almost uniformly be proved aliunde. It may often be made out, or rendered highly probable, by a recurrence to other written evidence; as where the instrument executed is found not to conform to a previous written agreement, in relation to the subject matter. And yet this is not conclusive; for it might very fairly be urged in comparing both, that the variance was designed and occasioned by the consent of the parties. Parol testimony is so generally admitted in chancery to prove a mistake, that in Baker v. Paine, 1 Vesey, 456, Lord Hardwicke inquired, "How can a mistake in an agreement be proved but by parol?"

It is well settled that it is admissible on the part of the defendant, upon a bill for the specific performance of a contract. The reason assigned is, that this is a class of cases in which a court of equity will exercise or withhold its power at its discretion, and that it will not interfere in favour of the plaintiff to enforce performance, where a mistake essentially affecting the contract is made to appear. Joynes v. Stratham, 3 Atk. 388; Rich v. Jackson, 4 Bro. C. C. 514; Ramsbottom v. Gosden, 1 Vesey & Beames, 165; Townsend v. Stangroom, 6 Vesey, 328, and the cases there cited.

In Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559, the learned Chancellor maintains that relief may be had in chancery against any deed or contract in writing, founded in mistake or fraud. That the mistake may be shown by parol proof, and relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defence. We have looked into the cases cited by him, but are not satisfied that they sustain the doctrine to the extent which his language would seem to imply. In some of them parol evidence of mistake was admitted on the part of the defendant, to rebut an equity. In others, contracts not relating to real estate, but of personal character, were reformed or amended upon parol proof of mistake. These cases show that this has sometimes been done in courts of equity; but under what circumstances, it is unnecessary to state, as the contract before us is one relating to real estate. * * *

We do not regard the precedents in relation to personal contracts as authorities in this case, which having relation to real estate, is under the protection of the statute of frauds. That statute is not formally pleaded; but the contract actually executed in writing is set forth in the answer, and it is relied upon by the counsel for the defendants, to repel the parol proof, set up by the plaintiff to vary its terms.

Marriage settlements are little known or used in this State; and though sometimes rectified or reformed in England, where mistakes have intervened, yet we have not found any case of the kind, where this has been done upon parol testimony, without written evidence to

amend by; nor are we aware that it could be done, without violating the statute of frauds.

In respect to mortgages, we have a system of our own, depending on statute, which varies in many respects from the law, as administered in the English courts of equity, and in the State of New York.

But the case of Gillespie v. Moon, itself, is relied upon as an authority in favour of the plaintiff. The defendant there had agreed to purchase two hundred acres of land, the location and bounds of which were well understood. But by mistake, clearly proved by parol, the deed embraced fifty acres more. The defendant perceiving his advantage, although he acknowledged the mistake to several persons, insisted upon holding all the land covered by his deed. This claim, so clearly against equity and good conscience, was strongly tinctured with fraud; for there is little difference in moral torpitude, between fraudulently making a deed conveying more than is intended by the parties, and attempting to hold the same advantage, where it arises from mistake or accident. Indeed fraudulent conduct is distinctly imputed to him in the opinion of the Court. The Chancellor says:

"The only doubt with me is, whether the defendant was not conscious of the error in the deed, at the time he received it and executed the mortgage, and whether the deed was not accepted by him in fraud, or with a voluntary suppression of the truth. That fraudulent views very early arose in his mind, is abundantly proved."

If it was a case of fraud, as well as of mistake, there could be no question either of the admissibility of parol testimony, or that the plaintiff was entitled to relief. Indeed he would have been so entitled at law. But the measure of relief would have varied. At law, a fraudulent deed is entirely void. In equity, its effect may be defeated only so far as it is intended to have a fraudulent operation. But aside from the fraudulent views, which may always be imputed to a party, who would take advantage of a mistake, that alone may be regarded in equity as an infirmity calling for relief, where it goes to the whole subject matter of a conveyance, or where it affects only a part of it. It is not charging a party upon an executory contract in relation to real estate, which cannot be enforced unless in writing; but it shows defects to defeat the operation of a written contract. It is in the nature of an injunction upon a party, not to avail himself of an advantage against good conscience. It does not make a new contract, but examines the quality, extent and operation of one formally executed by the parties. It is one thing to limit the effect of an instrument, and another to extend it beyond what its terms import. A deed by mistake conveys two farms, instead of one. If the suffering party is relieved in such a case by a court of chancery, full effect is not given to the terms of a written instrument. But the statute of frauds does not prescribe what effect shall be given to contracts in writing; it leaves that to be determined in the courts of law and equity. A deed conveys one farm, when it may be proved by parol that it should have conveyed two.

Here equity cannot relieve, without violating the statute. To do so, would be to enforce a contract in relation to the farm omitted, without a memorandum in writing, signed by the party to be charged, or by his authorised agent. These are distinctions, which may be fairly taken, between the case cited from New York, where the plaintiff sought to be relieved from the undue operation of a deed, which conveyed too much, and the case before us, where the prayer of the plaintiff is, that a contract in writing may be so extended by parol testimony, as to embrace more land than that contract covers. But whether this Court, sitting as a court of equity, would receive parol evidence of a mistake in a deed, to restrain its operation, it is not necessary to decide. There may be great appearance of equity in such a proceeding; but it may admit of question, whether more perfect justice would not be administered, by holding parties to abide by their written contracts, deliberately made, and free from fraud. As far as this rule has been relaxed by the clear, unequivocal, and settled practice of chancery, we are doubtless bound by it, in administering that part of our system, but we are not disposed to adopt any new or doubtful exception to so salutary a rule.

In Jordan v. Sawkins, 3 Bro. C. C. 388, 1 Vesey, 402; Rich v. Jackson, 4 Bro. C. C. 514; Clinan v. Cooke, 1 Shoales & Lefroy, 22; Woollam v. Hearn, 7 Vesey, 211, and in Higginson v. Clowes, 15 Vesey, 516, the doctrine maintained is, that a party seeking the specific performance of an agreement, and proposing to introduce new conditions, or to vary those which appear in a written instrument, will not be permitted to do so by parol testimony. And in Dwight v. Pomeroy et al., 17 Mass. 303, 9 Am. Dec. 148, Parker, C. J., regards this principle as fully settled by the more recent chancery decisions in England, and that a few cases bearing a different aspect, have been explained away or overruled by subsequent decisions.

Upon full consideration of the authorities, we are of opinion, that the plaintiff has not made out his case by competent proof. The bill is accordingly dismissed; but without costs, as there is reason to doubt whether the written instrument truly expresses what had been agreed between the parties.[38]

[38] But see Tilton v. Tilton (1838) 9 N. H. 385, where Wilcox, J., states the rule as follows: "The question has been somewhat discussed at the bar, whether a court of equity will reform a written contract by parol testimony, and then decree the specific performance of the contract as reformed. Upon this subject the authorities are conflicting. And the present case does not require of us a decision of the question. There is nothing in this contract to be reformed; the contract was well enough; the only ground of complaint is, that a portion of it was not performed. In Elder v. Elder (1833) 10 Me. 80, 25 Am. Dec. 205, it is said 'a deed conveys one farm, when it may be proved by parol that it should have conveyed two. Here equity cannot relieve without violating the statute.' And it is thus attempted to distinguish that case from Gillespie v. Moon (1817) 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559, where the deed conveyed too much land. If this position rests upon the provisions of the Maine statute, it may be well enough. But we cannot accede to it as the true rule of chancery jurisprudence, to be derived from the adjudged cases in

## II. Relation of Reformation to Statutory Requirements

### *(A) Statute of Frauds*

### JOYNES v. STATHAM.

**(In Chancery before Lord Hardwicke, 1746. 3 Atk. 388.)**

The bill was brought to carry an agreement into execution for a lease of a house during the life of the defendant's wife, which was signed by the defendant the lessor only: upon the face of the agreement the plaintiff was to pay a rent of nine pounds a year.

The defendant insists by his answer, that it ought to have been inserted in the agreement that the tenant should pay the rent clear of taxes, but the plaintiff having written the agreement himself, and omitted to make it clear of taxes, and that the defendant, unless this had been the agreement, would not have sunk the rent from fourteen pounds to nine pounds, and offered to read evidence to shew this was part of the agreement.

The plaintiff's counsel insisted, that the defendant ought not to be admitted to parol proof, to add to the written agreement, which is expressly guarded against by the statute of frauds and perjuries.

The cases cited for the plaintiff were Cheney's Case, 5 Co. 68, 1, and Selwin versus Brown, Cas. in Lord Talbot's time, 248.

England and America. In our opinion, a court of equity is competent to correct and reform any material mistake in a deed or other written agreement, whether that mistake be the omission or insertion of a material stipulation; and whether it be made out by parol testimony, or be confirmed by other more cogent proofs. And the same rule applies to contracts within the operation of the statute of frauds. Langdon v. Keith (1837) 9 Vt. 299; Fonbl. Eq. 58, b. 1, c. 1, § 7, and b. 1, c. 3, § 11; Desell's Ex'rs v. Casey (1810) 3 Desaus. (S. C.) 85; Bickham v. Gough (1797) 4 Har. & McH. (Md.) 17; 1 Story's Eq. 165; Johnson v. Boyfield (1791) 1 Ves. 314; Gillespie v. Moon (1817) 2 Johns. Ch. (N. Y.) 596, 7 Am. Dec. 559, and cases there cited; De Riemer v. Cantillon (1819) 4 Johns. Ch. (N. Y.) 85. This principle is apparently at variance with a well established rule of evidence, observed equally in courts of law and of equity, and resting upon the most satisfactory reasons; that when the parties have reduced their agreement to writing, the written instrument is the only admissible evidence of the terms of the contract, and is not to be controlled, added to, altered, or varied by parol. Fraud is, however, an exception to the rule; and so, in our judgment, is a case of mistake clearly made out. For it would be a reproach to the jurisprudence of the country, if it were not in its power to relieve from the consequences of a mistake unequivocally established. But the mistake must be made out in the most clear and decided manner, and to the entire satisfaction of the court; and especially must the proofs be clear and convincing, when the mistake is denied in the answer. Lyman v. United Ins. Co. (1817) 2 Johns. Ch. (N. Y.) 631; Gillespie v. Moon (1817) 2 Johns. Ch. (N. Y.) 599, 600, 7 Am. Dec. 559; Johnson v. Boyfield (1791) 1 Vesey, 317; Irnham v. Child (1781) 1 Bro. 94; Marquis Townsend v. Stangroom (1801) 6 Vesey, 328; Cleavland v. Burton (1839) 11 Vt. 138; Griswold v. Smith (1838) 10 Vt. 452; Sug. Law of Ven. 120."

For the defendant was cited Walker versus Walker, December, the 10th and 11th, 1740, before Lord Hardwicke. (Vide ante 2 Tr. Atk. Case, 92, pa. 98.)

LORD CHANCELLOR. I permitted this point to be debated at large, because it is decisive in the cause, for I am very clear this evidence ought to be read.

This has been taken up by way of objection to the plaintiff's bill.

The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance, or leave the plaintiff to his remedy at law.

Now, has not the defendant a right to insist, either on account of an omission, mistake, or fraud, that the plaintiff shall not have a specific performance?

It is a very common defence in this court, and there is no doubt but it ought to be received, and quite equal whether it is insisted on as a mistake, or a fraud.

It appears the agreement was drawn and written by the plaintiff himself; the defendant too cannot write, but is a marksman only: if there has been an omission, should not the defendant have the benefit of it by way of objection to a specific performance?

There have been many cases in this court, where such evidence has been admitted.

Suppose an agreement for a mortgage drawn by the mortgagee, the mortgagor being a marksman, and the mortgagee omits to insert a covenant for redemption, and then brings a bill to foreclose, shall not the mortgagor be at liberty to insist in this court upon reading evidence to shew the omission?

So in a case which has happened, of the mortgage being drawn in two deeds, one an absolute conveyance, the other a defeasance, and the mortgagee omits to execute the defeasance, the mortgagor shall be admitted to shew the mistake.

Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the court.

Because it was an agreement executory only, and as in leases there are always covenants relating to taxes, the Master will inquire what the agreement was as to taxes, and therefore the proof offered here is not a variation of the agreement, but is explanatory only what those taxes were: I am of opinion to allow the evidence of the omission in the lease to be read.

## CONAWAY et ux. v. GORE.

(Supreme Court of Kansas, 1880. 24 Kan. 389.)

Error from Rice district court.

Action brought by Gore against Conaway and wife, for the reformation of a certain deed. * * *

BREWER, J.[39] This case has been to this court once before, and the decision therein is reported in 21 Kan. *725. At that time a judgment upon the pleadings in favor of Gore was reversed, and the case remanded for trial upon the facts. Subsequently a trial was had by the district court, without a jury, special findings of fact made, and judgment entered upon them in favor of Gore. To reverse such judgment this proceeding in error has been brought. It may be stated generally that the court found against the facts alleged in the answer, so that the decision in the prior case has little, if any, bearing upon the questions now presented.

The first proposition of counsel for plaintiffs in error is that the petition is fatally defective. It alleges substantially the execution of a deed, that there was by mutual mistake a misdescription of the land, and prays a reformation. It does not allege a previous contract for the purchase of the land, the payment of any money, or any matter extrinsic to the deed by which it appears that the plaintiff has parted with anything or will suffer loss if reformation is not awarded. For all the petition shows, the deed may have been purely voluntary on the part of the defendants,—a mere gift,—and equity will not interfere to correct a gift. Now, it may be, as counsel claim, that a demurrer, if it had been filed, ought to have been sustained. But none was filed. No challenge was made of the petition. Answer and reply were filed, trial had, evidence received, and findings made before the sufficiency of the petition was questioned. And upon the question of the sufficiency of the pleadings, we need not look alone to the petition. We may properly examine all the pleadings, and if by them all there are sufficient allegations presented to make an issue of fact for trial, any defect in the petition will be cured. Now, the answer which was considered when the case was here before, alleged that plaintiff had contracted to purchase the land at and for the price of $800, and that, relying upon his promise to pay that amount, the defendants had executed the deed, and that he had since failed and refused to pay. Upon the maxim that he who seeks equity must do equity, we held that this answer stated a defense. Thereafter a reply was filed, in which the plaintiff alleged that he bought the land for $395, and had paid that sum. This reply was found by the court to be true. Now, taking the petition and reply together, a plain case for equitable relief is disclosed. Purchase, payment, and mistake in description, all

[39] The statement of facts is abridged.

appear. Clearly, the plaintiff would suffer great prejudice if denied a recovery; and no objection to the mere manner in which these facts are alleged is of any avail, if not presented until after the close of the trial.

Another claim of counsel is that the statute of frauds presents an insuperable obstacle to the plaintiff's recovery. The argument is that the contract for the sale of the land was in parol; that there is no allegation or proof of the delivery of possession, the making of improvements or any other matters which take a parol contract out of the statute of frauds; that the deed which was executed was a conveyance of other land, and therefore neither a conveyance nor a contract for the land in question. The argument is elaborated by counsel, and many authorities are cited. But these authorities run along the line of the doctrine of specific performance; while the case at bar comes under the head of the reformation of contracts. The difference between the two is marked and substantial. One aims to enforce a parol contract as though it were in writing; the other seeks simply to conform the written to the real contract. One would avoid the necessity of any writing; the other would simply correct the writing. The principles which control the one are essentially different from those which control the other. If a parol contract were sought to be enforced, the arguments and authorities of counsel would be in point. But the reformation of a deed already made,—the correction of a contract already in writing,—involve very different considerations. The question is, not whether there has been such a performance as renders inequitable the non-enforcement of the parol contract, but whether the written is the actual contract. It is not the substituting of acts in pais for the written contract; but it is making the written the expression of the real contract. We think, therefore, that the argument and authorities of counsel based upon the statute of frauds are not apt, and the objection urged not well taken. It would undervalue the whole doctrine of the reformation of contracts and deeds, if the case were to be treated as though no written contract had ever been made. The reformation implies the existence of a written contract. It corrects that which exists, and does not seek to avoid the necessity of that which is not. A mutual mistake must be shown, and that the party would be wronged by a failure to correct. These facts appearing, the power and duty of a court of chancery to reform is clear.

Many objections are urged in reference to the admission, exclusion, and effect of the testimony. We see nothing in reference to the admission or exclusion of testimony which calls for notice; nothing in which a different ruling would have changed the result. As to the effect of the testimony, it is urged that the findings of the court cannot be sustained, because one party swears that the consideration was $800, while the other as positively swears that it was but $395. Hence,

it is argued that the plaintiff has failed to make his case clearly apparent. We cannot agree with counsel; for the fact of a mutual mistake in the description is conceded, and the matter of consideration, performance, and prejudice must, we think, rest upon the ordinary rule as to the preponderance of evidence, and, as to that question of fact, the finding of the trial court is conclusive.

Upon the whole record we see no error prejudicial to the material rights of the plaintiffs in error, and therefore the judgment must be affirmed. All the Justices concurring.

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## JOHNSON v. BRAGGE.

(Chancery Division. [1901] 1 Ch. 28.)

The defence was raised to this action for rectification of a marriage settlement that under section 4 of the Statute of Frauds parol evidence was not admissible to rectify the alleged mistake.

In July, 1865, one John Walter Hawkesworth, in contemplation of an intended marriage with the plaintiff, then Miss Eliza Madeline Florence Dowler, wrote to his solicitor, Mr. William Rowcliffe, asking for information as to his present and future means and prospects to lay before the lady's father, and for advice and guidance as to the nature of the settlement he ought to execute.

In reply, Mr. William Rowcliffe wrote to John Walter Hawkesworth a letter, dated July 21, 1865, which, so far as is material, was as follows:

"I have now carefully looked into the documents, and am enabled to answer your letter of the 16th.

"(1) Under your grandfather's will, you will be absolutely entitled, on the death of your mother, to one-fourth of his estate, after deducting £5000, which was given as a portion by your grandfather on his marriage.

"This sum may be estimated in round figures at £4000.

"Under the same will, you will also probably become entitled to considerable parts of the shares of your three aunts; this, however, depends upon the periods of deaths of several parties, so that no estimate can be made.

"(2) Under the settlement which was executed the other day, you will be entitled for your life, on the death of your father and mother, to funds amounting together to about £7000, and this deed gives you a power to settle the income on your wife after your death for her life, and to give the capital among your children as you may think fit. Failing your children, you may give it as you please.

"Supposing you marry, I think you may fairly give the lady a life interest in the latter fund, and I think you should settle all the personal property which you may derive under your grandfather's will in the same way, namely:

"On yourself for life.

"After your death on your wife for life.

"After the death of the survivor, on your children. And failing these, you may give it to whom you may think fit.

"I have, of course, only stated the property to which you are absolutely entitled; but the lady's father should distinctly understand that your expectations under your grandfather's will are very considerable, but as they are subject to contingencies they cannot of course be treated as certain.

"I shall be very glad to see you and explain the matter more fully to you,

which can be done more satisfactorily at an interview than by letter, and, if this explanation is not quite intelligible and satisfactory to you, I hope you will talk it over with me before you shew it to the lady's father."

"The settlement which was executed the other day" was a post-nuptial settlement, dated December 9, 1864, under which J. W. Hawkesworth, subject to the life interest therein of his father and mother, was entitled to the income of the trust funds thereby settled for his life, with power by deed or will to appoint a life interest to any wife who might survive him, and subject thereto the trust funds were settled upon J. W. Hawkesworth's children as he should by deed or will appoint, and in default for his children at twenty-one or marriage.

The evidence as to the negotiations for the settlement, as given by the plaintiff, the only survivor of the parties to the transactions, and as accepted by the court, was that the plaintiff and her father and mother, and J. W. Hawkesworth, had several conversations at the Vicarage, Aldeburgh, where the lady's parents resided, in the course of which the father asked whether J. W. Hawkesworth could settle anything on marriage. He said he did not know, but he would write to his family solicitor, Mr. Rowcliffe. At a subsequent meeting J. W. Hawkesworth produced Mr. Rowcliffe's letter of July 21, with which the lady's father seemed very pleased. J. W. Hawkesworth said he would settle about £11,000, coming as to £7,000 from his parents' marriage settlement, and as to £4,000 from his grandfather's will. There was a long talk with the lady's father and mother about it. A solicitor, a friend of the family who was now dead, was then staying at Aldeburgh, and the plaintiff's father brought him up to the Vicarage and read him over Mr. Rowcliffe's letter in the presence of J. W. Hawkesworth, the plaintiff, her mother, and her brother. He was asked as a friend to prepare the necessary document. The plaintiff's father and mother said they would settle, so far as they could, certain property as to which no question was raised in this action. The plaintiff was to have the income of all during her widowhood. The solicitor friend took Mr. Rowcliffe's letter away, prepared a document, brought it up to the Vicarage next day, and left it for the purpose of being read. He came again another day with a second witness. It was signed by all parties at the same time. The solicitor friend said it was a settlement of J. W. Hawkesworth's £11,000 on the plaintiff. It was read over and explained. The solicitor friend stated that the settlement was made on the instructions in Mr. Rowcliffe's letter.

The settlement, which was entirely in the handwriting of the solicitor friend and was under seal, was in the form of articles of agreement. * * *

The marriage took place on August 7, 1865. No further settlement was ever executed pursuant to the articles; but in 1891 J. W. Hawkesworth and the plaintiff, on the occasion of the marriage of one of their

daughters, appointed one eighth of the trust property in her favour after the decease of the survivor of J. W. Hawkesworth and the plaintiff; and in 1898 J. W. Hawkesworth and the plaintiff appointed trustees of the settlement, and appointed that the remaining seven eighth parts of the property subject to the settlement should, from and after the death of the survivor of J. W. Hawkesworth and the plaintiff, be held for the remaining seven children in equal shares. J. W. Hawkesworth died in 1898, leaving eight children who attained twenty-one. His father and mother predeceased him. Shortly after the death of J. W. Hawkesworth doubts were raised as to the proper construction of the settlement, and in particular whether the plaintiff was entitled to a life interest in the £7,000 coming from the settlement of December 9, 1864. The contingent interests referred to in Mr. Rowcliffe's letter did not prove as valuable as was then expected, and there was not £7,000 under the grandfather's will in addition to the £4,000. By an order made by North, J., on April 26, 1899, on an originating summons (In re Walmesley, Medlicott v. Bragge, [1898] W. 3835), the court declared that the whole of the share of the said J. W. Hawkesworth under the will of John Walmesley not exceeding £11,000 was bound by the settlement of August 5, 1865, and the court declared that the settlement of August 5, 1865, did not operate as an exercise of the power of appointment contained in the settlement of December 9, 1864, in favour of the widow. Under these circumstances the plaintiff (who had married a second time) commenced this action, seeking to rectify the settlement so as to give her a life interest in the £7,000 comprised in the settlement of December 9, 1864. The defendants were the trustees, and the children of the marriage, or persons claiming under them. Some of the defendants disputed the plaintiff's claim; others did not contest it.

One of the defendants expressly pleaded the statute of frauds, section 4, as a defence.[40]

Nov. 16. COZENS-HARDY, J. This is an action seeking rectification of a marriage settlement under somewhat peculiar circumstances. [His Lordship having stated the facts and the result of the evidence as above, observing that the plaintiff gave her evidence in a manner which satisfied him that she was a witness of truth, and that he accepted her statements as to what took place, continued:]

Now, I am satisfied by the evidence that it was intended by all parties that the settlement should operate in favour of the plaintiff upon the two sums of £4,000 and £7,000 mentioned in Mr. Rowcliffe's letter, and that the power of appointment which Mr. Hawkesworth possessed over the £7,000 should be exercised by the settlement, and that all parties thought it had been exercised thereby, and that Mr. Hawkesworth died in this belief, but that a mistake was made by the solicitor friend who treated the £7,000 as coming from the same source as the

[40] The statement of facts is abridged.

£4,000. This being so, I think I ought to rectify the settlement, unless I am prevented by reason of two objections which were strenuously urged before me. In the first place the statute of frauds is pleaded, and it is contended that a marriage settlement cannot be rectified on parol evidence. In the second place it is contended that, as North, J., has decided that the power of appointment was not exercised, the Court, according to well-settled rules, cannot give relief against a non-execution, as distinct from an imperfect execution, of the power.

Now the plea of the statute of frauds somewhat surprises me, for the books are full of cases in which marriage settlements and conveyances of land have been rectified on parol evidence. But I was told that the statute of frauds had not been pleaded in those cases, although it might have been. The reason why the statute of frauds was not pleaded in modern cases is because it was settled at least a century and a half ago that parol evidence is admissible in an action to rectify a mistake in a marriage settlement, notwithstanding the statute of frauds: an action of that kind not being one seeking "to charge any person upon any agreement made upon consideration of marriage" within the meaning of section 4. In Thomas v. Davis (1757) 1 Dick. 301, 303, decided in 1757, the bill was to rectify a mistake in a conveyance. The evidence of the attorney who received the instructions to prepare the deed, and did prepare the deed, was held admissible, though in that case not sufficient. Sir Thomas Clarke says:

"The objection is, that it is a direct contradiction to the statute of frauds, but I am clear it may be read. Parol evidence is admitted for several purposes. It is allowed to rebut an equity. It is often admitted to prove an original fraud or mistake."

See, also, Rogers v. Earl (1757) 1 Dick. 294; Sugden's Vendors and Purchasers (14th Ed.) p. 172.

In Alexander v. Crosbie (1835) L. & G. t. Sugden, 145, 46 R. R. 183, which was a suit to rectify a settlement, Sir E. Sugden says (L. & G. t. Sugden, 150:

"In all the cases, perhaps, in which the court has reformed a settlement, there has been something beyond the parol evidence, such, for instance, as the instructions for preparing the conveyance or a note by the attorney, and the mistake properly accounted for; but the court would, I think, act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach."

See, also, McCormack v. McCormack (1877) 1 L. R. Ir. 119.

In Story's Equity Jurisprudence (13th Ed.) § 158, it is laid down that:

"The exceptions to the rule" (rejecting parol evidence to contradict written documents) "originating in accident and mistake have been equally applied to written instruments within and without the statute of frauds."

In my opinion the statute of frauds is not a valid defence.

As to the second objection, I am unable to appreciate its force. The instrument of August 5, 1865, is under seal. No further deed will be required. The deed, when rectified by inserting the few words

needed to correct the blunder made by the solicitor friend, will be a perfectly valid appointment. The jurisdiction I am asked to exercise does not depend upon any doctrine peculiar to powers. When once the deed is made to accord with what I find to have been the real bargain and intention of all parties to it, no further relief will be needed.

The result is that I must grant the relief asked by the plaintiff. I shall declare that the deed of August 5, 1865, was, in the particulars hereinafter specified, executed under mistake, and that the deed ought to be rectified by reading the same as if in the recital, after the words "under the will of his maternal grandfather John Walmesley," there had been added the words "and of the settlement made by his parents dated the 9th of December, 1864, respectively"; and I shall order a copy of this declaration to be indorsed on the settlement.

The costs of all parties of this action must be taxed and paid out of the trust estate.[41]

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## OLLEY v. FISHER.

(Chancery Division, 1886. 34 Ch. Div. 367.)

Action for the rectification of a written agreement, and for damages for the breach of the agreement as rectified.

On the 31st of January, 1884, an agreement in writing was entered into between the plaintiff and the defendant, by which the plaintiff agreed, within nine months from the date of the agreement, to erect and finish, fit for habitation, on a piece of ground at Lewisham, in the county of Kent, belonging to the defendant, six houses, according to certain specifications and plans, to the reasonable satisfaction of the defendant's surveyor, and the defendant agreed (inter alia) within three

[41] In Simmons Creek Coal Co. v. Doran (1891) 142 U. S. 417, at 435, 12 Sup. Ct. 239, 35 L. Ed. 1063, Chief Justice Fuller said: "The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court. Fishack v. Ball (1891) 34 W. Va. 644, 12 S. E. 856; Railroad Co. v. Dunlop (1889) 86 Va. 346, 10 S. E. 239. The general doctrine is not denied, but it is contended that the effect of the correction of the deeds (if the lost conveyance contained an identical description) is to enlarge them so as to include more land than they originally embraced, and that this renders the action of the court obnoxious to the statute of frauds. Glass v. Hulbert, 102 Mass. 24, is cited to the proposition that, although the principle maintained by Chancellor Kent in Gillespie v. Moon (1817) 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559, that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the true contract of the parties, might be afforded to a plaintiff seeking a modification of the contract as well as to a defendant resisting its enforcement, is well settled, it cannot be extended to enlarge the subject-matter of a contract, or to add a new term to a writing, by parol. We need not enter upon a discussion in this regard here, as the deeds themselves furnished the means of making the correction, and the statute of frauds was not pleaded."

months from the completion of the houses, to erect a bridge over the river Ravensbourne, as shewn in a plan annexed to the agreement. The defendant also agreed to grant the plaintiff leases of the ground and houses, at a specified aggregate ground rent.

The plaintiff within the nine months erected and finished four houses on the land, to the satisfaction of the defendant's surveyor. The plaintiff alleged that he executed the agreement under a mistake, induced by the negligence of the defendant, and believing that it provided that he should erect on the land (not six houses) but four, which was the number actually agreed upon between the plaintiff and the defendant, and the plaintiff alleged that the defendant was attempting wrongfully and fraudulently to take advantage of this mistake. The defendant had not, within three months from the completion of the four houses, erected the bridge over the river.

The plaintiff claimed rectification of the agreement, by striking out the number "six" and inserting in lieu thereof the number "four," as the number of houses thereby agreed to be erected and finished by the plaintiff; and damages for the breach of the agreement by the defendant.

By his statement of defence the defendant insisted that the written agreement correctly expressed the terms of the real agreement between himself and the plaintiff, and denied that he had made any default in the performance of his part of the agreement, but he did not plead the statute of frauds. * * *

NORTH, J. I am quite clear that the evidence is admissible, not for the purpose of interpreting the written contract as it stands, but to shew that the written contract ought to be different from that which it actually is. * * *

NORTH, J. I desire to add that I did not feel the slightest difficulty in admitting parol evidence for the purpose of rectifying the written contract, and shewing that the word "six" in it ought to have been written "four;" nor should I, if the evidence had shewn that the contract ought to be so rectified, have felt any difficulty, the statute of frauds not having been pleaded (as indeed, by reason of the part performance, it could not be), in going on to give consequential relief in the nature of specific performance on the footing of the contract as rectified, upon the principle pointed out by Lord Justice Fry, in his book on Specific Performance, 2d Ed. pl. 799, viz., that under section 24, subsec. 7, of the Judicature Act, 1873, the court can now have no difficulty in entertaining an action for the reformation of a contract and for the specific performance of the reformed contract in every case in which the statute of frauds does not create a bar.

## WOOLLAM v. HEARN.

(In Chancery before Sir William Grant, 1802. 7 Ves. 211.)

William Hearn, being possessed of a house in Ely Place, under an agreement for a lease for seven, fourteen, or twenty-one years, from the 25th of December, 1794, agreed to let the house to Penelope Woollam for seventeen years; and a memorandum, dated the 11th of December, 1798, was executed by them; stating an agreement for a lease to the plaintiff from the defendant for seventeen years, to commence at Christmas next, at the yearly rent of £73. 10s.; the tenant paying all taxes except the land-tax, which Hearn agreed to pay: the lease to contain all usual covenants; and also covenants, that no public trade should be carried on in the premises; and that no alteration should be made in the front; that the lessee should leave the premises in tenantable repair, with other covenants relative to the situation of Ely Place, as being extra-parochial.

The bill was filed by Mrs. Woollam against Hearn; stating, that the rent of £73. 10s. was inserted by mistake, or with some unfair view: the real agreement being, that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor; and that he did not pay more than £60; and, in confidence, that a lease would be executed to her, she paid £60 to the defendant at the time of executing the agreement, being the moiety of the sum, which the defendant alleged he had laid out in repairs. She also paid £33. 15s. 6d. for fixtures.

The bill prayed a specific performance; and that the defendant may be decreed to execute a lease according to the agreement, at the rent of £60 or such other rent as the defendant paid his lessor.

The defendant by his answer denied, that £73. 10s. was inserted by mistake, or with any unfair view; or that the agreement was, that the plaintiff should pay the same rent as the defendant paid; which he admitted to be £63. He stated, that he believed he might say in the course of the treaty, that she would have the premises upon the same terms as the defendant had; not meaning, that she was to have them at the same rent: but that she would on the whole have them upon terms of equal advantage with the defendant; considering the money he had expended upon them. He admitted the payment of £60; stating, that it was not a moiety of the money laid out by him; though at the time of payment it might have been so called.

On the part of the plaintiff, her son stated by his depositions, that when he treated with the defendant for a lease of the house, he said, he had got a lease of it; but could not at that moment lay his hands upon it; that he did not exactly know what the rent was, but it was somewhere about £70 a year; that he did not want to get any thing by her; and she should have the house upon the same terms he had it himself, which he repeated several times afterwards. The plaintiff's solicitor stated, that the defendant repeatedly said, upon being pressed

to execute a lease, that the plaintiff held the house upon the same terms upon which he held: but, when the deponent proposed to him to execute an assignment of the original lease, he objected, that it was always his maxim not to part with the original lease, but to hold it in his own possession for his security.

Mr. Romilly, and Mr. Wetherell, for the Plaintiff.

To the objection, that the plaintiff cannot vary the written agreement, the answer is, that this is a case of fraud; upon which you must have recourse to parol evidence; otherwise it cannot be made out; and that takes it out of the statute: St. 29 Car. II, c. 3; Shirley v. Stratton, 1 Bro. C. C. 440; Young v. Clark, Pre. Ch. 538. * * * If the bill had been filed against this plaintiff, upon all the authorities she might have insisted upon this variation; for the Court would not assist a plaintiff coming to enforce an agreement, by his own fraud not according to the true contract. There can be no principle, why a man may set up a fraud defensively, which he cannot offensively. The defendant must go the length of saying, that no proof of fraud, however clearly it may be made out, that the written agreement was not the actual agreement, will be adequate. Certainly a plaintiff must make out a stronger case. The consequence of refusing this relief would be, that the person who contrived the fraud, and who, if he filed a bill, would not be permitted to set it up, may secure the advantage by refusing to perform the agreement; driving the other to be the actor, and to file a bill. In many of these cases the fraud has not been clear. This is beyond a doubt misrepresentation from first to last; not only suppressio veri, but also suggestio falsi. How is it to be distinguished from a purchase of an estate, represented by the vendor at a certain number of acres, and turning out to be less? There is a similar reference here to the rent. The defendant's construction of his words is impossible.

Mr. Leach, for the Defendant.

The cases cited proceed upon a principle wide of the Statute of Frauds. The plaintiff signed this agreement under the notion, that the rent specified was paid by the plaintiff to his landlord. Assume that fact. She undertook it with full knowledge. This is not within the principle upon which the Court permits a written agreement to be varied by parol. The meaning of that rule is, that the writing must differ from the intention of the party, when signing it. This plaintiff intended, and knowing it bound herself, to pay £73. 10s. per annum. She does not insist, that she signed the agreement by mistake: but she contends, upon the suppression of the fact, not merely, that she is to be discharged from the written agreement, which might be done, if the case was made out, but beyond that to set up another agreement, existing only in parol. That is the distinction. If she meant only to pay a rent of £63 and the other by fraud inserted £73 the Court would correct it: but this is an attempt to repeal the Statute of Frauds. The danger of admitting such evidence must be attended to; persons supporting their own case, and affecting to state the very words that pass-

ed. By the alteration of a word the witness alters the whole conversation. But, admitting the evidence, it by no means supports their case. If the understanding was, that the plaintiff was to stand in the same relation to the original landlord as the defendant, how was it, that she was to pay £60 as a consideration for the lease? He meant nothing more than what he states in his answer; that she should have it upon terms of equal advantage. The supposed fraud consists in this; that having expended money he must therefore have an increased rent. * * *

THE MASTER OF THE ROLLS.[42] The doubt I have felt during the argument of this case, whether there is any instance of executing a written agreement with a variation introduced by parol, still remains; and as it is an important question, I wish to consider it.

THE MASTER OF THE ROLLS. This bill calls upon the Court for a specific execution of an agreement for a lease, at a rent of £60 a-year. There is no agreement in writing for a lease at that rent; the agreement expressing a rent of £73. 10s. The plaintiff contends, however, that she signed that agreement under a belief, that such was the rent payable by the defendant: the real agreement being for a lease at the same rent he paid to his landlord. The defendant in his answer admits, he might have said, she should have it upon the same terms, not meaning the same rent, but upon terms upon the whole equally advantageous; insisting, that, as he had laid out a great deal of money, she would upon the whole have as good a bargain. She offers parol evidence to prove an express agreement, that she was to have it upon the same terms as he had it; and to show, that nothing could be meant by that expression, but the same rent: nothing being in discussion between them, but the amount of the rent. He alleges a particular reason for not stating it; that he had not his own lease at hand. The question is, whether the evidence is admissible; for, though read, it has been read without prejudice. The defendant controverts the effect of the evidence, supposing it can be received; but I own, my opinion is, that, if received, it will make out the plaintiff's case; for, taking the whole together, there is hardly a doubt, that the impression meant to be conveyed was, that the rent should be the same; and, whatever he meant, that is the impression any person would have received from his language.

By the rule of law, independent of the Statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry, that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement; as furnishing better evidence than any parol can supply.

[42] Part of the opinion is omitted.

Thus stands the rule of law. But when equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show, that under the circumstances the plaintiff is not entitled to have the agreement specifically performed; and there are many cases, in which parol evidence of such circumstances has been admitted; as in Buxton v. Lister [3 Atk. 383]; which is very like this case. There, upon the face of the instrument, a specific sum was to be given for the timber: but it was shown by parol, that the defendants were induced to give that upon the representation that it was valued by two timber merchants, which was not true. So here by the agreement, upon the face of it, she is to pay this rent: but by the evidence she was induced to do so, because she thought, from his representation, that it was the rent he paid. If this had been a bill brought by this defendant for a specific performance, I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree: first, to falsify the written agreement; and then to substitute in its place a parol agreement, to be executed by the Court. Thinking, as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go further in receiving and giving effect to parol evidence, than I am forced by precedent. There is no case, in which the Court has gone the length now desired. * * *

But this is evidence to vary an agreement in a material part; and, having varied it, to procure it to be executed in another form. There is nothing to show that ought to be done; and my opinion being that it ought not, I must dismiss the bill, but without costs.

The plaintiff then applied for a decree according to the written agreement; with a covenant for quiet enjoyment; as he had not power to grant such a lease.

THE MASTER OF THE ROLLS said, the bill was not for that purpose; expressly objecting to a lease at the rent of £73. 10s.

The bill was dismissed without costs, and without prejudice to another bill for a lease, at the rent of £73. 10s.[43]

[43] In Rich v. Jackson (1794) 6 Ves. 334, note, Lord Loughborough states his understanding of the extent of the introduction of parol evidence in equity thus: "I have looked into all the cases; and I cannot find, that this Court has ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce; but it has often, with great propriety, where an attempt has been made to obtain by a decree of this Court a farther security, or more ample interest, than the party was in possession of by the paper itself, refused, if it appeared the demand was fraudulent or unfair. The case of Joynes v. Statham [(1746) 3 Atk. 388] was relied on. That was a case where parol evidence was admitted on behalf of the defendant; who by that evidence shewed, that the plaintiff had taken an unfair advantage of the evident ignorance of the defendant, and drawn an agreement for him in terms similar to that in this case, in which the same circumstances occurred. * * * None go farther than this in the decisions and rules laid down; that parol evidence of the conduct of the parties, the manner of conducting the transaction, the unfairness

and hardship, may afford a good ground to leave the party in the condition, in which he put himself at law, to make what he chooses to make of it; but ought not to make this Court give him any aid. If the defendant had not got by this paper what would be a security at law, and had applied to me, and the case was reversed as to the situation of the parties, I would not put the defendant in a better condition than that paper had put her in. It is impossible to admit any deviation from the rule at law. That confines the whole to the written agreement; and does not admit that to be varied by any evidence of the conversation or conduct of the parties. That rule will not affect the case of a subsequent, distinct, collateral, agreement; but the evidence, which I have heard, and ought not to have heard, in this case, is evidence of what passed at the time of, and prior to, the written agreement. The lease must be according to the written agreement. I suppose the plaintiff would not wish for a lease according to that. (The plaintiff declined to execute such a lease.) I must therefore dismiss the bill: but I will not dismiss it with costs."

In Quinn v. Roath (1870) 37 Conn. 16, at 29, the court, speaking through Phelps, J., said: "The ordinary ground on which a court of equity allows the introduction of parol proof to add to or affect a written instrument, is to provide relief in cases of fraud, mistake and surprise, and prevent a party who has obtained an instrument under such circumstances from deriving to himself an unfair and inequitable advantage from it, to the injury of the person from whom it was so obtained. This doctrine finds its sanction in the truest promptings of conscience, and while it is not of so general applicability in other cases it is not confined to those mentioned; and it is claimed by the respondent that, though operating within more circumscribed limits, it is recognized with similar certainty and clearness in the case we are considering, and that such evidence is equally admissible for the purpose for which it was here offered as it would have been to prove either fraud or mistake. Taking this case as we find it on the record, the evidence was offered, not for the purpose of proving a fraud in the petitioner in withholding the verbal stipulation from the writing, nor any accident, mistake or fraud in not embodying it in the written instrument. We understand the verbal provision not to have been designed to be incorporated into the writing, but to stand as an independent variation of it, and that the respondent claims it was intended, if not strictly performed by the petitioner, to render void the entire agreement; and that such performance by the petitioner was in effect to operate as a precedent condition to his right to a conveyance of the land. So considering it, we are to decide whether by way of defence against the petitioner's bill the evidence ought to have been excluded. The admissibility of the particular species of evidence here offered is restricted to the defence of bills brought for a specific performance, and the courts, in admitting it to repel the attempt of a purchaser or seller of land to oblige the other party to a contract to perform his part specifically, have proceeded upon the just ground of inequitableness in the petitioner in striving to enforce the execution of a written contract with parol variations by regarding only the written provisions and entirely disregarding the verbal variations. This is in strict accordance with the spirit of equity, which requires of a party seeking the aid of a court of chancery to come with clean hands and a willingness to do equity; and the most flagrant fraud, though grosser in degree, is not a more certain violation of this spirit, than a deliberate attempt to enforce only the written portion of a contract which contains verbal variations essentially changing its character and rendering it less favorable to the petitioner. The law seems well settled that if a party to a contract for the conveyance of land desires the enforcement of the performance of it, such enforcement must be of the precise contract in terms which the parties in fact made, and it is generally true that he will not be permitted to enforce one resting partly in writing and in part in parol, and if he attempts to compel the performance of a written contract which contains collateral verbal alterations he cannot be allowed the benefit of the written portion without also accepting such parol modifications of it as exist. It is equally well established that a petitioner who brings his bill for a specific performance, is not entitled to the same indulgence in the introduction of parol proof as the respondent may be, who defends against it and offers to prove the existence of verbal stipulations inconsistent with, and varying, and operating as conditions of or limitations to, the writing."

## BEARDSLEY v. DUNTLEY.

(Court of Appeals of New York, 1877. 69 N. Y. 577.)

Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court at special term.

This action was brought to obtain specific performance of an alleged oral agreement for the sale by plaintiff to defendant of a piece of land, the complaint alleging in substance that the land in question was contracted to be sold with various other parcels, and that plaintiff was induced to accept a deed of the other parcels, under and by means of fraudulent representations of defendant that it included the parcel in question.

The plaintiff, through her husband, negotiated with the defendant for the purchase of a farm. The negotiations were oral, and the plaintiff was present. A piece of land of about three acres, lying on the opposite side of the road from the remainder of the farm, was claimed by plaintiff to have been included in the negotiation. Subsequently defendant executed a contract under seal to plaintiff's husband, and the next day executed a deed of the farm to the plaintiff, which did not include the three-acre piece. Plaintiff paid or secured the consideration, went into possession of the farm, including the three-acre piece, cultivated it with defendant's knowledge, and is still in possession. Subsequently, learning that defendant claimed he had not sold the three acres, she demanded a deed thereof. On refusal she brought this action. On the trial of the action several questions were submitted to the jury, and they found in substance that it was understood by the plaintiff and her husband during the negotiations, and when the deed was delivered, that the sale and conveyance was to embrace the three acres; that the defendant knew at the time that they so understood; that he induced them to accept the deed with the fraudulent purpose and intent to have the three-acre lot excluded therefrom. The court adjudged that the plaintiff was entitled to hold the three acres and was entitled to a deed therefor.

MILLER, J.[44] * * * The defendant further claims that the verbal negotiations being within the statute of frauds, and the plaintiff having made no improvement on the premises, the plaintiff cannot claim the land, but is confined to relief in damages. The case of Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418, is relied upon by the defendant to sustain this theory. That case was a bill in equity filed by the purchaser of a lot of land, after taking the deed and paying the price, seeking relief on several grounds, and among others because during the negotiations for the sale of the lot, the defendant represented that it included land which it did not include, and under that misrepresenta-

[44] Parts of the opinion are omitted.

tion, the plaintiff agreed to make the purchase; and it was held, in reference to the additional land, that no decree could be made for its conveyance in the absence of any evidence to estop the defendant from pleading the statute of frauds, and that the only relief was by an action for damages. In the case cited, no possession was taken under the deed of the land excluded, so that in one of its most material and important characteristics, it differs entirely from the case at bar. Nor does it appear that in Massachusetts the statute of frauds contains a provision to the effect that nothing contained therein shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance of the same, as is the case here. See 2 R. S. 135, § 10. * * *

At a very early period in the history of equity jurisprudence of this State, it was held that equity relieves against a mistake as well as fraud, and in Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559, where the verbal agreement was to sell two hundred acres, and two hundred and fifty was erroneously included in the conveyance. The grantee took possession, and a decree was granted directing a reconveyance of the excess. The learned Chancellor Kent remarks:

"It would be a great defect in what Lord Eldon terms 'the moral jurisdiction of the court' if there was no relief for such a case."

In Glass v. Hulbert, supra, it is conceded that the principle maintained by Chancellor Kent was fully established, but an attempted distinction was said to exist because the relief sought and granted was by way of restricting, and not by enlarging the operation of the deed. The principle is the same and equally applicable to both cases, as is apparent from the discussion of the cases by the chancellor in Gillespie v. Moon, supra. Besides the subsequent decisions in this State distinctly hold that the same principle was applicable where the conveyance or agreement did not include all the land which was intended. * * * In the case at bar, the plaintiff took possession under the deed, with the knowledge of the defendant, and has ever since held possession of the same, and within the cases last cited, was entitled to the relief demanded. The case clearly was not within the statute, as there was sufficient performance to bring it within the well-settled rule that partial performance takes a parol agreement out of the statute of frauds. * * *

The judgment was right and must be affirmed. All concur.

Judgment affirmed.

## NEININGER et al. v. STATE.

(Supreme Court of Ohio, 1893. 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.)

WILLIAMS, J.[45] The principal question presented is whether a written instrument, which by mistake fails to express the agreement of the parties, may be reformed, and then enforced against a surety. The plaintiffs in error contend that it cannot, and for that reason they claim the court of common pleas erred in overruling their demurrer to the amended petition, and awarding the relief it demanded against them. This court in a number of decisions has strictly adhered to the rule that the liability of a surety cannot be extended by implication beyond the terms of his contract. In State v. Medary, 17 Ohio, 554, it was held that the sureties on a bond conditioned for the faithful performance by the principal of his duties as a member of the board of public works were not liable for his defalcation as an acting commissioner under the appointment of the board.

It is well settled that written contracts and other instruments of writing may be reformed when, through fraud or mistake, they fail to express the actual agreement and intention of the parties, and that the fraud or mistake may be established by parol evidence. That doctrine has been fully maintained in numerous cases in this state. The remedy has been administered even where the mistake was in the legal effect of the terms of the instrument, and but for the statute of frauds there would appear to be no reason why the contracts of sureties should not be subject to the remedy, the same as other written instruments. The obligation of the surety rests upon a consideration as adequate as that of the principal; for, though he receive no pecuniary or other benefit for his undertaking, credit is extended to the principal, and advantages are obtained by him, upon the faith of the surety's engagement. But as the statute requires a promise to answer for the debt or default of another to be in writing, and signed by the party to be charged therewith, in order to be binding, it is contended that to permit the writing to be reformed in any material part upon parol proof of a mistake would be to establish a verbal contract, and make it obligatory upon the surety, contrary to the provisions of the statute. If that is a valid objection to the reformation of a contract executed by a surety, it must be equally so to the reformation of any other contract embraced in the statute of frauds; for it is obvious the objection applies with equal force to all contracts that are within its provisions. The statute is not less explicit in its requirement that contracts for the conveyance of any interest in lands shall be in writing, and signed by the party, than it is that those of a surety or guarantor shall be of that character. Indeed, it is expressed as to both classes of contracts in

[45] The statement of facts and parts of the opinion are omitted.

the same language, and in the same section. And if those of either class cannot, on account of the statute, be reformed, it follows that those of the other cannot; but, if either may be, then so may the other. The statute presents no greater or different obstacle in the one case than in the other. It has long been the settled law of this state that contracts concerning lands, and even deeds and mortgages by which they have been conveyed, may be reformed on the ground of mistake, and upon parol proof, by correcting misdescriptions, including lands omitted by mistake, enlarging or restricting the character of the estate, inserting or qualifying covenants and conditions, and in other respects. In Davenport v. Sovil, 6 Ohio St. 459, it was held that a mortgage might be reformed so as to include land not described in it, and then enforced against the same. In the case of Clayton v. Freet, 10 Ohio St. 545, a deed which conveyed an estate in fee simple was so reformed as to convey a life estate to the grantee, with remainder to her children; and a deed, defective for want of an acknowledgment, was reformed, by enlarging a life estate into a fee simple, and a conveyance decreed accordingly, in the case of Ormsby v. Longworth, 11 Ohio St. 653. Other instances in which like relief has been awarded may be found in Hunt v. Freeman, 1 Ohio, 491; Evants v. Strode, 11 Ohio, 480, 38 Am. Dec. 744; Webster v. Harris, 16 Ohio, 490. * * *

After a careful and somewhat extended examination of the question, we have arrived at the conclusion that a written instrument executed by a surety, which by mistake fails to express the actual agreement and intention of the parties, may be reformed upon parol proof, like other written instruments, and then enforced against the surety; and such mistake and the actual agreement may be established by parol proof. But the evidence must be of that clear and convincing character which leaves no reasonable doubt either of the mistake or the terms of the agreement. * * * Judgment affirmed.

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### *(B) Statute of Wills*

### YATES et ux. v. COLE et al.

(Supreme Court of North Carolina, 1853. 54 N. C. 110, 59 Am. Dec. 602.)

BATTLE, J.[46] The object of the bill is to obtain the aid of a Court of Equity, for the purpose of reforming the will of the testator, Daniel McRae, so as to take from the defendant, Lucy Diggs, certain slaves, therein bequeathed to her by mistake as alleged, and give them to the feme plaintiff, for whom it is said they were intended. This

[46] The statement of facts and part of the opinion are omitted.

object, if attained at all, must be accomplished by a parol revocation of the bequest of the said Lucy, and then by a nuncupative will giving it to the said feme plaintiff. Can this be done? No authority has been produced by the plaintiff's counsel to show that it can, and we think there is a very strong and decisive reason why it cannot. Adams in his Treatise on Equity, after stating the doctrine in relation to the reformation of instruments inter vivos, says, at page 172:

"That a will cannot be corrected by evidence of mistake, so as to supply a clause or word inadvertently omitted, by the drawer or copyer; for there can be no will without the statutory forms, and the disappointed intention has not those forms." * * *

The reason given why a Court of Equity declines to interfere, when called on to reform a will, would seem to restrict it to a devise of real estate. But the principle is certainly applicable to the will in this case, though it be but a bequest of personalty. In the 13th section of the Statute concerning wills, (1 Rev. Stat. ch. 122,) it is enacted, that:

"No will in writing, passing or bequeathing a personal estate of greater value than two hundred dollars, or any clause thereof, shall be revocable, otherwise than by some other will or codicil, or other writing, declaring the same, or by cancelling," etc., and "no written will, passing or bequeathing a personal estate of two hundred dollars or less, shall be altered or revoked by a subsequent nuncupative will, except the same be in the lifetime of the testator, reduced to writing and read over to him and approved," etc.

It is obvious, that with a slight change of the phraseology quoted from Adams, and taken substantially from the opinion of the Vice Chancellor, in the case of Newburgh v. Newburgh, we may say here, that the will cannot be corrected by evidence of mistake, so as to strike out the name of the legatee and insert that of another, inadvertently omitted by the drawer or copyer; for there can be no revocation or alteration of a written will of personalty, without the statutory forms, and the disappointed intention has not these forms.

Such would be our conclusion in this case, were the evidence of the mistake satisfactory; but it may not be improper for us to declare, that were the legal objection removed, the testimony of the plaintiffs would be insufficient to entitle them to the relief which they seek.

Without going fully into the subject, it may suffice to say, that the testimony, to convert a deed, absolute on its face, into a mortgage, (an instrument founded on a valuable consideration,) must be something more than mere declarations: must be proof of facts and circumstances, dehors the deed, inconsistent with the idea of an absolute purchase. See Sowell v. Barrett, 45 N. C. 50, and the cases there referred to. The testimony to reform an instrument in favor of a mere volunteer could not of course be less.

The bill must be dismissed with costs.

## HUNT et al. v. WHITE.

(Supreme Court of Texas, 1860. 24 Tex. 643.)

WHEELER, C. J.[47] It is not questioned, that by the law of this state, in order to effectuate the manumission of a slave by will, provision must be made for the removal of the slave out of the state. * * *

This will contains no provision for the removal of the slaves out of the state; but on the contrary, seems to contemplate their remaining in the state, in the enjoyment of freedom. In so far it is in contravention of law, and consequently void.

It is not contended, that the written will effectuates the manumission of the slaves; but it is insisted, that they are entitled to their freedom, by virtue of the parol "explanation," by the witnesses to the will, which accompanied its probate and registration in the county court; and the question is, whether the omission in the will to provide for the emancipation of the testator's slaves, can be thus supplied by parol.

It is insisted, that it can be, in the exercise of the equitable powers of the court, to grant relief in cases of accident and mistake, and that the court may reform the will, so as to make it express the intention of the testator, as deposed to by the witnesses. But it must be observed, that the power of a court of chancery to grant relief in cases of mistake in written instruments, does not go to the extent of adding to or changing the nature and legal import of the writing. That would be to contravene the rule, which obtains as well in courts of chancery as in courts of law, that parol contemporaneous evidence is inadmissible, to contradict or vary the terms of a valid written instrument. The case of wills does not constitute an exception to the application of this rule. * * *

"In regard to mistakes in wills (says Judge Story) there is no doubt, that courts of equity have jurisdiction to correct them, when they are apparent upon the face of the will, or may be made out by a due construction of its terms." "But then, the mistake must be apparent on the face of the will, otherwise, there can be no relief."

There is no mistake apparent on the face of the will in this case; none that can be made out by a due construction of its terms; and it manifestly is not a case for relief in equity, on the ground of mistake or accident. The will is complete in itself, and formal in its execution. What is proposed by the parol evidence is, to add to the will an independent substantive bequest, and to make it speak upon a subject on which it is altogether silent. It is not proposed to call in extrinsic evidence, to enable the court to arrive at the meaning of the testator's language, used in the will itself, but to introduce into the will an intention not apparent upon its face, and different from that which the language used imports, by the proof of other language not contained in the will: in effect, to make a new devise for the testator, which he is

[47] The statement of facts and parts of the opinion are omitted.

supposed to have omitted, and not quite consistent with that he has made. The effect of the admission of such evidence, would be, that the will, though made and executed with the requisite legal solemnities, by the testator, in his life-time, would really and in fact, be made by the witnesses, after his death. It is unnecessary to advert to the danger of admitting such evidence. It is sufficient, that there is no authority for it in the law; that it would destroy all the guards intended to be secured by the statute of frauds, and the statute concerning wills, for the prevention of frauds and perjuries; and would contravene the clearest and best established principles and rules of law. * * *

Our conclusion is, that there was no bequest of freedom to the appellees, which the well settled principles of law will authorize a court, either of law or equity, to recognize and enforce; and that the judgment of the court, overruling the demurrer to the petition, and giving judgment for the appellees, is erroneous, and must be reversed, and the cause remanded.

Reversed and remanded.

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## WOOD v. WHITE et al.

**(Supreme Judicial Court of Maine, 1850. 32 Me. 340, 52 Am. Dec. 654.)**

WELLS, J.,[48] orally. A question has suggested itself, whether the heirs should not be made parties; but we think the rightful parties are before the court. Where, as in this case, the executors have control of all the estate, no other parties need be introduced. Executors and administrators may discharge mortgages and surrender notes.

The only question then is, whether the bequest can be corrected by substituting "George Wood" for J. Wood.

Courts are often called upon to adjudicate as to devises and legacies, when there are several persons of the same name. Such cases present a latent ambiguity.

In this case, the complainant is not of the name, mentioned in the will. There is no latent ambiguity. It is a case of misdescription. Can the court inquire who was meant? There is jurisdiction as to mistakes, as well in regard to wills as to other matters. The testimony makes it very apparent, that there was a mistake in the name, which ought to be corrected, and we consider that the power to do it exists in the court.

Prayer of the bill is allowed.

[48] The statement of facts is omitted.

### *(C) Statute of Limitations*

## WYKLE v. BARTHOLOMEW.

(Supreme Court of Illinois, 1913. 258 Ill. 358, 101 N. E. 597.)

DUNN, C. J.[49] The appellant filed a bill to correct the description in a deed, which the court, on a hearing, dismissed, and he appealed. * * *

It is clearly proved that an agreement was made for the settlement of the foreclosure suit, and that the deed to the appellant was made in pursuance of such agreement. There can be no doubt that a mistake was made in the deed; for, while a tract containing only three-quarters of an acre is described, the deed states "said tract being one and a quarter acres." The master found that there was no mistake in the description of the tract of land conveyed, but only in this recital that the tract contained 1¼ acres. * * *

Neither the statute of limitations nor laches is applicable to a suit to reform a deed, where the complainant has been all the time in undisturbed possession. Mills v. Lockwood, 42 Ill. 111; Schroeder v. Smith, 249 Ill. 574, 94 N. E. 969. Nor has the statute of frauds any application to a suit to correct a deed, on the ground of mistake, to make it conform to the intention of the parties. Hunter v. Bilyeu, 30 Ill. 228.

The agreement is clearly shown and the property intended identified. The decree is reversed and the cause remanded, with directions to enter a decree granting the relief prayed for.

Reversed and remanded, with directions.

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## BREEN v. DONNELLY et al.

(Supreme Court of California, 1887. 74 Cal. 301, 15 Pac. 845.)

MCFARLAND, J.[50] This is an action to reform a deed. Judgment went for plaintiff in the court below; and from the judgment and order denying a new trial defendants appeal.

The following are the material facts: On and before December 18, 1867, Patrick Breen and James Dunne were the owners in fee and in possession, as tenants in common, of a large tract of land containing over 48,000 acres, and known as the "Sobrante de San Lorenzo Rancho," each owning an equal undivided interest. Prior to said last-named day they had agreed upon a partition of the rancho, to be accomplished by ascertaining a line drawn from the easterly to the westerly side of the land, which should divide it exactly into two halves or

[49] Parts of the opinion are omitted.

[50] Parts of the opinion are omitted.

equal parts, and interchanging deeds of conveyance so that each would own a half in severalty. To this end they had employed one Smith, reputed and believed by them to be an honest, competent, and skillful surveyor, to run said line, who had reported that he had surveyed and established a certain line which divided the rancho into two equal areas as contemplated. This line was marked by stakes, and was afterwards designated for some distance by a plow furrow. Both Breen and Dunne were informed by Smith, and believed, that he had correctly computed the areas on each side of said line, and that they were equal. Thereupon, in accordance with their agreements, on the said eighteenth day of December, 1867, said Breen executed and delivered to said Dunne a deed of conveyance of the north-east half of said rancho, and said Dunne in like manner conveyed to said Breen the south-east half, and in each deed the description by metes and bounds included said line run as aforesaid by said Smith as a boundary line. The land was then, and ever since has been used solely for the purpose of grazing. * * *

But this is an action to reform a deed,—to correct a mistake in a written instrument, and make it conform to the real intent of the parties. That a court of equity has power to correct such a mistake in a proper case is of course beyond doubt, and that the facts here make a proper case is equally clear. It is established beyond doubt that the two tenants in common intended to convey by deed to each other the half of a tract of land, and that by pure mistake the deed sought to be reformed failed to convey such half. There is no question here of innocent purchasers. Neither are there any equities by reason of defendants having put any improvements on the land not included in the deed. They have had the benefit of the use of the land for pasturage since the date of the deed, and have not expended upon it any money whatever. In good conscience, they ought to correct the mistake; and their only defense is founded upon the naked plea of the statute of limitations.

But we think that the action was commenced in time. Section 338, Code Civil Proc., enumerates the kinds of actions which must be commenced within three years; and subdivision 4 of said section is as follows:

"An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

In the case at bar the discovery of the mistake was not made until 1880, at which time the cause of action "is deemed to have accrued." The action was commenced in less than two years afterwards. It was therefore commenced in time, unless the circumstances were such that plaintiff ought to have known the mistake, and therefore should be held in law to have had knowledge of it before the time of its actual discovery. But we think that there were no circumstances from which he should be charged with such knowledge. After the partition line

had been run by a surveyor believed to be competent and honest, and who had been specially employed for that purpose, there was nothing to excite the suspicion of either party that such line did not divide the rancho into two equal parts. Looking at, or walking or riding over, or using for grazing purposes, a tract of land containing over 24,000 acres, would not indicate to any one that it was 500 acres more or less than the half of another tract containing over 48,000 acres. * * *

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

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## DUVALL v. SIMPSON et al.

**(Supreme Court of Kansas, 1894. 53 Kan. 291, 36 Pac. 330.)**

JOHNSTON, J. The purpose of this action was to rectify a mutual mistake in describing lands, in a deed of conveyance, which had been purchased by plaintiff from defendants. The averments of the petition are to the effect that, according to the understanding and agreement of the parties, a much larger quantity of land was purchased than was described in the conveyance. The purchase was made and the conveyance executed on December 4, 1884; and the plaintiff alleged that she supposed and believed that she had received a conveyance of the quantity of land agreed upon and intended to be conveyed until about April 1, 1887, when the mistake was discovered. Soon thereafter, and within a reasonable time, she notified defendants of the mistake in the description, and demanded that the conveyance should be rectified in accordance with the mutual understanding and agreement of the parties, but the demand has not been acceded to by defendants. The legal title to the land intended to be conveyed, and not included in the conveyance, has remained in the defendants, so that the rights of third parties have not intervened, and would not be affected by a correction of the alleged mistake. This action was begun on January 24, 1890; and, upon demurrer to the averments of the petition, the court held that the plaintiff was not entitled to the relief sought.

It is contended that the lapse of time is a bar to the correction of the conveyance, and it is said that this was the ground upon which the district court rested its decision. It is claimed that the five-years statute of limitations applies in a case of this character, and that, as five years and one month elapsed from the execution of the instrument until the bringing of the action, the court was justified in refusing the relief. If that statute was applicable, and began to run when the instrument was executed, the claim would be well founded; but in cases of fraud or mistake the statute begins to run from the time of the discovery of the fraud or mistake, and not before, or from the time at which, by the exercise of reasonable diligence, it might have been discovered. The dis-

covery in this case was made less than three years before the beginning of the action, and we cannot hold that there was such laches or negligence in instituting the suit as would warrant a court of equity in refusing the relief sought.

It is insisted that by the exercise of ordinary diligence the plaintiff could have known the quantity of land described, and that her negligence in this respect should defeat her action. The description was by metes and bounds, and, being somewhat long, a mistake could easily be made. In Bank v. Wentworth, 28 Kan. 188, it is said that the most careful men make mistakes, and that oftentimes those mistakes are not discovered for years. In such case, if application is made immediately upon discovery of the mistake, and it is shown that it is simply a mistake, and no rights of third parties are prejudiced, then it is the duty of courts to intervene, and correct the mistake; and it matters not through how many papers or in how many proceedings the mistake has been carried and appears. See, also, McIntosh v. Saunders, 68 Ill. 128; Harold v. Weaver, 72 Ala. 373; 2 Story, Eq. Jur. § 1521; Busw. Lim. § 174. According to the allegations of the petition, the description written in the deed was an unintentional mistake, which was shared by both parties to the transaction. No one else can be prejudiced by correcting the mistake, and carrying out the intention of the parties. We think it is shown that there was no such negligence or laches on the part of plaintiff as will defeat a rectification of the deed of conveyance.

The judgment will be reversed, and the cause remanded for further proceedings. All the Justices concurring.[51]

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## COLLETT v. FRAZIER.

(Supreme Court of North Carolina, 1856. 56 N. C. 80.)

Cause removed from the Court of Equity of Randolph county.

The plaintiff having a claim, under the will of his father, to one-fifth of a family of slaves, which had been bequeathed to him and four other brothers, to be possessed when the youngest brother, Washington, should come of age, sold the same to his brother Ezekiel, the

[51] In Wall et al. v. Meilke et al. (1903) 89 Minn. 232, 94 N. W. 688, at 690, the court said: "Counsel for both parties seem to assume that an action for the reformation and correction of a written instrument upon the ground of mutual mistake may be barred by a statute of limitations in this state; but in this they are in error. There is no statute applicable to an action for reformation and correction of an instrument upon the ground of mistake. An action upon the ground of fraud is covered by the sixth subdivision of section 5136, Gen. St. 1894, where it also provided that such a cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud. But, if we had such a statute, it could not begin to run, as against defendants Meilke, until the time they discovered the mistake, or, at any rate, until the time when, by the exercise of due diligence, such mistake ought to have been discovered by them. This is a well-settled rule in equity in the absence of any provision of a statute of limitations on the subject otherwise fixing the time when it shall begin to run."

defendant's testator, for $350, and made a bill of sale, in the ordinary form, for his share of the property, in which was contained an acknowledgment that he had received the purchase-money and a release for the whole amount.

The plaintiff, in his bill (to which there was an amended bill) alleges, that he never received but $100 of the sum thus released; that being very poor and much in need of money, while his brother Washington was still under twenty-one years of age, he sold his interest in the property, which had been bequeathed to him by his father, to his brother Ezekiel for $350, and made the bill of sale as above stated; that on the day when he made the bill of sale, Ezekiel was to have paid him the $100 and given his note for $250; that when they met for the purpose of concluding the bargain, Ezekiel said he had been disappointed in getting money, and therefore was not able to comply with his part of the agreement; he insisted, however, on plaintiff's executing the bill of sale, and by promising, in a few days, to pay the money and give his note as agreed, he was prevailed on to do so; that, shortly afterwards, he paid him the $100, but they disagreeing about the amount for which the note was to be made, the plaintiff insisting that it was to be for $250, and his brother that it was to be for only $200, no note was ever given. The matter remained so until after three years had expired, but that the defendant's testator, within the three years before the bringing of this suit, had distinctly acknowledged the existence of the debt, and had promised to pay it. He particularly relies upon an acknowledgment and promise made in his last illness, a few days before his death, which was within one year before this suit was brought. The plaintiff gives as a reason for appealing to the jurisdiction of the Court of Equity, that if he had sued at law he would have been barred and estopped by his acknowledgment of payment and the release in the bill of sale, which he had given to his brother; that that acknowledgment was inserted from mistake, ignorance, and a misapprehension of its effect upon his rights.

The prayer is for the payment of the balance due him upon the original contract for the sale of his interest in the slaves.

The defendant, who was sued as administrator with the will annexed, answered and denied the allegations contained in the bill. He also relied on the statute of limitations.

There were replication and proofs; and the cause being set down for hearing, was sent to this Court for trial.

BATTLE, J.[52] * * * The ground upon which the plaintiff bases his title to relief in Equity, is admitted. See Crawley v. Timberlake, 36 N. C. 346. The only difficulties which he has to encounter are the proofs and the statute of limitations. The defendant cannot resist the force of the proofs that his intestate took a bill of sale for the plaintiff's interest in the slaves in question, in which there was inserted an

[52] Part of the opinion is omitted.

acquittance for the purchase-money, though it was not then all paid. The main reliance for defeating the recovery is the statute of limitations; this, the plaintiff admits, would bar him, but for distinct acknowledgments of the debt, and promises to pay it, made by the testator within less than three years before the bill was filed. Upon this part of the case, too, the proofs are clear and conclusive. The testator died in the month of April, 1849, and the bill was filed in 1851. While on his death-bed, and only a few days before his death, the testator admitted to his brother John that he still owed the plaintiff for the negroes, and said that John knew how much it was. John says, in his deposition, that he did not know how much the debt then was, but that, in 1841, when the parties attempted to settle, it was $250. The day before he died he told his sister, Mrs. Leach, that he owed the plaintiff a balance of $80 on the same debt, with some interest, which would make it amount to about $100; and that he wanted it paid. Here, then, is a distinct acknowledgment of a certain debt, if not a positive promise to pay it. This is clearly sufficient, according to all the authorities, to remove the bar of the statute; the court of equity in this respect, following the rule in the courts of law. There is some other testimony of acknowledgments made at other times, which tend to corroborate the statements of the witnesses to whom we have particularly referred. We have not overlooked the testimony introduced for the defendant. It shows that the plaintiff, at different times, and to different persons, admitted that his brother, the testator, owed him nothing, while at other times, to one or more of the same witnesses, he insisted that his brother was justly indebted to him for the slaves. From the circumstances under which the admissions were made, it is manifest, either that the plaintiff was not serious in making them, or that he did it to avoid the payment of his taxes, or some other just claim about to be made upon him. We cannot, therefore, give to them the effect of disproving the testimony of the solemn declarations made by the defendant's testator on his death-bed. Our conclusion is, that the plaintiff is entitled to a decree for $80, with interest thereon from the year 1841. As assets in the hands of the defendant have neither been alleged in the bill nor stated in the answer, there must be a reference, if the parties desire it, to ascertain whether any, and if any, what amount, is in the hands of the defendant, liable to the plaintiff's recovery.

PER CURIAM. Decree accordingly.

## SECTION 2.—CANCELLATION AND RESCISSION

### STANTON v. TATTERSALL.

(In Chancery before Sir John Stuart, 1853. 1 Sm. & G. 529, 65 E. R. 231.)

This was a suit by a purchaser seeking to rescind an agreement to purchase an edifice, No. 58 Pall Mall, against vendors who had sold the property at auction. The Plaintiff insisted that the contract ought to be rescinded, on the ground of misdescription in two particulars: first, that the house thus described was not in Pall Mall at all; and, secondly, that there was no sufficient access to the house, in accordance with the description.

The Defendants, Richard Tattersall and George Herbert Lewin, offered the premises in question in the cause for sale by auction, at the auction mart, on the 20th of April, 1852. * * *

THE VICE-CHANCELLOR.[53] * * * What the Plaintiff avers as the substance of the case is that he had contracted to buy certain property, and that what is presented to him and is proposed to be conveyed to him as the property which he has purchased, does not agree with the description given in the particulars of sale of the property which he contracted to buy. There are two particulars in respect of which a misdescription is alleged.

Where the property is described as "a freehold estate, being an edifice, No. 58 Pall Mall," that is not a proper description of a house which, in fact, is not in Pall Mall, but is behind another house situated in Pall Mall.

But if the question merely depended upon the right of the Plaintiff to have the contract rescinded on that ground, I think that he has by his conduct waived that right.

The auctioneer who sold it describes it in his affidavit, which is the Defendants' evidence, as consisting of a building which is situate at the back of the house No. 57, and that is an accurate description, as appears from the model which has been produced in Court. * * *

But there is another ground on which this contract ought to be rescinded. What is proposed to be conveyed to the Plaintiff, as a right of access to this house, which is not in Pall Mall, but is behind the house No. 57 Pall Mall, is a right-of-way consisting of a passage, which was formerly a part of No. 57 Pall Mall, and that passage and access to the house, of the length of at least sixty feet, is described in the evidence as thus situated:

"The floor of the way or passage is the timber floor of the house No. 57, in which passage is laid a pavement of Yorkshire stone; and the floor of the one

[53] The statement of facts is abridged and parts of the opinion are omitted.

pair story of No. 57 forms the ceiling of the said passage. The stone flooring of the said passage is supported underneath on a timber beam, which has deflected in the middle of its bearings to the extent of two inches or thereabouts: and which beam," one of the witnesses says, "in my judgment, is not sufficient to support the same in a substantial and durable manner; and which said way or passage must at all times, in my judgment and belief, be subjected to casualties from fire, and the more so by reason of the three several tenants or occupiers of the messuage No. 57, and from the decay of the timber supports which sustain the said stone flooring; and the said entrance would be rendered nearly or quite impassable by a fire happening, either in the basement or shop, or warehouse behind, forming part of the house No. 57."

It is also said that the infirmity of the props of the passage is such that the weight of an ordinary counting-house safe carried along it would probably cause it to give way. The particulars of sale do not mention any peculiarity as to the access to the house.

The house not being in Pall Mall, the purchaser is at least entitled to such a connexion between the house and Pall Mall, and such means of access to the house, as may be reasonably secure and commodious. It is said, indeed, that in the abstract of title this passage is mentioned as an easement, and especially as an easement to pass with the house. But that is not enough, where in truth the purchaser of the house, in order to reach it, must pass through part of another house by way of easement, without having a firm soil below, and where he is to have above him the floor of the room of the other house. No notice whatever having been given that this was the condition of the access to the house in the particulars of sale, my opinion is that this contract must be rescinded, on the plain principle that what is presented to the purchaser as the subject-matter of his contract is something so different from what must be understood from the description in the particulars of sale. There must, therefore, be a decree to rescind this contract, but it must be without costs, and the deposit must be returned.

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## LIVINGSTON v. PERU IRON CO.

(Court of Chancery of New York, 1831. 2 Paige, 390.)

The bill in this cause was filed by the son and grantee of John Livingston, deceased, to set aside the conveyance of a lot of land, on the ground of fraud. The bill stated among other things, that Palmer, one of the defendants, applied to J. Livingston to purchase the land in question, which was then wild and uncultivated, and that he falsely represented to Livingston that the same was of little or no value except for a sheep pasture, for which purpose he wanted the lot; whereas in point of fact he had previously discovered a valuable ore bed on the premises, which fact he fraudulently concealed from Livingston. The bill also stated that in consequence of this representation and fraudulent concealment, Livingston was induced to sell 164 acres of land to Palmer at $2 per acre; when the ore bed alone was worth $70,000.

The Peru Iron Company demurred to the bill for want of equity. * * *

THE CHANCELLOR [WALWORTH].[54] Upon the merits of this case the demurrer cannot be sustained. I am not aware of any case in our own courts, or in England, where the simple suppression, by the buyer, of a fact which materially enhanced the value of the property, has been deemed sufficient to set aside the sale, on the ground of fraud. The rule is different where the purchaser applies to a court of equity to enforce the specific performance of an agreement. In such a case this court will not enforce a specific performance of the contract, if the complainant has intentionally concealed a material fact from the adverse party, the disclosure of which would have prevented the making of the agreement; but he will be left to his remedy at law. It has even been questioned by many whether the suppression of a material fact by the one party, of which fact he knew the other party to be ignorant, was not of itself sufficient to avoid the contract on the ground of fraud. * * * In a recent case before Lord Eldon, he adverts to the general principle that parties dealing for an estate have a right to put each other at arm's length; and that if the purchaser knows there is a mine upon the estate, and the vendor makes no inquiry, the former is not bound to give him information thereof. But he says:

"Very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." Turner v. Harvey, Jacob's R. 178.

And certainly if the purchaser does any act, or makes any declaration, with the intention of misleading the seller and preventing him from ascertaining the real situation of the property, and at the same time conceals from him a fact which he knows to be material, he is guilty of a fraudulent deception.

From the statement in the bill this case appears to be one of that description. The defendant Palmer had discovered a valuable mine on the lands of Livingston, which were then wild and uncultivated and lay remote from the residence of the latter. Knowing that he could not obtain the land if he discovered the fact of the existence of the mine, he does not content himself with making a bargain in the language of Lord Eldon, at arm's length; but he falsely and fraudulently represents the land as being of no value except for a sheep pasture, and states that he wants it for that purpose. By this deception the vendor is thrown completely off his guard, and he contracts to sell the land at the usual rate or price of rough unbroken land in that region, instead of directing his agent, near the premises, to inquire and ascertain its true value. * * *

The demurrer must therefore be allowed. * * *

[54] The statement of facts is abridged and parts of the opinion are omitted.

## TORRANCE v. BOLTON.

(In Chancery, 1872. L. R. 14 Eq. Cas. 124.)

SIR R. MALINS, V. C.[55] * * * The vendors, from the beginning, intended to put up the property under conditions which threw upon the purchaser the obligation of paying off the mortgages to which it was subject, or in other words, they put up for sale, not the property free from incumbrances, but the equity of redemption in it; and the Plaintiff swears that he went to the sale intending to bid, and did bid, in the belief that he was to purchase property for the enjoyment of which he would only have to pay the purchase-money, and would then, after the expiration of the life estate of the tenant for life, who was then in her seventieth year, have it absolutely free from all incumbrances. Now a mistake on both sides is undoubtedly a ground for relieving a party from a contract into which he has entered.

Mr. Pearson was very anxious to impress upon me that the Court never entertains a suit for the rescission of a contract unless it has been obtained by fraud. I expressed my strong impression, derived from many years' experience in cases of vendor and purchaser, that mistake, where it is satisfactorily established, as where a purchaser has been led by the conduct of the vendor to believe that he has been purchasing one thing when in fact he has been purchasing another, is just as good a ground for rescuing persons from a contract as fraud. * * *

This case raises a point of very general importance, as to the practice, which I am told, prevails in almost all parts of England, of advertising the property to be sold under conditions of sale to be produced at the auction. They are not annexed to the particulars, but are read and listened to in the confusion and hubbub of the auction-room, by persons of different degrees of understanding, who are in those circumstances intended to be bound by conditions of the most onerous description put forward by persons who have had the fullest opportunities of printing and annexing them to the particulars, but have failed to do so. * * *

Take the present case; what would have been more simple than for these parties, who, I believe, intended to act properly, to describe what they were selling in accurate terms? When a man describes property he is selling as being seventy-five acres of land, that means that he is selling the fee simple. Here the description was so far accurate as to state that what was sold was the fee simple, not in possession, but subject to the life estate of a lady in her seventieth year; and if it had gone on to say that it was sold subject to mortgages for £2,500, it would have been perfectly accurate; but the vendor has preferred stating this by way of a condition. Then he was bound

[55] The statement of facts and parts of the opinion are omitted.

to let everybody who was likely to bid for this property know exactly what he would have when he bought, and under what conditions he was buying. That was not done. * * *

It is therefore, in my opinion, a case of common mistake. The clear doctrine of the Court is, that where contracts are entered into by mistake they must be rescinded. That is shewn by the passage in Lord St. Leonards on Vendors and Purchasers (14th Ed.) p. 120, where Stanton v. Tattersall, 1 Sm. & Giff. 529, is referred to, and the rule is laid down that mistake is a ground for rescinding a contract in this Court, just as much as fraud. And the mistake being one into which the Plaintiff has been led by the grossly negligent and improper mode in which the Defendant has conducted the sale, though I am satisfied there was no intention to mislead, the consequence is that the contract must be rescinded. * * *

On the whole, therefore, I come to the conclusion that it was the duty of the Defendant, in the description of the property itself, and not merely by conditions of sale, to describe that it was an equity of redemption which he was selling. I think it was an improper thing to introduce the fact of the property being mortgaged by way of condition at all; but if the vendor did it in that way it was incumbent upon him to annex the conditions to the particulars. It has not been attempted to be denied that the Defendant must have failed if he had been Plaintiff in a suit for specific performance, and considering that the Plaintiff was led to give more than the value of the property, I think it is my duty to give him the decree which he asks.

Then comes the question as to costs. If it had not been for the correspondence I should have held that the carelessness of the Plaintiff in not attending to the reading of the conditions of sale and want of due caution in not making inquiry would have been a ground for giving him the relief to which he is entitled without costs. But considering the offer which was made by the Plaintiff, the refusal to accept which led to the litigation, I must consider the Defendant as the cause of the suit, and give relief with costs.

With regard to the return of the deposit I understand it to be clearly established now as the rule of the Court that where a contract has been rescinded on the ground of fraud, surprise, misrepresentation, or anything of the kind, and where a deposit has been made, it is within the jurisdiction of this Court in the decree that is made also to order the deposit to be returned. Therefore it will be part of my decree that the deposit also shall be returned. I do not know whether you ask for interest, Mr. Cole? * * *

## CROWE et al. v. LEWIN.

(Court of Appeals of New York, 1884. 95 N. Y. 423.)

Appeal from a judgment of Special Term after an affirmance by the General Term of the Supreme Court in the first judicial department, by order made March 20, 1883, of an interlocutory judgment in favor of the plaintiffs.

This action was brought originally by Patrick Crowe, the present plaintiff's intestate, for the rescission of an alleged contract, for the exchange of real estate on the ground of fraud, and for an accounting for the rents and profits of the premises conveyed by plaintiff while they were in defendant's possession.

The court refused to find fraud, but found in substance that in February, 1878, the parties entered into an oral agreement whereby the plaintiff agreed to convey to the defendant and Honora Lewin, his coexecutor (now deceased), a house and lot in New York city, subject to a mortgage thereon of $3,300, in exchange for four lots of land situated near Williams Bridge in the city of New York, which the executors represented and claimed they had power to convey free from incumbrance, and which they agreed to convey. Plaintiff fulfilled on his part, and the defendants executed and delivered to the plaintiff a deed purporting to convey title to the four lots. The court further found that the defendants, when they executed and delivered their deed, had not nor had they acquired title since to the four lots or any power to convey the same or any other four lots of land at Williams Bridge. An interlocutory judgment was directed and entered requiring a reconveyance by the parties respectively, and that defendants account for the rents and profits of plaintiff's premises; and referring it to a referee to take such an accounting.

Further facts appear in the opinion.

FINCH, J. In this case the minds of the parties never met. The contract in form was not a contract in fact. It originated in mistake, and that mistake not mutual and about the same thing, but different on the part of each. Taking the findings as our guide, it appears that the plaintiff agreed to exchange his house and lot for four lots at Williams Bridge which the defendants represented that they owned and could convey. As matter of fact they did not own them, but did own a triangular parcel in the neighborhood fronting on the Bronx river, but of trifling value and much inferior area, which they say was what they intended to convey, but by mistake the four lots at Williams Bridge were substituted in the deed they gave. It is possible that the findings of fact might well have been different. The evidence on which they rest is quite slender and unsatisfactory, but we cannot say there is none. Assuming them to be true, the situation was this: The plaintiff came into court alleging that by the fraud and deceit of a false assertion of ownership he had been deprived of his property. The defend-

ants rebutted the charge of fraud by showing a mistake, and it is only as the result of that explanation that fraud was not found. If the defendants' representation of ownership related to the four lots, it was a falsehood and a fraud. If it related to the Bronx river lots it was not so understood by the plaintiff, and he was misled by a mistake. There was thus either fraud or mistake against which equity may relieve. The defendants' mistake was that they conveyed what they did not own and did not mean to sell. The plaintiff's was that he bought what he meant to buy, but without the asserted title in his grantors. What one meant to sell the other did not mean to buy, and what one meant to buy the other did not mean to sell.

Such was the judgment rendered and it was right. Its details are criticised in but one respect. There was a mortgage to a savings bank, resting as an incumbrance on the plaintiff's property, and which by acceptance of the deed the defendants assumed and agreed to pay, and they now complain that they are left liable to the savings bank for the amount of the mortgage debt. We do not think that result will follow. The judgment which declares that there was no effectual contract, and therefore no valid assumption of the mortgage, binds both parties and privies; and the bank, which had no right except through the promise to plaintiff, and dependent wholly upon it, and could only claim through it, is bound, if not by the judgment itself, at least by the effect of the judgment as annulling the whole transaction. The principle decided in Dunning v. Leavitt, 85 N. Y. 30, 39 Am. Rep. 617, fully covers the point. There Mrs. Leavitt's promise to pay the mortgage debt was founded upon the conveyance to her, but the judgment in ejectment brought by the Howell heirs determined that no title passed to her by her deed, that the land was not transferred, and as a consequence that no consideration for her promise to the grantor for the benefit of the mortgage remained, and so she never became liable. The effect of the decree here is the same. It annuls the deed and adjudges that the land did not pass, and so the savings bank can have no right of action upon a promise divested by the judgment of any consideration. Its rights were wholly dependent upon an effectual transfer of the mortgaged property, and affected by the equities existing between the original parties.

The judgment should be affirmed, with costs. All concur.

Judgment affirmed.

## FOND DU LAC LAND CO. v. MEIKLEJOHN et al.

(Supreme Court of Wisconsin, 1903. 118 Wis. 340, 95 N. W. 142.)

DODGE, J.[56] * * * The most vital facts, as found by the court, are that both parties, in making the conveyance between them, mistakenly supposed that the surveyors had included in the plat of Sackett's addition all the ascertained and fenced tract of land, comprising 39½ acres, purchased by Mrs. Sackett from Prefontaine, and upon that supposition treated, contracted, and finally made and received conveyance; that they both understood and supposed the description used in the deed correctly defined that particular body of land so fenced, and intended that the same should be thereby conveyed. After a careful examination of the evidence, we have no doubt that such findings are fully supported by it, notwithstanding the repeated assertion of Dr. Sackett that he only intended to sell what was in the plat. There are numerous circumstances, as well as his own statements on cross-examination, which make plain that such assertions were made by him only in such sense as to make them entirely consistent with an intent to convey the whole tract. * * *

The mutual mistake thus found to have existed, and to have been responsible for the fact that plaintiff failed to obtain title to this disputed strip of land for which it has paid the consideration to the owner, is, of course, a sufficient ground to warrant a court of equity to consider as done that which ought to have been done, and to so far correct and reform the writing and records as to make them truly evidence the actual transaction. This, we are satisfied, the decree does effectively. The conveyances now of record from Prefontaine, Brennan, and Mr. and Mrs. Sackett make complete chain of title to plaintiff of the disputed strip but for the ostensible title vested in appellant, Meiklejohn, by quitclaims to him. He is found to have taken these with full notice of plaintiff's rights and equities, of which, indeed, he was chargeable by reason of its possession. He therefore could have taken no superior rights against it. Hence the complete cancellation of any claim or right in him is proper.

Some attempt is made to invoke the rule that equity will only aid the vigilant, and to found its application on the claim that the plaintiff, if vigilant, would have discovered that the surveyor's stakes set when Sackett's addition was platted did not correspond with the fenced boundaries of the tract supposed to be included therein. Examination of the evidence, however, discloses, by very obvious preponderance that such fact was not apparent upon any reasonable or ordinary inspection of the premises.

Judgment affirmed.

[56] The statement of facts and part of the opinion are omitted.

## SEVERSON v. KOCK et al.

(Supreme Court of Iowa, 1913. 159 Iowa, 343, 140 N. W. 220.)

Appeal from District Court, Woodbury County; David Mould, Judge.

This action was brought to cancel a written contract and deed, on the ground that the same were procured by fraudulent representations and failure of title, and on the further ground of an alleged rescission by plaintiff, after discovery by him that defendants did not have title to the property, and after he found that the representations were false. There was a decree for plaintiff. The defendants appeal.

PRESTON, J.[57] On February 3, 1911, the defendant Jurgen Kock made a quitclaim deed to plaintiff for certain real estate in Sioux City, and on the same day the parties entered into a written contract in reference thereto. Among other things, said contract provided that plaintiff was to assume and pay the mortgages and liens then on said property. The plaintiff alleges that said defendant represented that he was the owner in fee simple of the property, and that the liens and incumbrances thereon did not exceed $40,000; and that the $25,000 mortgage on the property was a first mortgage, and could be carried as long as plaintiff desired at 5 per cent. The plaintiff says that defendant was not the owner in fee simple of the property, and that the liens and incumbrances were more than $43,000, and that for plaintiff to become sole owner in fee simple, free of all liens, plaintiff would have to pay more than $45,500; that the $25,000 mortgage had been foreclosed, and was drawing 8 per cent., and could not be continued at 5 per cent., or on any terms; that when plaintiff ascertained said statements were false he rescinded said contract and deed, and delivered defendant a quitclaim deed for the property, which was accepted by defendant.

The defendant admits the making of the contract and deed, and denies all other allegations of the petition, and alleges that on September 22, 1910, John M. Kock, made a written contract to convey to said defendant his right to the property, and on February 6, 1911, conveyed the property to plaintiff, and that on February 14, 1911, in further fulfillment of said contract of September 22d, said John M. Kock made a deed to defendant for the property, which was recorded February 18, 1911; that defendant was ready, able, and willing to perform his part of the contract; and that he never consented to rescind the same.

The appellant contends, first, that the decree canceling the contract and deed for fraud is not sustained by the evidence; second, that the court erred in finding there was a failure of title, or fraud, after John M. Kock delivered plaintiff a deed of his interest on February 6, 1911; and, third, that the quitclaim deed from defendant to plaintiff, the judgments, and the suits foreclosing the first and second mortgages

[57] Part of the opinion is omitted.

were notice to plaintiff of the condition of the title of the property and the debts thereon, and that the court erred in finding that plaintiff had no notice, and was deceived in the title, the amount of the debts, and the foreclosure of the first mortgage.

The trial court, by decree canceled and set aside the contract and deed, and decreed that the quitclaim deed delivered by plaintiff to defendant subsequent to February 3, 1911, be and is a full rescission, cancellation, and annulment of the contract and deed dated February 3, 1911. * * *

Where there is a positive affirmation of a fact, the party to whom the representation is made may rely thereon without investigation by examination of the records and the like. The party making the representation for the purpose of inducing the other to act may not say his statements should not have been believed. McGibbons v. Wilder, 78 Iowa, 531, 43 N. W. 520; Riley v. Bell, 120 Iowa, 618, 95 N. W. 170; 20 Cyc. 62.

Plaintiff testifies that the defendant stated there were about $40,000 in liens against the property, but did not think it would be that, for the reason it was in the hands of a receiver, and he thought there would be something coming from the receiver which would probably bring it down a couple of thousands under that. "He said all of the incumbrances, everything against the property, would not exceed $40,000." He also testified that defendant represented that he was the owner in fee simple of the property. These were positive assertions by the defendant, and he cannot now be heard to say that plaintiff should not have relied thereon. These representations were not true. Plaintiff relied on them.

At law, in order to recover, plaintiff would be required to prove the several elements constituting fraud and deceit—"representation, falsity, scienter, deception, injury." Boddy v. Henry, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769; Riley v. Bell, 120 Iowa, 618, 95 N. W. 170; Smith v. Packard, 152 Iowa, 1, 130 N. W. 1076. A different rule obtains in equity. This court said, in Mohler v. Carder, 73 Iowa, 582, 35 N. W. 647, and which is approved in Hunter v. League, etc., 96 Iowa, 573, 65 N. W. 828:

"Another equally well-established rule is that, to entitle a party to relief in equity by reason of fraudulent misrepresentations, it is not necessary that it be shown that the party making the false statements knew that they were false when he made them. They may have been innocently made, yet, if representing as positive statements of fact, as distinguished from mere opinions and relied upon by the other party to his prejudice, to the extent that he is led to act thereon, equity will afford relief."

See, also, Maine v. Investment Co., 132 Iowa, 272, 109 N. W. 801; McFadden v. Alexander, 154 Iowa, 716, 135 N. W. 398; Brokerage Co. v. Wharton, 143 Iowa, 65, 119 N. W. 969; Wilcox v. University, 32 Iowa, 367; Moyle v. Silbaugh, 105 Iowa, 531, 75 N. W. 362.

If we apply this rule here, plaintiff was entitled to the relief prayed. He asked a cancellation of the deed and contract and a rescission. It

is true he claimed there had been a rescission by the parties before the suit was brought; but that was a matter of proof, and he had a right to ask the court to rescind for the fraud, if the evidence was not sufficient to satisfy the court that there had already been a rescission. We are satisfied with the findings and decree of the district court.

Affirmed.

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## KRONMEYER et al. v. BUCK.

(Supreme Court of Illinois, 1913. 258 Ill. 586, 101 N. E. 935, 45 L. R. A. [N. S.] 1182.)

VICKERS, J.[58] Christian W. Kronmeyer and Sophia M. Staehle, plaintiffs in error, filed their bill in chancery in the circuit court of Will county against Werden Buck to set aside a deed made by Kronmeyer to Buck, and also to compel Buck to refund the proceeds of a $1,500 note given to the Will County National Bank, which said note was signed by both complainants. The prayer for relief was based on the charge that the instruments were fraudulently obtained through threats, coercion, and duress and that they were without consideration. Defendant in error answered denying the allegations of the bill, to which a replication was filed, and the cause was heard upon evidence given in open court. The court below dismissed the bill for want of equity, and complainants have sued out a writ of error. * * *

A careful examination of the direct evidence tending to show that Kronmeyer was guilty of embezzling his employer's money convinces us that the most that can be said of it is that it raises a suspicion that a trifling amount of money received was not accounted for; but this evidence does not convince us, however, that this trifling discrepancy may not have been due to careless methods of doing business rather than to an intention on his part to misappropriate the funds. * * *

At the time Buck procured the deed to all the real estate that Kronmeyer owned, and $1,477 in cash, there was not, nor is there now, clear and satisfactory evidence that Kronmeyer actually owed him one cent. Having obtained this property, defendant in error insists on his right to retain it regardless of whether Kronmeyer owed him anything or not. He frankly admits on the witness stand that he would insist on retaining all of this property even if he knew Kronmeyer only owed him $5 at the time the deed and money were obtained. What are the legal rights of the parties under the foregoing facts?

We have no hesitation whatever in holding that the execution of the note by Mrs. Staehle was procured by duress. She was an innocent third party. There can be no pretense that she was indebted to Buck in any amount. The first intimation that she had of any trouble was when her brother approached her in a highly excited manner and told her Buck claimed he had been stealing from him and that unless he

[58] Parts of the opinion are omitted.

got this note executed he would have to go to jail. She signed the note to keep her brother from going to jail and under the belief that if she did sign it he would be saved from imprisonment and prosecution. * * *

But it is said by the defendant in error that the deed, being an executed conveyance of real estate, cannot be annulled or set aside by evidence that there has been a failure of consideration, and Redmond v. Cass, 226 Ill. 120, 80 N. E. 708, Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46, and other cases are relied on in support of this proposition. We recognize the full force of the well-established rule that a failure of consideration for an executed conveyance of real estate gives the grantor no right, at law, to avoid his conveyance. Page on Contracts, § 1479, and cases there cited. But this is an equitable proceeding, in which specific justice between the parties before the court is of greater importance than the mere mechanical enforcement of a general rule of law. Courts of equity, in order to relieve against a great hardship where one has been induced to convey real estate for little or no consideration, will seize upon circumstances of oppression, fraud, or duress for the purpose of administering justice in the case in hand. Kusch v. Kusch, 143 Ill. 353, 32 N. E. 267, Dorsey v. Wolcott, 173 Ill. 539, 50 N. E. 1015, and McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559, are illustrations of different aspects of the rule above stated.

Assuming that Kronmeyer did not owe Buck anything, or only the nominal sum that the evidence in this record tends to prove, it would be a reproach to the law to say that Buck could take title to $5,000 worth of property and hold it because his title was evidenced by a deed under seal, which cannot be impeached by showing a failure of consideration. The facts already adverted to are sufficient to give a court of equity jurisdiction to rescind this transaction. If Kronmeyer embezzled any money belonging to Buck he ought to repay it, but in the absence of convincing evidence that he owes any sum whatever, and with only proof enough to raise a bare probability that he may owe a trifling amount, a court of equity will not permit Buck to take the law in his own hands and penalize Kronmeyer by taking and retaining title to this property. The deed should be set aside. If Buck has received any rents or net profits from the real estate he should be required to account for the same. If the incumbrance on the property has been discharged by Buck, Kronmeyer will receive the property clear, and in such case will not be entitled to a decree for any amount that Buck may have paid on said incumbrance. If the incumbrance is still unpaid Buck should be required to account for $1,477, and interest thereon at the rate of 5 per cent. from the day he received it.

The decree of the circuit court of Will county is reversed, and the cause remanded to that court, with directions to enter a decree for plaintiffs in error in accordance with the views herein expressed.

Reversed and remanded, with directions.

## VANDERBILT v. MITCHELL et al.

(Court of Errors and Appeals of New Jersey, 1907. 72 N. J. Eq. 910, 67 Atl. 97, 14 L. R. A. [N. S.] 304.)

Appeal from Court of Chancery.

Bill by John Vanderbilt against Myra L. J. Vanderbilt and others. From a decree sustaining a demurrer to the bill (71 N. J. Eq. 632, 63 Atl. 1107), complainant appeals.

The bill in this case is filed by John Vanderbilt against Myra L. J. Vanderbilt, his wife; William Godfrey Vanderbilt, an infant, appearing herein by guardian, and Henry Mitchell as medical superintendent of the bureau of vital statistics of the state of New Jersey. The complainant charges that he is the husband of the defendant Myra L. J. Vanderbilt; that they were married in this state in February, 1901, and then were, and are now, residents of this state; that they lived together as man and wife for two months after the marriage, and no longer; that from September, 1901, to July, 1903, the wife and a third party named lived together in adultery at a place designated in the bill, and that during said period complainant had no matrimonial access to his wife; that as a result of the adulterous intercourse there was born to the said wife, in the state of New Jersey, on or about the 20th day of October, 1903, a male child, by her named William Godfrey Vanderbilt, which infant is one of the defendants herein; that the complainant is not the father of the child, but that the infant is an adulterine bastard. The bill charges that the defendant, Myra L. J. Vanderbilt, upon the birth of said infant, falsely stated to the attending physician that the complainant was the father of the child, and that the child was the lawful issue of said marriage between herself and the complainant; that she made these false statements to induce the physician to insert them in the birth certificate, which the physician did, transmitting the certificate to the bureau of vital statistics, where it was duly filed and recorded. * * *

The bill also avers, in adequate terms, the existence of a testamentary trust created by the mother of the complainant, by the terms of which certain real property in the state of New York is vested in certain trustees, from which the complainant receives an income during the lifetime of his nephew and his niece, and at the decease of both the nephew and the niece, under the provisions of the existing trust as stated in the bill, the corpus of the estate is to be distributed to certain persons, in which distribution the complainant, if alive at the time, or otherwise his lawful heirs or devisees, would share. The allegation is that the complainant is sick, infirm, and stricken with a fatal illness, and that it is the purpose of the defendants, the wife and the infant, to use this record, false in fact, after the death of the complainant and loss of testimony, to enable the infant to assert his claims to property

as the lawful heir of the complainant. The relief sought is the cancellation of this fraudulent record and the destruction of its evidential character as to the paternity of the infant. In effect, a decree of nullity as to this status of parentage thus prima facie created and fraudulently recorded against the complainant. The complainant seeks a permanent injunction restraining both the mother and the child from claiming, under this certificate, for the said child, the status, name, property, or privilege of a lawfully begotten child of the complainant. An injunction is also prayed for against the issuing, by the state medical superintendent, of copies of this fraudulent record, and against Myra L. J. Vanderbilt and William Godfrey Vanderbilt from using or offering in evidence the record, or certified copies thereof, or in any way availing themselves of its evidential character. The court below sustained a demurrer to the bill, on the ground that the case did not fall within any recognized head of equity jurisprudence, that no property right is shown to be involved, and that a court of equity could not take cognizance of personal rights or redress personal wrongs not affecting property.

DILL, J.[59] No one of the allegations of the bill of complaint presents an exception to the general rule that the facts alleged must be regarded as admitted under a demurrer, as must all the facts which can be implied by a reasonable and fair intendment. A court of equity is the only tribunal which can afford adequate relief to the complainant under the peculiar and somewhat novel circumstances of this case, and that regardless of whether certiorari or mandamus would afford him relief in certain respects.

The complainant properly invokes the aid of a court of equity, on the ground of its inherent jurisdiction over frauds, to annul and cancel a fraudulent certificate, based upon the false statements of the wife as to the paternity of the child, filed by a public officer, which certificate, by force of the statute, has such evidential character that it is prima facie evidence of the facts therein contained, and which, unless attacked by competent evidence, becomes conclusive to prove the facts therein recorded. As we view the gravamen of the bill, the complainant does not seek a decree dissolving any existing valid status, thereby altering the actual relation of the parties, but a judicial determination of the matter of the alleged status of paternity prima facie created by this certificate, to determine that such alleged status does not exist and to give adequate relief. In other words, the theory upon which the equity of the bill rests is not to establish a status, or, on the other hand, to disestablish a status, except for the special object of determining whether the information given to the physician by the wife was fraudulent, and whether thereupon the certificate itself, so far as it imputes to the complainant the paternity of the child was fraudulent. The relief sought is a decree expunging from the public records of this

[59] The statement of facts is abridged and parts of the opinion are omitted.

state, on the ground of fraud, the certificate of birth, or so much thereof as relates to and charges upon the complainant the paternity of the child, with an injunction against all parties who might issue copies or use such copies or the original certificate as evidence of such paternity. * * *

Upon the question of equity jurisdiction, it may be said that the jurisdiction of a court of equity to cancel, annul, and set aside judgments on the ground of fraud, as well as certificates and determinations of public officers charged with judicial or executive functions, is settled. The principle is well stated in Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485, as follows:

"There has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong, in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void or other relief granted."

It was held in Garland v. Wynn, 20 How. 6, 15 L. Ed. 801, that courts of equity have power to review a contested claim to a right of entry to land under the pre-emption laws and to set aside the decisions of the register and receiver, confirmed by the commissioner in a case where they have been imposed upon by false swearing. Jurisdiction in equity was also entertained to set aside an adjudication of a register authorizing an entry upon land on proof "showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation." Lytle v. State of Arkansas, 22 How. (U. S.) 193, 16 L. Ed. 306. * * *

The jurisdiction of the Court of Chancery in cases of fraud is as broad and far-reaching as the forms, the devices, and the ramifications of fraud can extend, and no public record will be allowed to stand as evidential in the face of facts showing in a direct proceeding in a court of equity that the certificate is false, conceived in fraud, and with deliberate intent to use it in the future to wrongfully establish the paternity of a child, create a liability for maintenance and support, and rob the lawful heirs of a decedent of their inheritance. If the court has jurisdiction to set aside adjudications of judicial officers on the ground of fraud, it necessarily follows that a public record, the essential facts of which are obtained by ex parte statements, without the sanction of an oath and prepared by an officer whether performing a ministerial or judicial function, may be annulled, and rendered innocuous by a decree of a Court of Chancery, especially where private rights are invaded and where the forms of law are used to perpetrate a fraud, establish an unfounded claim or injuriously affect, or threaten future vested or contingent estates. A well-recognized jurisdiction of a court of equity is to compel the surrender and cancellation of instruments, such as notes, where they have been procured by fraud.

It cannot be that a court of equity has jurisdiction, on the ground of fraud, to compel the cancellation of an obligation for the payment of a specified sum of money, and has not the power to compel the cancellation of an instrument, by fraud made a public record, which unjustly places upon the complainant the burden of a prima facie status of paternity and exposes him to the liability to support and maintain the infant.

The complainant is entitled to be relieved of the fictitious status of father so far as it is prima facie created by this certificate and which may reasonably be presumed to impose burdens upon him, both present and future. To prevent the injustice of his being forced to pay unfounded claims out of property either acquired or to be acquired, and to obviate the necessity, on the part of the complainant or his heirs, of meeting from time to time, in various suits and proceedings, this same issue, viz., the validity and evidential force of this certificate, equity interferes in præsenti, on the doctrine of quia timet, that at some time in the future, after the death or departure of witnesses or other loss of evidence, the party or his privies may be menaced by the outstanding instrument. The effect of a decree of nullity in this case, when entered upon the record, would be notice to all the world that this public record was fraudulent and was not entitled to be received in evidence in any court of this state to prove the facts therein contained, or entitled to full faith and credit in other states under the federal Constitution. The question in this case is not whether the Court of Chancery would have power, upon a bill properly framed, to determine that the complainant was not the father of the child, so as to preclude forever a trial of that question. The issue here is narrower, and the effect of a decree canceling the birth certificate, finding that the statements of the wife to the physician that the complainant was the father of the child were false, would not forever preclude a trial of the question of paternity. The effect of the decree would be to destroy the evidential character of this certificate, so that no one would be entitled thereafter to use it as evidence upon such issue. The equity, so far as we are now discussing it, stops with the destruction of the fraudulent piece of evidence and with an injunction against its use. * * *

Finally, the technical basis of the jurisdiction we are exercising is the protection of property rights. The equitable character of the action itself requires us to regard comparatively remote and trifling interferences with such property rights in the light of the great and immediate interference with the personal rights of the complainant, although, as we have already stated, whether this bill might not be rested on such personal basis alone, without reference to the technical protection of property, is not now decided, because the present case does present the property feature to an extent sufficient to satisfy even the rule adopted by the court below.

Upon the whole case, we are of the opinion that the Court of Chancery has jurisdiction to afford the complainant ample and complete relief, as already indicated in this opinion; that, should the Court of Chancery refuse relief under the circumstances stated in the bill, it would cease to be a court of equity governed by principles of natural justice, especially where property rights may be said to be threatened and personal rights are clearly invaded.

The decree sustaining the demurrer is reversed.

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## SWEDESBORO LOAN & BUILDING ASS'N v. GANS et al.

(Court of Chancery of New Jersey, 1903. 65 N. J. Eq. 132, 55 Atl. 82.)

Suit by the Swedesboro Loan & Building Association against James Gans and others.

REED, V. C.[60] This suit is brought to have a mortgage, which has been canceled upon the record, re-established and foreclosed. The facts, as I gather them from the pleadings, from the meager testimony, and from the position taken by counsel, are as follows: One Charles Gans, of Gloucester county, made a mortgage dated March 11, 1892, to the Swedesboro Loan & Building Association, to secure the sum of $1,100, payable in one year. Charles Gans, the mortgagor, died June 9, 1894, intestate, leaving, him surviving his widow, Kate P. Gans, and as his heirs two brothers, James and John, and three sisters, Jennie, Phebe, and Mary. On April 1, 1895, the widow released to the complainant her right of dower in the mortgaged premises. The complainant accepted a deed from one Sebastian Gans, the father of Charles, the deceased mortgagor, under the belief that on the death of Charles the property descended to his father. After the execution of this deed the loan and building association, believing that it held the legal title to the premises, on August 5, 1895, canceled its mortgage. The procuration of the deed from Sebastian Gans seems to have been accomplished by one Benjamin McAllister, who was a scrivener, and was at one time a director of the building association and did writing for them, and who seems also to have been mixed up in the settlement of the estate of Charles Gans. He apparently acted as intermediary between the building association and the Ganses, and got the deed, which the complainant accepted, upon his word, as a conveyance of the equity of redemption in the mortgaged premises. Upon the execution of this deed the complainant went into possession, and has since received the rents and profits therefrom. There can be no doubt that the cancellation of the mortgage was induced by the belief that by force of the deed of Sebastian Gans the loan association owned a complete title to the property.

[60] Parts of the opinion are omitted.

It is thus manifest that the equity of the situation is entirely with the complainant. The defendants, as heirs of Charles Gans, received the property subject to the lien of this mortgage. The cancellation of the mortgage was a pure gift to the defendants of the mortgagee's interest in the property. The heirs had not paid one cent to bring about this change in the respective position of mortgagee and heirs. Neither has any purchaser, bona fide or otherwise, come into existence upon the faith of the cancellation of the mortgage. It is clear, therefore, that, unless some inexorable rule compels otherwise, the complainant should be relieved from the predicament into which it was misled by its belief in its ownership of a complete title to the mortgaged property.

The substantial ground upon which the heirs resist the granting of this relief is that, while the cancellation was caused by a mistake of the complainant, it was a mistake of law, and not of fact. The maxim, "Ignorantia juris excusat non," is invoked by the defendants. This maxim is subject to so many exceptions that it is quite as often inapplicable as applicable to suppose mistakes of law.

That the present case, involving the release of private rights under a mistaken notion as to private ownership of property, is one in which the English courts of chancery would afford prompt relief, cannot be doubted. * * *

The result of the English cases is summed up by Mr. Kerr in the remark:

> "That if a man, through misapprehension or mistake of the law, parts with or gives up private rights to property, or assumes obligations, upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general consideration of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired." Kerr on F. & M.

This statement of the equitable rule was cited with apparent approval by Chancellor Runyon in Macknet v. Macknet, 29 N. J. Eq. 54–59, and in Martin v. N. Y. S. & W. R. R., 36 N. J. Eq. 109–112.

The equity cases in this country, more particularly the earlier cases, exhibit a less liberal spirit in granting relief for mistakes in law. This resulted mainly, I think, from the great influence which the early reported cases decided by Chancellor Kent had in shaping the early equity jurisprudence of this country. The case of Lyon v. Richmond, 2 Johns. Ch. (N. Y.) 60, was an application to set aside an agreement because it was entered into under the influence of a supposed condition of the law, and afterwards the Court of Errors rendered a decision which changed the law as it was supposed to exist when the agreement was made. In deciding that the court could grant no relief, Chancellor Kent, having in mind, of course, the particular facts of that case, made some general remarks in respect to the impolicy of a court of equity attempting to relieve against mistakes of law. These remarks appear again and again in the earlier cases, being used as a general

authority against the granting of relief in all cases of mistakes of law. * * *

Our later cases display a desire to discover some ground to rectify an inequitable result flowing from mistakes of all kinds. Chilver v. Weston, 27 N. J. Eq. 435; Macknet v. Macknet, supra; Martin v. N. Y. S. & W. R. R., supra; Young v. Hill, 31 N. J. Eq. 429. The ability of courts of equity to rectify mistakes arising from ignorance of the law is everywhere acknowledged to exist in certain instances. The propriety of exercising this power must depend upon the circumstances which surround each case. It will depend upon whether a party who asks relief has been negligent; whether he has been led into his belief by the other party; whether other innocent parties will be injured by a rectification of the mistake; or whether the mistake can be regarded as one of fact, although indirectly resulting from a mistaken notion of the law. All these and other features are to be considered in deciding whether it is equitable and politic to put the mistaken party in statu quo. The cases in which the power has been exercised are collected and classified in 20 Enc. of Law (2d Ed.) p. 16. In my judgment, the power should be exercised in the present case. The mistake was in respect to the ownership of the property upon which the canceled mortgage was an incumbrance, and the English cases treat such a mistake as one of fact.

Again, the annulment of the mortgage was without any consideration whatever. Nothing was received by the mortgagee and nothing was paid by the heirs. The language of the Supreme Court of Maine (Freeman v. Curtis, 51 Me. 140–145, 81 Am. Dec. 564) in respect to the execution of a release induced by a mistaken notion of the rights of the releasor is pertinent. The court said:

"There was nothing between the parties as a basis for any negotiation, and there was no claim of the one against the other, valid or invalid. It was an isolated act—the obtaining of a release of five-sixths of a valuable estate without any pretense of any consideration, through the ignorance of the parties giving it. Whether the defendant was ignorant or not, it would be a reproach to the law if he should now be permitted to retain the fruits of such a proceeding."

In my judgment, the heirs cannot, in the present case, equitably retain the advantage which the mistaken act of cancellation gave them. * * *

There should be the usual decree of foreclosure, with reference to a master to take an account of the rents and profits as a basis for ascertaining the amount due upon the mortgage.

## MORELAND v. ATCHISON.

(Supreme Court of Texas, 1857. 19 Tex. 303.)

Appeal from Grayson. Tried below before Hon. William S. Todd.

Petition filed September 21, 1855, as follows:

The petition of George W. Moreland, a resident of Grayson county, would represent and show that heretofore, to wit: on the 30th day of October, A. D. 1854, he purchased of one Robert Atchison, who is also a resident of Grayson county, and who petitioner prays may be made a defendant to this petition, three hundred and twenty acres of land in Grayson county, and described as follows: [Here followed a description of the land by metes and bounds, fixing the beginning corner by course and distance from the S. E. corner of Thomas F. Hay's pre-emption survey.] Petition charges that on the 9th day of December, A. D. 1853, one Daniel Boon filed his application as a pre-emptioner with the county surveyor of Grayson county to pre-empt the aforesaid land. Petitioner further charges, that on the —— day of ——, A. D. 1854, and before your petitioner purchased the aforesaid land of the said Robert Atchison, the said Atchison purchased the same of the said Daniel Boon, for and in consideration of the sum of three hundred and twenty dollars. Petitioner further charges, that said sale, made by the said Boon to the said Atchison, was never reduced to writing, and that after your petitioner had purchased the same as aforesaid of the said Atchison, he, the said Atchison, proposed, as there was no writing between him and the said Boon, that the said Boon should make a deed of conveyance to your petitioner directly, which would save the making of a deed from the said Boon to the said Atchison, and from him, the said Atchison, to your petitioner, and would also save the expenses of recording more than one deed, which your petitioner agreed to for convenience. Petitioner further charges, that in pursuance of the aforesaid agreement, and for the purpose of saving expenses and for convenience sake, the said Boon did, on the 30th day of October, 1854, execute to your petitioner a deed of conveyance for the aforesaid 320 acres of land. Petitioner charges as aforesaid, that said deed was made directly from Boon to your petitioner, for the purpose aforesaid, and not for any consideration paid by petitioner to said Boon. Petitioner states that the entire trade was made between him and the said defendant, and that the entire consideration paid by petitioner for said land was paid to the said Atchison, with whom he traded, and that he never made any contract with said Boon for said land, nor did he ever pay the said Boon any of the consideration for the said land; and he further states that it was agreed that said Boon should be substituted as the maker of said deed to your petitioner, in the place of said Atchison; all of which the said Atchison proposed himself and agreed to; which said deed, made by the said Boon as aforesaid, is hereto attached and made a part of this petition, and marked "Exhibit A." Petitioner further states and charges, that at the time he made the aforesaid purchase of the said Atchison, he was a stranger in the country, and was an entire stranger to, and unacquainted with, the land system of Texas, he being just moved into the state of Texas, and that the said Atchison represented himself as an old settler in Texas, and entirely familiar with the lands and with the laws governing land titles within Texas. Petitioner further charges, that said Atchison corruptly and fraudulently represented to your petitioner that he, the said Atchison, had a good title to the aforesaid 320 acres of land, and that your petitioner could hold the same without any molestation or hindrance, and that he would guarantee the title to the same.

Petitioner states that, believing and confiding in the representations and statements made by the said Atchison as aforesaid, and that his, the said Atchison's, title to the said land was good, purchased the same as aforesaid from the said Atchison, for which he paid the said Atchison one stallion Jack at seven hundred dollars; also one order from Boon on the said Atchison, one hundred dollars; he also executed to the said Atchison his two certain promissory notes for one hundred bushels of corn each, rating corn one dollar per bushel; one of said notes is due in the fall of the year 1855; the other due in the fall of the year 1856; making in the whole your petitioner paid and

was to pay for said land, one thousand dollars. Petitioner further charges that said Atchison did not have any title to said land, and that your petitioner acquired no title by his aforesaid purchase, and that at the time the said Boon made his application to pre-emption the same, it was not subject to be pre-empted or located, because the 320 acres of land was lying in what was known and called Peters' colony, and that by law, all persons were prevented from pre-empting or locating any lands in said colony, except by virtue of colony certificates. He therefore charges that the said Atchison had no title whatever to said land, when he sold the same to your petitioner. Petitioner therefore charges that he was wholly induced to purchase said land by the false and fraudulent representations made to him by the said Atchison, that the title to the same was good.'

The premises considered, he brings this suit, and prays that said Atchison be made a defendant herein, and hereby tenders back the deed that the said Boon executed, to and all the rights he acquired by the same, to the said Atchison. And he also here offers to release unto the said Atchison all the interest that he may have acquired by his aforesaid purchase.

Petitioner also prays for judgment against the said Atchison for the sum of eight hundred dollars, which he has paid him, together with the interest thereon due. Also, the sum of five hundred dollars as damages, by reason of the fraud practiced on him by the said Atchison.

Petitioner further prays that the said Atchison be compelled to surrender the two aforesaid notes executed by your petitioner to the said Atchison for corn, and that the same be cancelled, set aside, and held for nought. Petitioner further prays for citation against said defendant, and also for all relief that may seem equitable and just in the premises, and the nature of this case demands, and as in duty bound petitioner will ever pray, etc. * * *

Defendant filed a general demurrer, and for special exceptions as follows:

1st. Plaintiff seeks to annul a sale of land for fraud in the vendor in representing his title to be good when he set out a deed in writing as a part of this petition, only quit-claiming to plaintiff.

2d. Plaintiff desires to annul a written contract and sale of land for want of a covenant of warranty in the same, when he expressly declares that the deed was made to him by Boon instead of Atchison, by his consent, and for his own convenience.

3d. No matter what were the parol representations of defendant in regard to his title, the plaintiff has accepted the quit-claim and is bound thereby.

Defendant also denied the fraud charged; claimed damages in reconvention on the ground of impotency of the Jack, and also claimed in reconvention a recovery of the note which had fallen due. The court sustained the demurrer, and plaintiff declining to amend, the cause went to trial on the pleas in reconvention (the plaintiff excepting), and defendant obtained a verdict for the amount of the note; judgment, etc.

WHEELER, J.[61] Whatever differences of opinion adjudged cases may exhibit, as to the cases where the purchaser of land will be entitled to have the contract rescinded, or to be relieved against securities given for the purchase money, where there is no charge of fraud, it is clearly settled beyond controversy, that chancery will decree a return of the purchase money, for insufficiency of title, even after the purchase has been carried completely into execution, by delivery of the deed and payment of the money, and whether the deed

[61] The statement of facts is abridged and parts of the opinion are omitted.

was with or without covenants, provided there had been a fraudulent representation as to the title. Edwards v. McLeary, Cooper's Eq. 308; Fenton v. Browne, 14 Ves. 144; Denston v. Morris, 2 Edw. Ch. (N. Y.) 37; 2 Kent, Com. 471. The petition avers such fraudulent representation; and the only question is, whether it was of a matter respecting which the party can claim to be relieved, on the ground of the deception and fraud,—whether he was not bound to know the law, which disabled the defendant from making title, and whether to grant him relief would not be to relieve against ignorance or mistake of law. The maxim, "ignorantia legis neminem excusat," is respected equally in courts of equity and law. The legal presumption is, that every man who is not non compos mentis knows the law where he knows the facts; and this presumption, though arbitrary and false in fact, is founded upon reasons of sound policy; for although a thorough knowledge of the law presupposes a life devoted to the laborious study of principles, and in the application of the knowledge thus acquired, to the complicated affairs of men, there will questions arise upon which the best informed will differ in opinion, and no such thing as absolute certainty can be attained; yet without some arbitrary rule, imposing upon all the duty of well considering and understanding the consequences of their acts and contracts, there would be no limit to the excuse of ignorance, no safety to society, and no security in any obligation. The law presumes, therefore, that every man who makes a contract acts advisedly and with a knowledge of its legal effect and consequences. The question whether, in any case, mere ignorance or mistake of law will entitle a party to relief, has been much discussed by judges and commentators, and is still a disputed question. 1 Story's Eq. ch. 5, §§ 111 to 138. Judge Story says that:

"Agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally held valid and obligatory. The doctrine is laid down in this guarded and qualified manner, because it is not to be disguised that there are authorities which are supposed to contradict it, or at least to form exceptions to it." * * *

Admitting the rule that ignorance of the law, with a knowledge of the facts, cannot generally be set up as a defense ([Storrs v. Barker] 6 Johns. Ch. [N. Y.] 169, 170, 10 Am. Dec. 316), there are other elements in the present case which bring it within the exceptions, or take it out of the operation of the rule, and entitle the party to relief. It is not a case of mere ignorance of law, unmixed with fraud and ignorance of fact. There was both fraud and ignorance of fact, as well as law. And it has been the constant practice of courts of chancery to grant relief, where the case did not depend upon a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, or advantage taken of another's situation. Story's Eq. 120 et seq. and notes.

There was, in this case, misrepresentation and fraud, if corruptly deceiving one, as to matter of law, amounts to fraud, in a legal sense; and we do not doubt that it may, where, as in this case, advantage is taken of the ignorance of the party. An immigrant arrives in the country, and his first object is to procure a home. He, of course, is ignorant respecting the land titles of the country; and he meets with an old citizen who professes familiarity with them, and who proposes to sell him land to which he assures him he had a perfectly good title. The immigrant relies on his superior information, and trusts to his representation; and has he not a right to do so? When one who has had superior means of information professes a superior knowledge, even of the law, and thereby obtains an unconscientious advantage of another, who is confessedly ignorant, and who has not been in a situation to be informed, is not the injured party as much entitled to relief, on the ground of fraud, as if the misrepresentation were of a matter of fact? We think he is.

The plaintiff is not supposed to have had a knowledge of the laws of this state until he came within their influence. Ignorance of the law signifies ignorance of the laws of one's own country; ignorance of the law of a foreign government is ignorance of fact. Haven v. Foster, 9 Pick. (Mass.) 112, 130, 19 Am. Dec. 353. To deny him relief against a ruinous contract, induced by the misrepresentation of one who professes a knowledge of the subject, and who has been in a situation to be informed, while he has not, and when, if he had been informed, he would not have made the contract, would not only be extremely unreasonable and unjust to the injured party, but it would be giving a premium to the other party for taking advantage of his ignorance. It would be plainly repugnant to good morals and fair dealing. There can be no good reason why the law, in this case more than any other, should suffer one who has no right or title to retain that which is the property of another.

But the truth or falsehood of the representation did not depend upon a mere question of law; nor would a knowledge of the law alone have enabled the plaintiff to detect its falsehood. He might have known that the land included within the boundaries of the colony was reserved by law from location and pre-emption, and still have been ignorant of the fact that this land was within the bounds of the reserved territory. Whether the defendant had or could make a good title to the land was a question of fact as well as law, no less in this than in other cases where there had been a prior appropriation of the land. The misrepresentation, therefore, was of matter of fact as well as law. The consequence is, that the defendant has obtained the property of the plaintiff without consideration, and by means which does not divest the latter of his title, and ought not, on principle, to deprive him of his remedy. We conclude that the plaintiff has stated a case which entitled him to his action to recover back his property

or its value; and that the court erred in dismissing the petition. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.[62]

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## BARKLEY et al. v. HIBERNIA SAVINGS & LOAN SOCIETY.

(District Court of Appeal of California, Third District, 1913. 21 Cal. App. 456, 132 Pac. 467.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Margaret H. Barkley, executrix of the will of Edward Duncan, deceased, and George O. Davis against the Hibernia Savings & Loan Society. From a judgment for defendant, and an order denying a motion for a new trial, plaintiffs appeal.

For memorandum decision of Supreme Court denying rehearing, see 132 Pac. 467.

See, also, 132 Pac. 462.

BURNETT, J.[63] * * * Appellant claims that this action is brought under section 3412 of the Civil Code, and is authorized thereby. Said section provides that:

"A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may upon his application, be so adjudged, and ordered to be delivered up or canceled."

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[62] NECESSITY OF GIVING NOTICE OF RESCISSION BEFORE BRINGING SUIT.—In Sneve et ux. v. Schwartz et ux. (1913) 25 N. D. 287, 141 N. W. 348, at 350, Burke, J., said: "The first and most serious objection raised to the complaint is that it contains no allegation of rescission, thus raising the question as to the necessity of giving notice to the adverse party of the intention to rescind before bringing action. The general rule unquestionably is that the party believing himself defrauded must elect to rescind and make his election known in some manner to the other party. This is founded upon the plainest principles of justice. The rule, however, is not broader than the principles of justice upon which it is founded. In executory contracts, where the parties have merely agreed to transfer their property at some future time, the necessity for the notification is not so imperative as in contracts fully executed, because the other party knows that, until the negotiations are finally completed, there is a possibility of some disagreement necessitating the abandonment thereof. So in the case at bar, where neither party was to part with his property until a future date, there would be less reason why one of the parties should notify the other of his intention to rescind on account of fraud. And this for the reason that the party in the wrong might rectify his wrongful acts before the day of final settlement. In other words, the plaintiff herein who was merely to deposit his deed in escrow might not feel justified in rescinding the contract because he had discovered that the defendants had no title to the premises which they were obligated to convey, because the defendants might acquire the property by the time the deeds were to be formally transferred. The defendants had until November 15th within which to deposit their last deed and furnish the abstract. This action was begun on the 29th of December following, which was about as soon as the plaintiffs could be expected to act. We conclude, therefore, that in this action at least there was no necessity for the plaintiffs notifying the defendants of their election to rescind otherwise than by the bringing of an action promptly upon learning of the deceit practiced upon them. Brown v. Search (1907) 131 Wis. 109, 111 N. W. 210."

[63] Parts of the opinion are omitted.

It may be conceded that appellants have brought themselves within the terms of this section, but the court below was justified in sustaining the demurrer on the ground of their laches. The deed from Davis to respondent, as we have seen, was executed May 31, 1905, and the original complaint in this action was filed May 13, 1908, nearly three years thereafter. There is not even an excuse offered for the delay, nor is there any allegation of fraud upon the part of respondent.

As to the degree of promptness with which, under the circumstances, steps must be taken to have the instrument canceled, the rule in this state is the same as in the case of rescission of contracts.

Burkle v. Levy, 70 Cal. 250, 11 Pac. 643, involved an action to set aside a deed of trust executed by the plaintiffs to the defendant as trustee. The Supreme Court, after referring to sections 1689 and 1691 of the Civil Code, in reference to rescission, said: "Here, as has been seen, the trust deed was executed on the 23d day of May, 1884, and this action was not commenced till the 10th day of October, 1885. There is nothing in the complaint to account for this long delay, and under the circumstances we must hold it unreasonable and fatal to this action."

In Bailey v. Fox, 78 Cal. 389, 20 Pac. 868, where the action was to rescind a partnership contract, it was held that a delay of four months after the discovery of the fraud was fatal to a claim of right to rescind.

The authorities, it may be said, are not altogether uniform in the application of the doctrine of laches. This is not surprising, however, in view of the element of discretion that is therein involved and of the peculiar facts of the various cases. Prof. Pomeroy treats the subject in his article on Cancellation of Instruments, 6 Cyc. p. 300, wherein many citations are made illustrating the different views of different jurisdictions. He says therein that no attempt is made "to reconcile the various judicial utterances on the subject of laches." * * *

We think the judgment and order should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

# CHAPTER IV

# INJUNCTION IN RELATION TO TORTS

## SECTION 1.—NATURE OF INJUNCTION

### MORRIS v. LESSEES OF LORD BERKELEY.

(In Chancery before Lord Hardwicke, 1752. 2 Ves. Sr. 453, 28 E. R. 289.)

Motion to continue injunction to stay building.

LORD CHANCELLOR. Whoever comes into this court on such a right, must found it either on defendant's building so as to stop ancient lights, for which he has prescription (notwithstanding that he must lay a particular prescription), or else on some agreement, either proved, or reasonable presumption thereof. An insufficient answer is not a ground to continue an injunction: it must be excepted to, and then if reported insufficient, application may be to revive.

### HANSON v. GARDINER.

(In Chancery before Lord Eldon, 1802. 7 Ves. 305, 32 E. R. 125.)

The Attorney-General, and Sir Thomas Turton, for the Plaintiff, showed cause against dissolving the injunction upon the answer put in. The prayer of the bill was for an injunction against cutting down timber or wood in a wood or coppice, consisting of about 130 acres, within the Manor of Bromley, and depasturing cattle therein. The injunction was granted by the Master of the Rolls upon affidavits. The plaintiff represented himself as seised in fee of this wood and coppice; which were formerly enclosed; but that some time ago the enclosure was thrown down; and considerable damage done to him by the cattle of the commoners trespassing thereon. The defendants contended, that the plaintiff was not seised in fee. The plaintiff further insisted upon his right as Lord of the Manor under the Statute of Merton. St. 20 Hen. III, c. 4. The defendants stated, that there are large patches of pasture within the wood; upon which they claimed as commoners a right of pasture; and that after this enclosure there would not be sufficient common of pasture. They also claimed common of estovers; and denied, that the wood and coppice were ever enclosed. They stated various encroachments by the plain-

tiff: that for some time they acquiesced: but finding his encroachments increase, they at length resisted; which produced an action of trespass by the plaintiff; which was tried at the Summer Assizes, 1801; and the plaintiff was nonsuited. He afterwards, having permitted the enjoyment for some time, gave notice, that he would enclose under the Statute of Geo. II. St. 29 Geo. II, c. 36. The enclosure was ordered at the Sessions under an agreement with some of the commoners: but the defendants appealed; and that order was quashed.

LORD CHANCELLOR.[1] This bill for an injunction is not like a bill between lord and tenant, praying the establishment of rights, and an injunction till, or at, the hearing, as auxiliary to the rights: this bill not stating the relation between the plaintiff and the tenants; but simply praying an injunction. The law as to injunctions has changed very much; and lately they have been granted much more liberally than formerly they were. Formerly, when legal rights were set up to the extent, in which they are set up in this case, the Court were very tender in granting injunctions. I remember, when in a case of trespass, unless it grew to a nuisance, an injunction would have been refused; and even in the case of waste, if by temporary acts, from time to time merely, the subject of an action, and not bringing along with it irreparable mischief, Lord Hardwicke thought, it was granted only as following the relief. Lord Thurlow had great difficulty as to trespass. I have a note of a remarkable case, in which the name of one of the parties was Flamang. There was a demise of close A. to a tenant for life; the lessor being landlord of an adjoining close B. The tenant dug a mine in the former close. That was waste from the privity. But when we asked an injunction against his digging in the other close, though a continuation of the working in the former close, Lord Thurlow hesitated much; but did at last grant the injunction; first from the irreparable ruin of the property, as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of this court enjoining on matter of trespass, where irreparable damage is the consequence.

This led to Robinson v. Lord Byron [1 Bro. C. C. 588] and the other cases; in which also this principle operated; that unless there was some jurisdiction to prevent it, there would be a great failure of justice in the country. The ground of that case was irreparable mischief; and irreparable mischief, that would have been done, before there could have been any trial at law as to the right claimed to let off the water. Isaac v. Humpage is a case upon its own particular circumstances; certainly not standing upon the notion of irreparable waste. Mr. Justice Buller put it upon fraud. It does not appear exactly how he applied that to the case: but it certainly is not at all connected with what is here stated. If this is to be considered upon trespass alone, an injunction would not be granted, merely because

[1] Part of the opinion is omitted.

asked for, without stating distinctly, that it was upon trespass alone. If it is not to be so considered, then it is a bill brought by the Lord of the Manor; which must be taken to admit, either, that there are rights of common of pasture and estovers, or, that it may so turn out; insisting against those rights upon an enclosure made under the Statute of Merton or other authority. It is difficult to state, what he is to say as to common of estovers: this case stating, that he has a right to preclude them from ingress, &c.; denying therefore their right to estovers. * * *

Suppose, this bill had been filed before an action, and I had granted an injunction upon the affidavits till the trial of an action directed by me; and there was a nonsuit: it would be extraordinary after that to apply for a continuation of the injunction; and the Court would have some reason to reproach itself for having restrained the exercise of the right in the mean time. I think myself authorized to take what passed at law, as if an action had been directed by this Court. After that nonsuit the plaintiff opens the place enclosed; and admits their right by permitting the enjoyment. Then he makes an agreement for a compensation for shutting them out; as far as it goes an additional admission, at least not a denial of the right. His conduct therefore at and since the trial instead of affirming the allegations of the bill renders them improbable; and it is no answer, that it proceeded from mistaken advice or advice not followed up; when there is so much evidence of right of Common of Pasture and Estovers; the bill too alleging that claim: no negative of the right to be put in the balance against the nonsuit upon that very point permitted by the plaintiff; the answer of the defendants; no passage in any one of the affidavits, which I look at entirely without prejudice to the question, whether I ought to look at them, or not, containing any assertion of marks of ancient enclosures, and that the cattle did not pasture here, as far as they could, while it was unenclosed; the defendants swearing to the enjoyment of the right of pasture; and in this way, that if the 130 acres are enclosed, they will not have sufficient Common of Pasture; upon which there is no contradiction whatsoever.

The injunction must be dissolved; and if there is any hardship as to the intermediate enjoyment, it is better that it should fall upon the plaintiff than upon the defendants.[2]

[2] See Simon v. Nance (1911, Tex. Civ. App.) 142 S. W. 661, 663, where the court said: "The mere lapse of time, independent of the statute of limitation, may be a sufficient ground for denying an injunction, unless legal excuse is shown for such delay. 22 Cyc. 777, and authorities there cited; Morris v. Edwards (1884) 62 Tex. 205. Long and continued acquiescence will defeat the right to injunctive relief. See High on Injunctions, vol. 1, § 756; also, G., H. & S. A. Ry. Co. v. De Groff (1909) 102 Tex. 433, 118 S. W. 138, 21 L. R. A. (N. S.) 749."

## ROWE v. HEWITT.

(Divisional Court of Ontario, Canada, 1906. 12 Ont. Law Rep. 13.)

This was an appeal by the defendants, the members of the executive committee of the Ontario Hockey Association, to the Divisional Court from the judgment of Falconbridge, C. J. K. B., granting an injunction restraining the defendants from expelling the plaintiff, or suspending him as a playing member of the Hockey Association.

On February 7, 1906, an interim injunction was granted ex parte by the county judge of the county of Simcoe, Ardagh, Co. J., and on its coming before Falconbridge, C. J., it was turned into a motion for judgment, when the injunction was made absolute as above stated.

The complaint set forth in the action in which the injunction was sought, was that the Association were about to expel or suspend the plaintiff as a playing member of the Association, in which he held a playing certificate for one year and which expired during the pendency of this action. A match was to be played on the 9th February between the Barrie Club and the Argonaut Club of Toronto, the plaintiff being a member of the former club, and it was alleged that the contemplated action of the Association was to prevent him from playing in that match. There was no allegation or proof on the part of the plaintiff that he had any right of property in the Association of which he would be deprived or from which he would be excluded.

On March 30, 1906, the appeal was heard before BOYD, C., and MAGEE and MABEE, JJ.

April 4. The judgment of the Court was delivered by BOYD, C. The whole cause of action alleged by the plaintiff is that the defendants, or the body that they represent, are about to expel or suspend him as a playing member of the Hockey Association. He holds a playing certificate for one year, which expired pending this action, and his anxiety was to be allowed to play hockey in one match with the Barrie Club on the 9th of February last.

An ex parte injunction was granted on the 7th of February by Judge Ardagh, which was ultimately made absolute as on a motion for judgment by Falconbridge, C. J., on the 21st February.

The game in view either did not go on, or went on without the plaintiff, so that we have here the beginning and the end of the grievance; asking the interference of the Court that plaintiff might play one game of hockey.

The plaintiff has lost nothing nor will he lose anything in the nature of property by his suspension or expulsion. It does not appear that he has paid any fee or admission, nor would it matter if he had, for that would be answered by his having access to the rooms and grounds of the Association—if there be any, for as to that also we are in the dark. According to the rules, the only result which

follows the expulsion of a player is that he shall be barred from playing with or against any club in the Ontario Hockey Association till reinstated (Regulation 7). Even if he is to be permanently barred from play, that may or may not be a benefit, but it is certainly no deprivation of any property right.

In brief, there is no allegation and no proof of any property, real or personal, of the Association, nothing of value in this sense from which plaintiff has been excluded—nothing which by any possibility could come to him if the Association were to be dissolved or wound up. Jurisdiction then, according to binding authorities, is fundamentally lacking in this case, so far as an injunction is concerned—and that is the only relief given or claimed.

This point upon which we proceed was not raised or suggested before the Chief Justice—otherwise we should not have been troubled with an appeal.

Even if jurisdiction existed, I should as a matter of discretion refuse an injunction. That, as said by Cozens-Hardy, J., is a formidable legal weapon which ought to be reserved for less trivial occasions. Llandudno Urban District Council v. Woods (1899) 2 Ch. 705, 710; see also as to a football match, Radford v. Campbell (1890) 6 Times L. R. 488.

It must appear, to give jurisdiction to interfere by way of injunction to restrain the expulsion of a member of a society or club, that the plaintiff as member has some right of property for the protection of which the court will interfere by this method of relief. If it be no more than this, that paying a subscription entitles one to the use and enjoyment of the rooms and property and effects of the society, without any right to participation in its assets if distribution ensued, then the right is only a personal one, and, if the expulsion is wrongful or injurious, the person injured has his remedy in seeking damages; this is the highest measure of relief which the court will give in the absence of a right of property. Baird v. Wells (1890) 44 Ch. D. 661.

In case of voluntary societies the court has jurisdiction, where all the property, in the event of dissolution, will go ratably among the members, because each one has a pecuniary interest in being a member and to resist being improperly expelled. Brown v. Dale (1878) 9 Ch. D. 78; Rigby v. Connol (1880) 14 Ch. D. 482, at p. 487, per Jessel, M. R.

The facts and the law are both against the plaintiff, and the action should be dismissed with costs and with costs of appeal.

## STATE ex rel. GRAY v. OLSEN et al.

(Supreme Court of South Dakota, 1912. 30 S. D. 57, 137 N. W. 561.)

Application by the State, at the relation of John Gray, against Oscar C. Olsen and others and S. C. Polley, as Secretary of State, for an injunction. Demurrer to complaint sustained, and application for injunction denied.

McCoy, P. J.[3] Plaintiff makes application for injunction restraining defendant Samuel C. Polley, as Secretary of State, from certifying to the various county auditors the nominations for presidential electors selected by the Republican state convention held at Huron July 2d, under the provisions of the primary law. The electors so nominated are also defendants. Plaintiff as a Republican voter and elector, by his petition, claims the right to such injunction on the ground that such presidential electors selected at said Huron convention were not and are not Republicans, and that their selection and the placing of their names upon the official ballots in the regular Republican column results in a fraud upon plaintiff and all other Republican voters of this state who desire to vote for President Taft by means of the regular Republican ticket. Defendants have demurred, and also moved to quash plaintiff's petition on the ground that the same does not state facts sufficient to warrant the injunction relief demanded by plaintiff.

It is the contention, among others, of defendants that as no other Republican, or Taft, electors have been nominated whose names might in any manner appear on the regular Republican ticket in the Republican column, plaintiff would be in no different or better position if the injunction were granted than he is now, in so far as his said political right to vote for President Taft on the regular ticket is concerned. We are of the opinion that this contention of defendants is well taken. Plaintiff is not a candidate himself for presidential elector, or for any other office affected by the action of the Huron convention. The specific right which plaintiff claims will be violated and invaded is that of voting, or the opportunity of voting, for President Taft by means of the regular Republican ticket on the official ballots to be used at the November election. The only effect of the injunction, if granted, would be to prevent the names of these electors appearing in the Republican column in the Republican ticket on the official ballots, and would accomplish nothing further than to leave a vacancy in the Republican ticket on the official ballots as to Republican nominees for presidential electors, and would in no manner protect or operate to enforce or secure to plaintiff, or any other Republican so situated, the right or opportunity to vote for President Taft by means of the regular Republican ticket on the official ballots.

[3] Parts of the opinions are omitted.

It seems to be generally held that the applicant for an injunction has the burden of showing that he would in some manner be injured or deprived of some lawful right without the aid of such injunction, and that by the granting of such injunction he would obtain the desired relief. Section 197, Code Civ. Pr. It is another general rule or principle of law that courts should never be required to perform idle or useless acts.

The granting of the injunction, as prayed for by plaintiff, under the circumstances of this case, and in view of the present situation existing in this state, with reference to the nominations for Republican presidential electors, of which this court will take judicial notice, would be an empty and idle act in so far as it would affect the right or opportunity of plaintiff, or any other Republican so situated, to vote for President Taft by means of the regular Republican ticket on the official ballots. On this ground we are therefore of the opinion that the showing made by plaintiff is not sufficient to empower the court to grant the prayed for injunction. * * *

Some of our associates contend that the injunction prayed for by plaintiff should be granted on the ground that this is an ex rel. action maintainable by the Attorney General of the state on behalf of the people of the state, and that it is the people of the state who are injured by the names of the defendants, nominees for presidential electors, appearing on the official ballots in the Republican column, and, on account of the allegations contained in plaintiff's petition, that the Attorney General has refused to institute this action in the name of the people of the state plaintiff's demand for injunction should be granted. Neither plaintiff nor his counsel have presented or argued any such contention or question, nevertheless, we are of the opinion that this contention is also untenable. Whether this action be maintainable by the Attorney General on behalf of the state, or by private individuals as the members of a political party, does not relieve the party plaintiff, whoever it may be, from making out a good and proper case or cause for injunction under the rules of equity applicable to the granting of such relief. Again, we cannot concur in the view that this is a cause properly maintainable by the Attorney General on behalf of the people of this state. We are of the opinion that neither a political party nor any considerable number of the members thereof constitute the people of this state for the purpose of seeking relief by injunction such as demanded in the petition in this case. Plaintiff in his petition, in substance, states that he is a Republican voter and elector of this state who desires to vote for President Taft, and that this action is brought by himself as such voter and elector and also on behalf of all other Republican voters so situated, and that he is injured and defrauded of his said right to so vote by reason of the presence of the names of defendants, electors, appearing on the regular Republican ticket. Conceding that plaintiff has legal capacity to

sue and maintain this action as a party plaintiff for himself and other Republican voters similarly situated, still he must show that he and all others so similarly situated would be benefited by the granting of said injunction by giving him the right or opportunity of which he claims to be so deprived by defendants. Plaintiff by the very allegations of his petition is not seeking relief on behalf of the whole people of the state or in which the whole people of the state might be interested, but only as an elector who desires to vote in a particular manner by means of a particular ticket. * * *

The demurrer of defendant may be sustained and the application for injunction denied.

HANEY, J. (dissenting). * * * In my opinion an elector, upon the refusal of the Attorney General to prosecute, may maintain a proceeding involving questions pertaining to the sovereignty of the state, its franchises and prerogatives, and the liberties of its people, in this court, in the name of the state. In such a proceeding, the state, not the elector, is the plaintiff, and the latter's interest, other than as an elector, is immaterial. In other words, in such a case, whether on the relation of the Attorney General or an elector, the Attorney General having declined to act, it is wholly immaterial what effect, if any, the result of the proceeding may have upon the relator. * * *

CORSON, J. (dissenting). I fully concur in the dissenting opinion of my Associate, Judge HANEY. * * *

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## CITY OF PITTSBURGH v. VAN ESSEN et al.

**(Common Pleas Court of Allegheny County, Pennsylvania, 1912. 60 Pittsb. Leg. J. 711.)**

Motion to dissolve preliminary injunction. In Equity.

CARNAHAN, J. This bill was filed by the mayor of the city of Pittsburgh, acting for and in behalf of the city, to restrain the defendants from organizing and conducting certain political meetings at the corner of Homewood avenue and Kelly street in the city of Pittsburgh. Several meetings had already been held in the place in question, and because of the vast crowds of men, women, and children in attendance, the streets were blocked, public travel was suspended and business houses in the immediate vicinity were practically closed. The defendants, with others, it was averred, widely advertised, organized and conducted these meetings, to the prejudice of residents and business interests in the immediate vicinity and in the neighborhood generally. Upon complaint made to the police by residents and neighboring business men, notice that such meetings thereafter, at this particular place, would not be permitted, was given by the police to the defendants, who appeared to be largely instrumental in the organization and conduct of the meetings. Future meetings were then threat-

ened and particularly one for Saturday evening, August 17, 1912; this proposed meeting had been advertised, and it was the intention of the defendants to hold it, in open defiance of police authority. At one of the previous meetings the presence of two hundred policemen was required, in order to disperse the crowds and preserve the peace. It was anticipated that at this proposed meeting a riot would take place, and the city, averring, in detail, what has been briefly stated here, and averring further, that such assemblages were forbidden by ordinance, except as regulated by the police, asked for the interference of a court of equity, by injunction, on the ground that such meetings had been, were and would be a continuous nuisance and that it was necessary to prevent their continuance, in order to avoid probable collision or collisions between the police and those in attendance at the meetings, which would result, possibly, in bloodshed.

When the bill, supported by the necessary affidavits, was presented in open court, counsel for both plaintiff and defendants were heard and the statement of facts, as averred, were not denied. The right of the city to interfere by its police officers, or otherwise, was denied, as was also the jurisdiction of a court of equity.

The court being of opinion that the matters complained of constituted or were in the nature of a nuisance, which threatened immediate and serious trouble, granted not a mere temporary restraining order but a preliminary injunction; and upon a motion by defendants to dissolve that injunction, the case is again before us, testimony of witnesses in support of and against the motion having been taken in open court.

It does not appear that any property is involved—at least no such property right as would entitle a municipality to call to its aid the authority and power vested in a court of equity. The city of Pittsburgh is empowered by law to preserve the public peace within its territorial limits, and it is charged with the duty of preserving it. It may, by ordinance, regulate assemblages upon the public highways and enforce obedience to all of its reasonable provisions. It does not need the assistance of a court of equity to such end, nor is it proper for a court of equity to interfere, in order to enforce compliance with the provisions of a city ordinance, unless the act complained of be a nuisance per se. In case of nuisances, equity has jurisdiction, and the facts, as averred, if proven, may constitute a nuisance. It is not of itself a nuisance for a person to address the public on a public highway. The mere assemblage of persons on a public highway for the purpose of hearing the talk or address of a public speaker, although, strictly speaking, is not lawful, does not necessarily constitute a nuisance, and especially is this so, if the proper and customary use of the street is not interfered with. But if such assemblages are of frequent occurrence and so block the street as to effectually stop public travel and thus prevent the very use for which streets and high-

ways are intended, such interference may amount to a nuisance. Assemblages of this character, however, are not nuisances per se.

In the light of the facts as now presented, it does not appear that this case is within the jurisdiction of the court of equity, there being an adequate remedy at law. The injunction heretofore granted should, therefore, be dissolved.

And now, to wit, October 7, 1912, the preliminary injunction granted August 16, 1912, is, upon motion of defendants, hereby dissolved.

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## MURRAY v. KNAPP et al.

**(Supreme Court of New York, 1872. 42 How. Prac. 462.)**

LEARNED, J. The plaintiff is the owner of an island in the Delaware River, at Big Eddy. It appears that at this point of the river the current is of such a nature that it is difficult for rafts to pass down, unless they are pulled out of the eddy. The best, if not the only means of doing this is, the carrying of rope from the plaintiff's island to the rafts. The plaintiff and his predecessors have made this a business, and in so doing have been accustomed to go on the plaintiff's island for this purpose. An injunction was granted restraining defendants from going on plaintiff's island and carrying on the business of drawing rafts through the eddy or interfering with plaintiff's said business. The defendants now move to vacate the injunction.

It is well known that generally an injunction does not lie to restrain a simple trespass. But this rule has exceptions, and the present case may be one.

The question as to the rights of raftsmen to use the shores of rivers for tracking, and of others to make a similar use for the benefit of the raftsmen may need a careful examination. But in the view I have taken of the case I shall not consider either of these matters.

It is plain that since the merging of law and equity, and especially since the adoption of the Code, the granting of preliminary injunctions has been carried to excess. Even as a mode of final relief, an injunction is not desirable.

When a plaintiff can be compensated by damages, such compensation is the better remedy. But there are cases in which no final relief other than an injunction will give the plaintiff his just rights. And I am not aware that in final judgments the courts have, in recent times, gone beyond the cautious use of this relief, which characterized the old chancery proceeding. But this remark is not true of preliminary injunctions. They have been granted with a dangerous frequency. A plaintiff on an ex parte application at the beginning of his action has too often obtained a remedy which he should not have had until a hearing of both parties on the trial, and to which he might then have been found not to have been entitled. In many cases of this kind the

plaintiff practically has obtained his judgment at the outset, and the continuance of the action has been only a struggle by the defendant to relieve himself of an ex parte decision. The result of this often is that the plaintiff has a strong inducement to protract the litigation, for a final decision may deprive him of the relief he has already obtained, and the defendant under the pressure of the injunction, in limine is forced to compromise.

This modern custom has become a serious evil. For it, both the bar and the bench are responsible, and it is time that both returned to the correct and just rules of earlier days. Said Chancellor Walworth:

"There are many cases in which a complainant may be entitled to a perpetual injunction on the hearing, when it would be manifestly improper to grant an injunction in limine. The final injunction is in many cases a matter of strict right, and granted as a necessary consequence of the decree made in the cause. On the contrary the preliminary injunction before answer, is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing and the delay is dangerous." New York Printing, etc., v. Fitch, 1 Paige, 97.

The same language is used by Chancellor Kent in Ogden v. Kip, 6 Johns. Ch. 160. Such preliminary injunctions are usually granted ex parte, and the experience of every one shows that an ex parte statement seldom presents the full truth.

These principles are elementary and ought to be familiar, but it must be acknowledged that of late they seem to have been forgotten or overlooked. All who desire that law should be administered justly should endeavor to restore these principles to the control of our practice.

The present case is an illustration of the evil I have suggested. Taking the most favorable view of the plaintiff's rights, and granting that on the trial he will obtain a judgment for a perpetual injunction, what pressing injury, what danger from delay rendered it necessary to restrain the defendants in limine?

If they damaged his island, money would compensate the damage. The island had no buildings on it or property of special or peculiar value. It was at times nearly overflowed, and its only value was for the purposes above mentioned, and possibly for slight cultivation. If the defendants by carrying on the business of drawing rafts injured the similar business of the plaintiff, the damages for that injury could be readily compensated, and money would compensate for them.

If the defendants were irresponsible still it would be a most dangerous proposition that preliminary injunctions should be granted to restrain a trespass, because the plaintiff might be unable to collect a judgment if he should recover.

There was not, that I can see, any reason, except the incorrect custom which has recently grown up, and which I have mentioned, why the plaintiff should not have waited until the trial of the cause before asking the court to interfere by injunction. Yet simply on the veri-

fied complaint, and at the very commencement of the action, the plaintiff has obtained all the relief, except as to its permanence, which he could have had on a final judgment. I do not speak of this present case as unusual, or as showing a greater infringement on what should be the rule than many other recent cases.

Evidently the opinion prevails that when a plaintiff shows himself by his complaint and the accompanying proofs, to be entitled to a final judgment for an injunction, he is necessarily entitled to an injunction in limine. This opinion has in part arisen from the unsettled practice of a new system, but it is erroneous and injurious, and it should be condemned.

Without therefore passing in any way on the merits of this action as they may appear on the trial, or on the question whether the plaintiff may not be entitled to a judgment restraining the defendants, I shall dissolve this injunction on the ground that there was no such pressing injury or danger in delay as called for an injunction in limine. The defendants are entitled to $10 costs of motion.

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## COLGATE v. JAMES T. WHITE & CO.

(Circuit Court of the United States, S. D. New York, 1909. 169 Fed. 887.)

In Equity. On application for preliminary injunction.

NOYES, Circuit Judge. While there is much doubt about the questions discussed in the briefs, I am inclined to the opinion that the complainant presents a case calling for the preservation, so far as practicable, of the status quo of the parties pending the litigation. If an injunction is not issued, the complainant may suffer the very injury of which he complains before the cause can be heard. If it is issued, the defendant will suffer no especial harm, and for any possible injury should be protected by a bond.

Upon filing a proper and sufficient bond, therefore, an injunction may be issued restraining the defendants pendente lite from publishing the complainant's portrait, or his biography so far as the same may be based upon information obtained from him, and from enforcing the subscription contract. If the parties cannot agree as to the amount, form, and sufficiency of the bond, the matter may be presented to the court upon affidavit.[4]

[4] In the case of Knight v. Cohen et al. (1907) 5 Cal. App. 296, 90 Pac. 145, Taggart, J., said: "Provisional remedies of all kinds are intended by the law to be used for the maintenance and preservation of the status of the property or person involved in the litigation, so that the judgment of the court when given or made may be effectually carried into execution. A preliminary injunction is no exception to the rule. It was not necessary for the court to decide the merits of the controversy in favor of the plaintiff to support its order granting him a preliminary injunction. Cases are not tried on their merits upon pleading and affidavits. A preliminary injunction is granted before a

hearing on the merits has been had, and its purpose and sole object is to preserve the subject in controversy in its then existing condition, and, without determining any question of right, merely to prevent a further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered until a full and deliberate investigation of the case is afforded to the party. 16 Am. & Eng. Ency. of Law, p. 345."

In Interstate Commerce Commission v. Southern Pac. Co. et al. (C. C., S. D. Cal. 1904) 137 Fed. 606, at page 608, upon the discretionary right of the court to suspend the operation of a decree for an injunction pending an appeal from such decree, the court said: "This brings me to the question whether or not the pending motion presents a case calling for the exercise of said discretion. In order to justify the exercise of the discretion, or, stating the matter concretely, in order to justify the suspension of the decree in this case, it should be made to appear, first, that irremediable loss will result to the defendants, during the pendency of the proposed appeal, from the enforcement of the decree; and, second, that no such loss will result to the complainant from its suspension. The two conditions set forth in the preceding paragraph constitute substantially the familiar equity doctrine of comparative hardships, which under some circumstances is determinative on applications for provisional or temporary injunctions; that is to say, under certain circumstances, without stopping to enumerate what such circumstances are, the court will grant an injunction if the damages resulting to the defendant would be less than those resulting to the complainant from its refusal. This rule, it should be observed, however, is applied by courts of equity in advance of any hearing upon the merits, and is therefore the most favorable rule the defendants in the case at bar could invoke, because here there have been practically two decrees on the merits against them—one the order of the Interstate Commerce Commission, and the other affirmation of said order by this court. It may be conceded that the defendants will sustain by the enforcement of the decree during the pendency of the contemplated appeal damages, for which no adequate compensation can be found. This concession I make without going into the details or elements of damage, but with the qualification that the amount of damage, in the nature of things, is unascertainable. When I have said that defendants will sustain damages—large or considerable damages, it may be—by the enforcement of the decree during the pendency of the appeal, the amount of which, however, is unascertainable, the case has been stated as strongly in favor of defendants as its circumstances will permit. The next question in logical sequence is as to the effect a suspension will have upon the complainant; and by 'complainant' I do not, of course, mean the Interstate Commerce Commission, but the public at large, or, more directly, the shippers of citrus fruits, of whom said complainant, as I held by my written opinion upon the merits, is but the representative in this litigation. In what condition, then, would a stay of this decree leave the shippers of citrus fruits? How would it affect them? The decree restores to these shippers the routing privilege. The stay of the decree would longer withhold it from them. Denial of said privilege to the shippers, as found in my opinion above mentioned, has utterly destroyed competition for this traffic between the Eastern connections of the initial lines; and, to appreciate the advantages of competition, as estimated by the highest judicial tribunal of the land, we have only to read the opinions of the Supreme Court in the Freight Association and Joint Traffic Association Cases (1896) 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and (1898) 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. Mr. Bissell, in his affidavit filed on this motion, says that the shipments of citrus fruits this season will probably be between 25,000 and 30,000 cars. What the benefits of competition may be to the shippers of that vast product cannot be told accurately in dollars and cents, but it would be difficult to overstate them. The strenuous efforts put forth by both parties in this litigation to secure the routing privilege abundantly testify to its great value. Of course, when I speak of the value of competition to the shipper, I do not include rebates as an element of such value. Rebates flagrantly violate the commerce act, and it is hard to find language strong enough to suitably condemn and stigmatize them. But the remedy for rebates is to be found in the severe penal sanctions denounced against them, and not in pooling arrangements between competing railroads, which are themselves violative of said act. As I said in my previ-

## WESTERN NEW YORK & PENNSYLVANIA TRACTION CO. v. STILLMAN.

(Supreme Court of New York, 1910. 68 Misc. Rep. 456, 124 N. Y. Supp. 246.)

BROWN, J. It is the contention of the plaintiff that, under its franchise to maintain and operate a street railway in the city of Olean by the trolley system, it has a vested property right to occupy the streets to maintain its trolley and supporting wires 17 feet above the pavement, which is indestructible, paramount, and superior to the rights of all others; that it cannot be compelled to raise or lower such wires to permit the moving of a building; that the moving of a building 30 feet high, which would collide with such wires, is a trespass; that the raising or the lowering of such wires, or the cutting of the same, so as to permit a building to cross its tracks, would produce such an injury to its trolley wires that it could not be replaced in as good condition as before; that the common council of the city of Olean had no authority to grant a permit to the defendant to move his building along or across the streets, which would necessitate any interference with plain-

ous opinion, already mentioned, one violation of the commerce act cannot be justified on the plea that it tends to or will suppress or has suppressed another infraction of the act. I repeat, it does not appear from this motion, and counsel for defendants have industriously and with ability presented all that can be said on their side of the question—it has not been made to appear that the damage to defendants will be any greater from the enforcement of the decree than would be the damage to the shippers from its suspension, and this view of the case is conclusive against a suspension of the decree."

See Federal Equity Rules (1913) 33 Sup. Ct. xxxix:

*Rule 73.—Preliminary Injunctions and Temporary Restraining Orders*

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

*Rule 74.—Injunction Pending Appeal*

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

tiff's wires. To prevent such trespass and injury the defendant is restrained by the temporary injunction herein.

It is the contention of the defendant that the franchise of the plaintiff secures to it the right to occupy the streets of the city of Olean for the purpose of its business, subject to the right of the public to use the street in a reasonable manner; that such reasonable use includes the right to move buildings across such tracks and along the streets; that for many years the plaintiff has raised or lowered its wires for such purposes, upon being reimbursed the expense incurred; and that such expense is trifling, and no damage has resulted.

In moving defendant's building from its present location to its contemplated site, it will necessarily pass under five span wires on the west side of Union street, which support plaintiff's feed or trolley wire, and at the junction of Union and Henley streets the building will pass under the trolley wire extending into Henley street for one block. It has been established by the many affidavits presented that the handling of these wires by competent electrical linemen, so as to permit the moving of the building along Union street, and into and through Henley street to defendant's premises, will not produce injury to the plaintiff of such a character as to be impossible of repair, nor which cannot be ascertained by careful and competent inspection. The plaintiff has in its employ many such linemen and inspectors, and by taking advantage of the provisions of the ordinance of the city of Olean adopted June 30, 1910, may protect itself from careless or negligent handling of its wires by taking charge of and doing the work; and, as the defendant offers to reimburse the plaintiff for all expense of such handling of such wires and all damage caused the plaintiff, the conclusion is necessarily reached that the plaintiff is not entitled to maintain its temporary injunction upon the ground that defendant's contemplated act of moving his building will cause irreparable injury and damage to plaintiff, for which it has no adequate remedy at law.

The claim that the moving of defendant's building and the consequent interference with plaintiff's wires will be a trespass upon plaintiff's property rights cannot be maintained. The proof is that for many years it has been the usual and customary practice to use the streets of the city of Olean for the purpose of moving buildings. Many buildings have been moved across plaintiff's tracks, plaintiff raising or lowering its trolley and span wires as necessities required, and the injury, damage, expense, or inconvenience occasioned thereby has been trifling. The municipality has granted defendant a license permitting him to use the streets for the purpose of moving his building. Plaintiff's property rights in the street are subject to the rights of the public to use the street for all reasonable purposes, and there would seem to be no good reason why the common-law right to move such a building along or across a highway should not be preserved as a reasonable use of such highway. In Hinman v. Clarke, 121 App. Div. 105, 105 N. Y. Supp. 725, affirmed 193 N. Y. 640, 86 N. E. 1125, it is said that an individual

has "a common-law right, in the absence of general legislative restriction by ordinance or otherwise, to the reasonable use of the public streets and highways for the purpose of moving his buildings." The common council, in the exercise of its right to reasonably regulate the use of the city streets in moving buildings, having granted defendant the privilege of moving his building—the character of the building being such that the moving of it through the streets would be a reasonable use of the streets—the plaintiff's rights in the street must be held to be subservient and subject to defendant's right to move the building.

The temporary injunction will be vacated, upon condition that the defendant pay all expense and damage incurred by plaintiff in raising or lowering its wires and comply with the provisions of the city ordinance adopted June 30, 1910, with $10 motion costs to defendant.

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## ARLINGTON HEIGHTS FRUIT CO. et al. v. SOUTHERN PAC. CO. et al.

**(Circuit Court of the United States, S. D. California, 1909. 175 Fed. 141.)**

MORROW, Circuit Judge.[5] The court is not required at this stage of the proceedings to determine whether the proposed rate of $1.15 per 100 pounds for the transportation of lemons to the New York market is just and reasonable or unjust and unreasonable. Indeed, the final determination of that question rests with the Interstate Commerce Commission, and there is no disposition on the part of the court to intrude upon the jurisdiction of that tribunal.

The present application is for a temporary injunction that will preserve the status quo until a hearing is had upon the merits by the proper authority, the status quo being a charge of $1 per 100 pounds for the transportation of lemons from California to the New York market. What the court is required to do now is to determine from the evidence submitted whether there is a reasonable probability that the complainants will be able to maintain the case set forth in the bill and establish the fact that the proposed increased rate of $1.15 per 100 pounds will be unjust and unreasonable; and whether pending such a hearing upon the merits the complainants will suffer an irreparable injury. In reaching conclusions upon these questions it is the duty of the court to balance the equities between the parties and ascertain which of them will suffer the greater detriment or inconvenience by the action of the court. If the balance of detriment or inconvenience, in the event of the temporary injunction is refused, is against the complainants, then the injunction will be granted. But if, on the other hand, the balance of detriment or inconvenience is against the defendants, in the event the temporary injunction should issue, then it should be refused. In the present case, if the temporary injunction is issued, the defendants will

[5] Part of the opinion is omitted.

be denied the right to collect the increased rate of 15 cents per 100 pounds until the Interstate Commerce Commission has determined whether such increased rate is just and reasonable or unjust and unreasonable, but in the meantime the defendants will be fully secured in a bond to indemnify them for the difference between the proposed rate and the rate which they may collect.

Now, how will it be with the complainants if the temporary injunction is refused? They must pay the increased rate, which it is estimated will amount to about $250,000 in one year. If it is finally determined that this rate is unjust and unreasonable they may recover of the defendants the amount so exacted. But what will be their situation or condition pending this determination? It appears from the evidence that the lemon growers cannot pay the increased rate and market their crops in the Eastern markets at a profit. They must go out of business if required to pay the increased rate. They will be compelled to destroy their lemon trees and put their land to other uses. This is a detriment and inconvenience in addition to, or rather aside from, the difference in rate. If the equities of the parties related only to the difference in rate they would be equally balanced and the temporary injunction would be refused. But there is evidence before the court that the equities are not so balanced. The complainants will suffer an irreparable injury by the increased rate not measured by the difference between that and the present rate, and this fact clearly balances the equities in favor of the complainants. Moreover, there is evidence that for some years prior to November, 1904, the present rate of $1 per 100 pounds was an emergency rate established by the carriers to enable the shippers to meet the special conditions of the season and of the Eastern markets. But in November, 1904, after some negotiations between the parties, the rate was made a permanent rate, or at least the lemon growers so understood it, and thereupon, having faith that such permanent rate would be continued, they have enlarged the area of their orchards and increased their business upon that basis of this factor of expense. This rate has now been continued for five years. The defendants deny that they ever gave the complainants to understand that the rate of $1 per 100 pounds was to be a permanent rate, but I think the evidence furnished by the bill and supported by the affidavits satisfactorily establishes the fact that the complainants, as a result of their negotiations with the defendant, were given to understand that the rate of $1 per 100 pounds would be a permanent rate upon which they could go on and develop this industry, and the fact that it has been continued for five years indicates that the rate was to be permanent, and is prima facie evidence that the rate is not unreasonably low.

Now, what has occurred since November, 1904, to justify the defendants in increasing the freight rate to $1.15 per 100 pounds? There is some evidence that there has been an increase in the cost of labor, but this fact applies with equal force to the business of both parties.

The entire cost of transportation is not, in fact, any greater. The services rendered by the carriers do not appear to be any more expensive as a whole than they were in 1904, if indeed they are as expensive now as they were then. Where, then, is the change of condition? Why the increased rate? It appears to be confined exclusively to the legislation by Congress respecting the tariff.

By the Dingley Tariff Act of July 24, 1897, c. 11, § 1, Schedule G, par. 266, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1651), the duty on imported lemons was 1 cent per pound. This duty was raised by the recent act of August 5, 1909, to 1½ cents per pound. This increase of duty appears to have been made upon representations to Congress that it was necessary to have such a protective duty to enable the complainants to sell their product in competition with the Italian or Sicilian lemons in the Eastern market. It is represented that in Italy or Sicily the cost of labor in producing lemons is only 25 per cent. of what it is in California and that the freight charge from Sicily to New York is only 25 per cent. of the freight charge on lemons from California to New York. As, for example, it costs $1 in labor to produce 100 pounds of lemons in California, while it costs only 25 cents to produce the same quantity of lemons in Sicily. The freight charge on 100 pounds of lemons from California to New York is $1, while the freight charge on the same quantity of lemons from Sicily to New York is 25 cents. It was upon representing such facts to Congress that the duty was increased one-half cent per pound. It was increased because freight and labor are so much higher in this country than in Sicily, because the cost of freight and labor in this country was for each $1 per 100 pounds, and the cost of freight and labor for the foreign producer was for each only 25 cents per 100 pounds. Congress then had in view two facts justifying an increase in the duty on lemons. One was the cost of labor in this country and the other was the fact that the lemon growers in California were required to pay the railroad companies $1 per 100 pounds for the transportation of their lemons to the New York market. * * *

Let a temporary injunction issue as prayed for in the complaint.

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## BEECH CREEK R. CO. v. OLANTA COAL MINING CO.

**(Circuit Court of Appeals of the United States, Third Circuit, 1907. 158 Fed. 36, 85 C. C. A. 148.)**

HOLLAND, District Judge.[6] This is a bill of complaint filed by the Olanta Coal Mining Company to compel the New York Central & Hudson River Railroad Company, lessee of the Beech Creek Railroad Company, to construct a siding at its coal mines to connect with the company's road; the coal company offering "to pay all expenses in

[6] Parts of the opinion are omitted.

connection with putting in the siding." The request, accompanied by this offer of payment, was refused. The prayer for relief is that the railroad company "shall proceed without further delay forthwith to construct such siding and switching connections, and to give and grant to your orator the same facilities for shipping and transporting its product to market as are furnished to other miners and shippers of bituminous coal on its lines." The Circuit Court entered a decree directing the railroad company to place in position and construct a switching or siding connection to connect with the proposed siding of the coal company in plaintiff's bill and shown by plaintiff's draft offered in evidence with the main track of the railroad company, the cost price of switching frogs, labor and expense of putting them in place by defendants to be paid by the plaintiff. From this decree the railroad company took this appeal. * * *

Could the appellee then have proceeded under the Pennsylvania act of May 5, 1832, and its supplements? It is the owner of mining property lying contiguous to the railroad, and no lands intervene over which it would be necessary to lay the proposed siding. * * *

The objection so strenuously urged at the argument, that the point where it is intended to connect the proposed siding "is unsafe and unfit for such connection," can be obviated by the parties selecting a point of connection where these elements of danger do not exist. It appears that the coal company "is willing that the connection shall be made in the mode and at the point the respondents prefer."

As all railroads are charged with the duty and obligation of transporting the freight offered along its line, and as this transportation of freight usually requires the use of sidings, the Supreme Court of Pennsylvania has held, in the case of Pittsburgh & Lake Erie Railroad v. Robinson, 95 Pa. 426, that a railroad company is a common carrier, and that its railroad is a public highway, and in duty bound to permit mill owners, mine owners, and others to construct on their land adjoining said railroad suitable switches for the use of their business, and to connect the same with the tracks of the company, subject to the general rules of the company regulating such connections, and that the railroad company is thereafter bound to receive and deliver to and from said switch or siding cars and freight for the parties so offering them on equal terms with all other individuals or transportation companies. Mr. Justice Gordon, in that case, said: "It being conceded that under the Pennsylvania acts of assembly the owners of mills and manufactories may of right connect their private sidings with the railroad in their vicinity," it follows that in case the railroad refuses to permit such connections when necessary some remedy must be found by which the rights of shippers can be enforced. Common carriers and public service corporations in general owe certain duties to the public. Individuals are entitled to enforce these obligations in so far as they are themselves concerned; and, when the legal remedies are inadequate, equity will grant its relief. Accordingly

mandatory injunctions may be awarded to compel a common carrier to transport freight or to furnish transportation facilities. Pomeroy's Equity Remedies, § 633. In Wells, Fargo & Co. v. Northern Pacific Railroad Co. (C. C.) 23 Fed. 469, a bill was maintained to compel a railroad to furnish facilities to an express company, and, in the case of Butchers' & Drovers' Stockyard Co. v. Louisville & N. R. Co., 67 Fed. 35, 14 C. C. A. 290, the right to compel a railroad company to furnish facilities for loading and unloading live stock was held by Judge Taft to be enforceable by bill in the court of equity; and in Ex parte Lennon, 166 U. S. 556, 17 Sup. Ct. 661, 41 L. Ed. 1110, the Supreme Court held "that affirmative action may be required where the circumstances of the case demand it."

Numerous authorities are collected by Judge Evans of the District Court of Kentucky in Wiemer v. Louisville Water Co. (C. C.) 130 Fed. 251, in support of the proposition that a mandatory injunction is often resorted to in modern practice. They will be found on page 256 of 130 Fed. In this case the court compelled a water company to supply water to one engaged in business after it had arbitrarily refused to do so upon his request.

Our conclusion is that the court below was right in adjudging the complainant to be entitled to such a connection as was claimed, and in awarding a mandatory injunction to compel the allowance of that right; but we think that the court below, in view of the importance of the matter to the public as well as to these parties, should be afforded an opportunity to further exercise its discretion respecting the question as to whether the point of connection proposed is one which, all things and especially the question of safety being considered, ought to be sanctioned.

Accordingly the decree of the Circuit Court is affirmed, but with leave to the defendants below to apply to that court to open the said decree for the purpose of further inquiry and determination touching the safety and convenience of the manner and point of connection proposed.

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## HOLLENBECK v. ST. MARK'S LUTHERAN CHURCH.

**(Supreme Court of New York, Appellate Division, Third Department, 1912. 154 App. Div. 328, 138 N. Y. Supp. 1063.)**

LYON, J.[7] The parties hereto are owners of buildings fronting South Perry street in the city of Johnstown, N. Y., standing so closely together that the eaves are in practically the same verticle plane. The building of the plaintiff consists of a dwelling house erected in 1869, and the building of the defendant of a church edifice erected in 1896, which the plaintiff claims stands partly on his land. At

[7] Part of the opinion is omitted.

times during the winter season snow and ice have collected upon the roofs of both buildings and slid off into the narrow space which separates the bodies of the structures, in sufficient quantities, plaintiff alleges, to make a bank five or six feet high, reaching to the top of the window in the first story of his house, and which, melting, rendered the wall of his house damp, and ran into his cellar. * * *

As to the accumulation of snow and ice in the space between the church and dwelling, it appears that the plaintiff has contributed materially thereto by allowing the snow and ice from the roof of his dwelling to fall into this space, although by far the greater portion of the snow and ice has come from the larger area of the northeasterly portion of the roof of the church. Owing to the fact that the plaintiff contributed to this collection of snow and ice, and to the general nature of the proof as to amount of alleged damages to plaintiff's property, the evidence affords no basis upon which any such damages could be ascertained. The defendant has made no claim of damage on account of snow and ice falling from plaintiff's roof; but as plaintiff claims to suffer damage by reason of snow and ice from the roof of the church, defendant should be enjoined from allowing snow and ice from its roof to be deposited in this space between the structures of the parties hereto, to the damage of the plaintiff. That it is the duty of the owner of a building to restrain, by snow guards or otherwise, the snow and ice which accumulate upon the roof of his building, and not allow the same to pass off to the damage of his neighbor, is well settled. Davis v. Niagara Falls Tower Co., 171 N. Y. 336, 64 N. E. 4, 57 L. R. A. 545, 89 Am. St. Rep. 817; Tremblay v. Harmony Mills, 171 N. Y. 598, 601, 64 N. E. 501.

As the merits of the controversy seem plain, we think it unnecessary to send the case back for a new trial, but that we should modify the fourth finding of fact, herein expressed, and that the order denying the motion for a new trial should be affirmed, but that the judgment should be reversed, and judgment directed in favor of the plaintiff, requiring the defendant to use reasonable care by the construction of snow guards and gutters to prevent the falling of snow, ice, and water within the space between the buildings of the parties hereto to an extent to damage the plaintiff, without costs in the court below or upon this appeal. All concur.

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## JACKSON v. NORMANBY BRICK CO.

**(In Chancery. [1899] 1 Ch. Div. 438.)**

This was an original motion by the plaintiff for an order directing the defendants to pull down and remove kilns, chimneys, and buildings which had been erected by them since the commencement of the action on part of certain land comprised in a lease granted by the plaintiff to the defendants, or for such other order as might be neces-

sary for giving effect to the declaration that had been made in the action.

The action was to restrain the defendants from building on the land contrary to the provisions of the lease. The Court of Appeal, on appeal from Kekewich, J., had made a declaration that the defendants were not at liberty to build without the consent of the plaintiff, and gave the plaintiff liberty to apply for a mandatory injunction after the expiration of three months. The application was made by the present motion.

LINDLEY, M. R. The plaintiff is entitled to an order in the terms of the notice of motion. The registrar has called our attention to the form in which orders of this kind have hitherto been made, namely, restraining the defendant from allowing the buildings to remain on the land; but in future it will be better for the court to say in plain terms what it means, and in direct words to order the buildings to be pulled down and removed. The order will therefore go.

RIGBY and COLLINS, L. JJ., concurred.[8]

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## CHAPMAN et al. v. SCOTT.

(Circuit Court, of the United States, District of Columbia, 1806. 1 Cranch, C. C. 302, Fed. Cas. No. 2,609.)

Injunction to stay a judgment at law.

CRANCH, Chief Judge. The simple and only ground of equity stated in the bill is, that the complainant had a good defence at law, and duly summoned his father as a witness to prove it, ("which will appear from the annexed summons.") But that when the cause came on to

[8] It is somewhat remarkable that the court has now for the first time had the courage to exercise in a direct form a branch of its jurisdiction which, for at least ninety-five years, it has been content to exercise in—as Lord Brougham when Lord Chancellor, said in 1832—"a roundabout mode." The first case in which a doubt seems to have been expressed as to whether the court could make a decree or order in a direct mandatory form requiring the performance of a particular act, seems to be Lane v. Newdigate (1804) 10 Ves. 192, where the plaintiff by his bill prayed that the defendant might be decreed to repair the banks, stop-gates and other works connected with a canal. There Lord Eldon, while admitting the jurisdiction of the Court to enforce the performance of a particular act, expressed a doubt whether it was according to the practice of the court to order in specific terms that act to be done; but added: "I think I can direct it in terms, that will have that effect." His Lordship thereupon pronounced an order in the form given in the report. In Blakemore v. Glamorganshire Canal Navigation (1832) 1 My. & K. 154, 184, which came first before Lord Lyndhurst and subsequently before Lord Brougham, Lord Brougham, adverting to the point raised by Lord Eldon, said: "I take leave to agree with Lord Lyndhurst in the opinion that if the Court has this jurisdiction"—of ordering a specific act to be done—"it would be better to exercise it directly and at once; and I will further take leave to add, that the having recourse to a roundabout mode of obtaining the object, seems to cast a doubt upon the jurisdiction." Lord Brougham, however, in consequence of the difficulty felt by Lord Eldon in Lane v. Newdigate, declined, though, as he said, without denying the jurisdiction, to exercise it in that particular case.—G. L. F. C.

trial, the complainant's father was so much indisposed, that he could not, in time, attend as a witness for the complainant, and judgment was obtained at law against him. The summons was served not by a marshal or other officer, but by the son of the witness. The answer denies the ground of defence at law, but does not say any thing of the absence of the witness at the trial. If, therefore, the equity of the bill is sufficient to warrant an injunction, it cannot be dissolved. The mere fact of the absence of a material witness at the time of trial, is not of itself a sufficient ground for an injunction, because the court of law who tried the cause, was fully competent to give relief, by a continuance or a new trial. The bill does not even aver that an application was made to the court of law for that relief; and if it had, and the court had erroneously refused it, or had improperly exercised its discretion in refusing it, it is not competent for a court of equity to revise and correct the errors of a court of law in a case in which the latter had complete jurisdiction, equitable as well as legal. There being therefore, no ground of equity in the bill, the injunction must be dissolved.

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## CITY OF MANSFIELD v. HUMPHREYS MFG. CO.

(Supreme Court of Ohio, 1910. 82 Ohio St. 216, 92 N. E. 233, 31 L. R. A. [N. S.] 301.)

SUMMERS, C. J.[9] The manufacturing company brought this action to enjoin the city and its board of public service from shutting off from plaintiff's factory the supply of water from the city waterworks. The plaintiff in its petition filed December 3, 1907, avers that it is, and has been, using at its factory water supplied by the city, and that it has no other source or means of supply for a portion of its factory, and that if the city shuts off this supply it will stop a large portion of plaintiff's manufacturing and cause it irreparable injury; that plaintiff has always paid the amount charged against it, and that it is now willing to pay the city for the water consumed; that the city on the books of its waterworks has charged against the plaintiff $610.13 for six months' water rental, and has given plaintiff notice that, unless the same is paid by December 5th, the city will shut off the supply; that the charge is exorbitant; that the plaintiff has not during said time used $200 worth of water; and that it has tendered to the city $200 which it refuses, and that it threatens to and will, unless enjoined, shut off the water.

The city in its answer admits that it has this amount charged on its books against the plaintiff, and that it will, unless enjoined, cut off the supply of water. It then sets out a scale of meter rates established by the city, avers that the water supplied to the plaintiff during the pe-

[9] Parts of the opinion are omitted.

riod in controversy was measured by meters installed in the manufacturing plant of the plaintiff, and that the amount charged was due as determined by the quantity registered by the meters and at the established rates, and that the rates are reasonable. It is also averred that the following rule, adopted by its board of public service, relating to the waterworks, was in force:

"Section 20. If any party shall refuse or neglect to pay the water rent when due, or permits any waste of water not authorized by the rules and regulations of the board of public service, the water shall be turned off and not turned on again until all back rent and damages shall be paid, and the further sum of $1.00 for turning on and off the water."

The reply of plaintiff denies that it consumed the quantity of water stated in the answer, and avers that if the meters registered that quantity then they were out of order and inaccurate, and that if the meters were not inaccurate that they were inaccurately read. The court of common pleas dismissed the petition and the plaintiff appealed to the circuit court. The circuit court, among other things, found that the plaintiff is solvent and fully able to pay the charge, that it had paid all previous charges, and that after the bill in controversy had been presented it had tendered to the city the sum of $200; "that there is a dispute over said bill for water between said plaintiff and said defendants, and that said dispute is not captious and dilatory, but is maintained by plaintiff in good faith; that the defendants have not resorted to an action at law to determine the amount of said bill for water, nor has the amount of said bill ever been adjudged in any civil action;" and that if the water was shut off it would cause irreparable injury, and it enjoined the city from shutting off or interfering with the water supplied to the plaintiff until such time as the amount due is determined by a court, and then provided that, if the amount so found is not then paid, the city may turn off the water under its said rule. Error is prosecuted in this court.

Whether the circuit court enjoined the city from shutting off the water on the ground that its rule respecting that matter is unreasonable, or on the ground that under the circumstances it was inequitable to enforce it, does not appear from its judgment. The implication is that it did not find the rule unreasonable. In that event the court ought not to have sent the city out of court without determining the amount due it from the plaintiff. It should have enjoined the cutting off of the supply of water pending the action only upon the plaintiff giving bond to pay the amount ascertained to be due, and should have ascertained in that action the amount due.

Section 7, Municipal Code, authorizes municipal corporations to provide for a supply of water by the construction of waterworks and to collect money for water supplied. * * * Section 1536—522 authorizes them to assess and collect a water rent, "in such manner as it deems most equitable upon all tenements and premises supplied with water, and where more than one tenant or water taker is sup-

plied with water from one hydrant or off the same pipe, and when the assessments therefor shall not be paid when due, the board shall look directly to the owner of the property for the entire rent, or so much thereof as remains unpaid for water furnished said premises, to be collected in the same manner as other city taxes." * * *

The statutes and decisions in other states cannot throw much light upon our own statute, but they may be helpful in determining the question of the reasonableness of the rule under consideration. * * *

Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432, was a suit to compel the water company to supply the plaintiff with water, and to restrain it from preventing him from securing a suitable supply thereof. In the superior court a decree had been entered restraining the water company from refusing or neglecting to supply the plaintiff with a suitable supply of water so long as he continued to pay the regular water rates and complied with all other reasonable and usual regulations of the company in the future, except those relating to the payment of the water rates remaining unpaid of previous owners or tenants. The decree was affirmed. In that case the plaintiff rented a dwelling house, the owner of which was indebted to the company for water previously supplied, and the court held that, in the absence of legislation, the company could not by its regulation impose a lien upon land, and it was upon that ground that the rule was held unreasonable. Quite a number of cases are referred to and discussed in the opinion, and it is for that reason referred to, and it is followed in Burke v. City of Water Valley, 87 Miss. 732, 40 South. 820, 112 Am. St. Rep. 468.

In People ex rel. v. Manhattan Gas Light Co., 45 Barb. (N. Y.) 136, a mandamus was refused to compel the gas company to furnish gas to a person who was insolvent and against whom the company had a judgment for gas furnished at another place in the city. In McGregor v. Case, 80 Minn. 214, 83 N. W. 140, the plaintiff sued to enjoin the officials charged with the management of the waterworks of the city of Duluth from cutting off the supply of water to a building in that city which they were about to do because of the refusal to pay the sum of $8.77, which the plaintiff claimed was excessive. It is there said:

"It may be admitted that in a controversy over the rate charged for water supply, where there is but one source of obtaining the same in a city, and a cut-off is threatened, an injunction may, upon proper showing, be had to restrain the illegal duress to collect the improper charges."

And the court refused to hold that the trial court had abused its discretion in refusing the temporary injunction, saying:

"In view of the small amount involved, the large interests of the city in operating its water system, the difficulties that might follow if it should transpire that the controversy were ill advised or unfounded, in a suit to recover the small overcharge, we cannot say that there was an abuse of discretion by the learned trial court in denying the temporary writ."

* * * * * * * * * *

In Brass v. Rathbone, 8 App. Div. 78, 40 N. Y. Supp. 466, it is held that:

"Courts of equity will not sustain an action to restrain the collection of a water tax except under circumstances of great necessity and to prevent irreparable damages."

On the other hand, it is held, in some cases, that a city cannot enforce the payment of old, overdue, and disputed bills by shutting off the supply of water. In Wood v. City of Auburn, 87 Me. 287, 292, 32 Atl. 906, 908 (29 L. R. A. 376) it is held:

"The water taker may prevent such action by injunction in equity; nor can the court in such proceeding be required to investigate and determine the merits of the unpaid and disputed installment. The water company must resort to the court, if it would enforce its claim."

In the opinion it is said by Emery, J.:

"The city, as a water company, cannot do as it will with its water. It owes a duty to each consumer. The consumer once taken on to the system, becomes dependent on that system for a prime necessity of business, comfort, health, and even life. He must have the pure water daily and hourly. To suddenly deprive him of this water, in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He must surrender and swallow his choking sense of injustice. Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money; yet the consumer must pay it again and perhaps still again. He cannot resist lest he lose the water. It is said, however, that the consumer can apply to the courts to recover back any sum he is thus compelled to pay, if it was not justly due from him; or, if he can show affirmatively that it is not a just claim against him, he can by judicial process restrain the company or municipality from shutting off the water. To oblige a person to follow such a course would be a violation of the fundamental juristic principle of procedure. That principle is that the claimant, not the defendant, shall resort to judicial process—that he who asserts something to be due him, not he who denies a debt, shall have the burden of judicial action and proof. It is only in the case of dues to the state that this principle is suspended."

* * * * * * * * * *

But now meters have come into use, and when the quantity consumed is to be ascertained by that means, the sum to be paid cannot be determined in advance, and the door to contention is opened. It is like a sale on credit. The water is supplied upon faith that the consumer will pay at the meter rates for the quantity consumed as indicated by the meter, and there is an implied promise by the consumer to pay the sum so determined. This is upon the assumption that the meter is accurate, but the presumption is that it is, and that the charge is correct. The consumer may dispute the charge and refuse to pay it, but if he does he ought not to be permitted to require the city to continue the service. It is just as reasonable that the city should determine the amount due as that the consumer should, perhaps more, as the determination for the city is by officials without personal interest. If the charge is a lien upon the premises of the consumer and the city undertakes to collect in the manner taxes or assessments are collected, the consumer would have to apply to the courts for relief. Of what use are rules and regulations if the city can enforce them only through

the courts? It has been held that the consumer may pay under protest and recover any excess, or that he may sue for damages; but it has been also held that these remedies are inadequate and that he may, therefore, seek equitable relief. If he does he ought to do equity and accompany his prayer for an injunction against the cutting off of his supply with an offer to pay the sum the court may ascertain to be due. If he takes the matter into court, why should it also be necessary for the city to do so? The Code of Civil Procedure has supplanted actions at law and suits in equity with a civil action in which the remedies of both may be applied. The circuit court ought only to have enjoined until the amount due could be ascertained and it should have been ascertained in that action, and the costs assessed against the party at fault.

Van Nest Land & Improvement Co. v. New York & Westchester Water Co., 7 App. Div. 295, 296, 40 N. Y. Supp. 212, was a suit to enjoin the defendant from cutting off the supply of water in violation of a contract between the parties. In the opinion by Ingraham, J., it is said:

"The plaintiff alleges that it has tendered the amount actually due, and the sole question between the parties is as to the amount due under the contract. No doubt is presented as to the responsibility of either of the parties, the plaintiff expressly offering in the complaint to pay the amount that the court should find due to the defendant. It further appears that it will cause the plaintiff great injury if the water supply is cut off. Upon this state of facts the court below enjoined the defendant from cutting off the water during the pending of this action. * * * It is manifestly difficult to determine the question as to how much allowance should be made to the plaintiff under the contract, because of a failure by the defendant to comply with the contract on its part. That can only be done upon a more extended examination than could be had upon a motion of this character where no cross-examination is possible and where the witnesses are not before the court. The plaintiff, however, does not appear to be liable to the defendant for the amount actually due under the contract, and we think that, before the defendant should be enjoined from discontinuing its service, the plaintiff should give a bond conditioned for the payment of any amount found by the court to be due under the contract. The order below is, therefore, modified by providing that the injunction shall be continued upon the plaintiff filing with the clerk of this court a bond with two sureties to be approved upon justification in the penalty of $10,000, conditioned for the payment of any sum found due by the court, on the trial of this action, to the defendant under the contract alleged in the complaint; that in the event of the failure to give such bond within 10 days after service of a copy of this order, the injunction be vacated."

We think a similar modification should be made in this case, and it will be so ordered, and the cause remanded to the circuit court for further proceedings.

Judgment modified.

CREW, SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.[10]

[10] In the case of City of Madison v. Madison Gas & Electric Co. (1906) 129 Wis. 249, 108 N. W. 65, 66–70, 8 L. R. A. (N. S.) 529, 116 Am. St. Rep. 944, 9 Ann. Cas. 819, the action was instituted to enjoin the defendant from exacting from the plaintiff, the city of Madison, and all its customers, for gas and electricity used by them, unreasonable and excessive rates; and to compel it to furnish such customers in the future, gas and electricity, of good

quality and at reasonable rates, without unjust discriminations. The relief sought was in no way to affect the rates at which gas and electricity was to be furnished the city during the period of the existing contract between it and the gas company. Siebecker, J., among other things, said: "It appears that the action is planted in equity, and is one seeking to enjoin the gas company and its officers and agents from demanding or exacting from its customers unreasonable and excessive rates for gas to be furnished to them, to compel it to furnish a good quality and a sufficient quantity of its commodities at reasonable rates, without unjust discrimination, and to establish a uniform schedule of prices for them. * * * Nothing has been done by the state, either directly, or indirectly through the city of Madison as one of its agencies, to prescribe a rate at which the gas company is to furnish gas to the city and its inhabitants. True, the gas company is obligated to furnish the commodity at a reasonable rate, but no power exists in the court to prescribe as a fixed charge for such service in the future what it may find to have been a reasonable rate for the service theretofore furnished. The relief demanded, compelling the gas company to furnish gas to its customers at a reasonable rate in the future, must be secured, either directly or through an appropriate agency, by legislative action, prescribing rates or charges which shall be reasonable for the service. We discover no other object in this action, nor do the facts presented, upon which equitable relief is sought, afford any basis for any other equitable relief to remedy the wrongs complained of. Upon these considerations, it must follow that the court erred in denying defendants' motion for dismissal of the action. The order appealed from is reversed, and the cause remanded, with directions that the court enter an order dismissing the action and granting costs to the defendants."

See Waller v. Village of River Forest (1913) 259 Ill. 223, 102 N. E. 290, where Carter, J., said: "This was a bill in equity filed by appellant in the circuit court of Cook county against the village of River Forest and the Chicago & Northwestern Railway Company to quiet title and to enjoin them from destroying appellant's fence or interfering with his possession of a tract of land 35 feet wide and 400 feet long lying west of Oak avenue and north of the right of way of said railway in said village, and to remove as a cloud a certain plat so far as it affects a certain tract theretofore vacated as a street. A demurrer filed by the village was overruled and thereafter its answer was filed. On a hearing before the court the bill was dismissed for want of equity, and this appeal followed. * * * It is apparent that practically only the north 15 feet of said 35-foot strip, between Oak avenue and Waller avenue as vacated, is in dispute between the village authorities and appellant. * * * Counsel for appellee concedes that if said Blackall did not convey a fee in this strip of land to the village of River Forest the decree below should be reversed. Counsel for appellant contend that this deed only conveyed an easement to the village. * * * Beyond question, the court in the burnt records proceeding construed the deed conveying this strip of land from Blackall to the village of River Forest as only giving an easement for street purposes to said village, and held that the fee-simple title remained in the grantor by the terms of said deed and had been conveyed to the Hibernian Banking Association. * * * The circuit court in that case had full authority to enter that decree. It effectually settled the title between the parties. * * * Where a municipality undertakes to take possession of a street to which it has no right, the proper remedy is injunction. City of Peoria v. Johnston (1870) 56 Ill. 45; McIntyre v. Storey (1875) 80 Ill. 127. Under these authorities the facts in this record authorized a court of equity to grant the relief prayed for. The circuit court erred in dismissing the bill for want of equity. The decree of that court will therefore be reversed, and the cause remanded, with directions to enter a decree in accordance with the prayer of the bill."

## DALTON ADDING MACHINE CO. v. STATE CORPORATION COMMISSION.

(Supreme Court of the United States, 1915. 236 U. S. 699, 35 Sup. Ct. 480, 59 L. Ed. ——.)

Appeal from the District Court of the United States for the Eastern District of Virginia to review a decree refusing to enjoin the threatened enforcement of a state statute requiring foreign corporations doing business in the state to obtain a license, at the instance of a corporation which asserts that its business within the state is wholly interstate.

See same case below, 213 Fed. 889.

The facts are stated in the opinion.

Mr. Justice HOLMES delivered the opinion of the court:

This is an appeal from an order of three judges, denying a preliminary injunction, as prayed in the appellant's bill. The bill alleges that the appellant is a Missouri corporation, having its factory in Missouri, that it obtains orders for its machines in Virginia through drummers, considers and accepts or rejects them in Missouri, and, if it accepts, forwards the machine from its factory. In some cases the possible customer is allowed to try a machine previously forwarded and in the hands of the Virginia agent, and if he is accepted as a purchaser and desires to keep it, is permitted to do so. The appellant contends that its business in Virginia is wholly interstate. A statute of Virginia requires foreign corporations doing business there to obtain a license from the state corporation commission, to pay a fee, etc., and it is alleged that the commission threatens to take proceedings to enforce the statute and the penalties provided for disobeying it against the appellant, contrary to article I., § 8, of the Constitution. The appellant further alleges that it has reason to fear and fears a multiplicity of proceedings and the imposition of many fines, and that it will suffer irreparable loss from even a temporary interference with its affairs, through loss of sales and prestige, help to its competitors, and encouragement of similar proceedings in other states. 213 Fed. 889.

The court below remarked that it was not contended that the statute was unconstitutional, but was alleged only that it was feared that it might be enforced in such a way as to contravene the commerce clause, and suggested that if proceedings should be instituted by the commission there would be a hearing before it, with a right to appeal to the supreme court of appeals, and, upon a proper showing, to take the case to this court, and that there was nothing to indicate that the commission would not give the appellant a fair hearing, or would attempt to enforce the law against it in an oppressive way. On this ground, without expressing an opinion as to the liability of the appellant under the statute, it held that no case for an injunction was made out.

We agree with the district court in its conclusion and in its grounds.

Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of the commission is or is not the action of a court protected from interference on the part of the courts of the United States. Rev. Stat. § 720. Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226, 230, 53 L. Ed. 150, 158, 160, 29 Sup. Ct. 67. The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. First Nat. Bank v. Albright, 208 U. S. 548, 553, 52 L. Ed. 614, 616, 28 Sup. Ct. 349. Especially is this true in the matter of collecting taxes and license fees. Boisé Artesian Hot & Cold Water Co. v. Boisé City, 213 U. S. 276, 53 L. Ed. 796, 29 Sup. Ct. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 690, 47 L. Ed. 651, 656, 23 Sup. Ct. 452.

Decree affirmed.

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## GREEN et al. v. PIPER et al.

(Court of Chancery of New Jersey, 1912. 80 N. J. Eq. 288, 84 Atl. 194.)

EMERY, V. C. The bill and amended bill are filed by complainants as citizens, taxpayers, and residents of Long Branch, an incorporated city, against the city and the lessees of property of the city, called the "Ocean Park." These lessees, or their managers (who have also been made parties), have erected and are operating in the park various amusement structures, such as scenic railways, merry-go-rounds, Ferris wheels, etc., and operate these, or some of them, on Sundays, as well as week days. These Sunday operations, which have been continuous during the seashore season, are alleged to be violations of the vice and immorality act, and punishable as crimes. The lease from the city, under which the tenants claim, does not contain any provisions restricting the use of the leased property in this respect, or providing that the property shall not be used for illegal purposes. The lease is for the term of 20 years from March 1, 1910, for 2 years at an annual rental of $3,000, and for the next 8 years 5 per cent. of the gross receipts of the tenant from all sources, and for the remaining 10 years 10 per cent. thereof.

At the time of the execution of the lease, February 9, 1900, an ordinance of the city, passed May 20, 1907, was in force, the object of the second section of which was, according to the bill, "to prevent, among other things, games and plays on the first day of the week, commonly called Sunday;" but on July 17, 1911, as the bill alleges, this second

section was repealed by the passing of another ordinance, in lieu thereof, by the city council, from which last ordinance the second section, preventing games and plays on Sundays, was eliminated. Neither of these ordinances is set out in the bill; but, for purposes of this demurrer, the ordinances will be treated as having the effect stated in the bill, and as if, under the first ordinance, the present amusements complained of were "games and plays" forbidden by the first ordinance, and as if the prohibition was repealed by the passage of the second ordinance. The charge in reference to the ordinances is that this repeal of the ordinance forbidding games and plays was a violation of duty on the part of the mayor and common council of the city; and that by this act, and also by their failure to prevent the operation of the scenic railway on Sunday, they are aiding and assisting the lessees in open and notorious violation of the Sunday laws. The "mayor and the city council of the city of Long Branch" are made parties defendant by that name only, and the several individuals holding these offices at the time of filing the bill (September 2, 1911) have joined with Long Branch, the incorporated city, in demurring to the bill. The lessees, and the defendants, claiming or operating under them, have not joined in the demurrer.

The relief prayed in this case is a decree that the council of the city has power and authority to stop the operation of the scenic railway on Sunday, that the tenants and their managers have no right to operate on Sunday, and may be enjoined from so operating it, and that the mayor and common council be enjoined from permitting it to be operated, and for a mandatory injunction, compelling the mayor and common council to prevent the operation on Sunday "by all proper means in their control." This bill is not for the protection of any property rights of any of the complainants, but is essentially a bill by a citizen and taxpayer of a municipal corporation (1) to compel by injunction the municipal officers to perform a duty of enforcing public laws, and (2) to enjoin the lessees of the municipality from violating the criminal laws of the state in their occupation of the lands leased by the city. In neither aspect of the case has a court of equity power to grant the relief asked.

Jurisdiction by injunction, mandatory or otherwise, merely to compel public officers to perform their duties in relation to the enforcement of the criminal law has never been exercised. For any such willful violation of merely public duties, the remedies are exclusively in other courts. Courts of equity, on proper occasion, interfere to protect property rights, and for this purpose sometimes interfere when the acts complained of are crimes; but they never exercise a jurisdiction based solely on the right of a suitor or citizen to prevent the commission of a crime, or its continuance. Ocean City Association v. Schurch, 57 N. J. Eq. 269, 271, 41 Atl. 914 (Grey, V. C., 1898); Gilbough v. West Side Amusement Co., 64 N. J. Eq. 27, 36, 53 Atl. 289

(Pitney, V. C., 1902); McMillan v. Kuehnle, 76 N. J. Eq. 256, 263, 73 Atl. 1054, 1057 (Walker, V. C., 1909), approved on this point on appeal Id., 78 N. J. Eq. 251, 252, 78 Atl. 185 (1910).

The exercise of such a jurisdiction by a court of equity, and its determination by decree that a crime had been committed, would hold defendants to answer for a crime otherwise than by the presentment or indictment by a grand jury, and violate the constitutional provision of article 1, par. 9. The bill alleges that several convictions under the criminal law for the operation of the scenic railway on Sunday have been obtained before a justice of the peace; that nominal fines of one dollar were imposed; and that these convictions have had and will have no effect in preventing the violation of the law in the future; and, further, that the grand jury of the county have failed to indict the defendants operating the railway upon complaint, duly made and proved before them, and in disregard of the charge of the Justice of the Supreme Court in relation thereto. A court of equity assuming jurisdiction on these grounds would become a criminal court, reviewing the proceedings of grand juries, and manifestly act in violation of the constitutional provision.

On the second claim to an injunction prohibiting the lessees of the municipality from illegal criminal use of the public park by violation of the Sunday law, it is plain that any power of this court to exercise jurisdiction must be based on two propositions: First, that the city, in its capacity as the lessor and property owner, has the right to enjoin its lessees from the illegal use complained of; and second, that on the failure of the city, as such lessor and property owner, to protect its property rights, a citizen and taxpayer has the right to sue for the injunction on behalf of the city, making the city a party defendant.

The complainants' case must fall, in my judgment, because the city, as lessor, has not, under the lease, the right to the injunction claimed. In the absence of any provision in the lease itself, by which the mere unlawful use of the premises leased becomes a ground for forfeiture or injunction, or in the absence of a statute providing for the effect upon the lease of the unlawful use of the premises, there is no ground for interference on behalf of the landlord by reason merely of such illegal use. I have not been referred to any authority for the exercise of any jurisdiction of this character. The cases in which relief of any kind is given to the lessor by reason of the illegal use of the premises are those where the protection is based, either on the express restrictive covenants of the lease, or upon statutes authorizing forfeitures of the lease for such uses.

No provisions relating to the illegal use of the property were incorporated in this lease. The provisions of the ordinance then existing, relating to Sunday games and plays, did not, in the absence of any reference thereto in the lease, become a portion of the lease itself; and, even on the assumption that by its mere existence it did become

part of the lease, its subsequent repeal by the city itself relieved the lessees from its operation, and by the act of the lessor itself. The fact that the individuals exercising at the time the legislative power and discretion of the city violated their individual duties to the public by this repeal, and by such violation changed any property rights of the lessor arising by reason of the existence of the ordinance at the time of the lease, does not have the effect of preventing the legal operation of the repeal upon the lease, or authorize this court to decree relief, based on the continued existence, either in law or equity, of the section repealed and abandoned by the lessor.

Complainant further claims that, by reason of the sharing by the city in all the receipts, it becomes a sharer in the profits of the illegal Sunday business; that this revenue could not be collected, and therefore the lease is imperiled. But, unless the lease expressly provided for carrying on such illegal business, the lessor is certainly entitled to an account for the receipts from all the legal business; and, inasmuch as the object of complainant's bill is to restrict the business to legal business, there is plainly no basis for injunction on this claim.

Disposing of complainant's case as presented and argued on its substantial claim, the demurrer of the city must be sustained, as also the demurrer of the individual officers holding the offices. I do not consider at all the formal objection as to making the mayor and common council defendants by those names alone; there being no such incorporation. The bill also presented another question, viz., one relating to the legal validity of the lease itself, based on allegations that under the charter and laws the right to make the lease was vested, not in the mayor and common council, who made the lease by ordinance, but in another body, called "the Beach and Park Commission of Long Branch." This commission (not alleged, however, to be a corporate body) is made defendant by this name, and the individuals comprising the body have joined in the demurrer. This claim, if there is any basis on which it can be considered at all in any court, is manifestly a legal claim only, involving purely questions of law, which complainants have no standing to have adjudicated in a court of equity. If the municipality has any legal claim or demand arising out of the invalidity of the lease, complainants may apply to the courts at law for authority to institute an action thereon. Practice Act, § 44 (3 Comp. Stat. 1910, p. 4064).

I will advise an order sustaining the demurrer.

## GOMPERS et al. v. BUCKS STOVE & RANGE CO.

(Supreme Court of the United States, 1911. 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874.)

On Writ of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, punishing by imprisonment an alleged contempt of an injunction against the continuance of a boycott.

MR. JUSTICE LAMAR[11] delivered the opinion of the court:

The defendants, Samuel Gompers, John Mitchell, and Frank Morrison, were found guilty of contempt of court in making certain publications prohibited by an injunction from the supreme court of the District of Columbia. They were sentenced to imprisonment for twelve, nine, and six months respectively, and this proceeding is prosecuted to reverse that judgment.

The order alleged to have been violated was granted in the equity suit of the "Buck's Stove & Range Company v. The American Federation of Labor and Others," in which the court issued an injunction restraining all the defendants from boycotting the complainant, or from publishing or otherwise making any statement that the Buck's Stove & Range Company was, or had been, on the "Unfair" or "We Don't Patronize" lists. Some months later the complainant filed a petition in the cause, alleging that the three defendants above named, parties to the original cause, in contempt of court and in violation of its order, had disobeyed the injunction by publishing statements which either directly or indirectly called attention to the fact that the Buck's Stove & Range Company was on the "Unfair" list, and that they had thereby continued the boycott which had been enjoined.

The defendants filed separate answers under oath, and each denied: (1) That they had been in contempt or disregard of the court's orders. (2) That the statements complained of constituted any violation of the order; and, on the argument, (3) contended that if the publication should be construed to amount to a violation of the injunction, they could not be punished therefor, because the court must not only possess jurisdiction of the parties and the subject-matter, but must have authority to render the particular judgment. Insisting, therefore, that the court could not abridge the liberty of speech or freedom of the press, the defendants claim that the injunction as a whole was a nullity, and that no contempt proceeding could be maintained for any disobedience of any of its provisions, general or special.

If this last proposition were sound, it would be unnecessary to go further into an examination of the case, or to determine whether the defendants had in fact disobeyed the prohibitions contained in the in-

[11] The statement of facts and parts of the opinion are omitted.

junction. Ex parte Rowland, 104 U. S. 612, 26 L. Ed. 864. But we will not enter upon a discussion of the constitutional question raised, for the general provisions of the injunction did not, in terms, restrain any form of publication. The defendant's attack on this part of the injunction raises no question as to an abridgment of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage.

Courts differ as to what constitutes a boycott that may be enjoined. * * *

But whatever the requirement of the particular jurisdiction, as to the conditions on which the injunction against a boycott may issue, when these facts exist, the strong current of authority is that the publication and use of letters, circulars, and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction. * * *

While the bill in this case alleged that complainant's interstate business was restrained, no relief was asked under the provisions of the Sherman anti-trust act. But if the contention be sound that no court, under any circumstances, can enjoin a boycott if spoken words or printed matter were used as one of the instrumentalities by which it was made effective, then it could not do so, even if interstate commerce was restrained by means of a blacklist, boycott, or printed devise to accomplish its purpose. And this, too, notwithstanding § 4 (26 Stat. at L. 209, c. 647, U. S. Comp. Stat. 1901, p. 3201) of that act provides that where such commerce is unlawfully restrained, it shall be the duty of the Attorney General to institute proceedings in equity to prevent and enjoin violations of the statute. * * *

The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the restraint of trade under the Sherman anti-trust act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined, would be to render the law impotent.

Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.

But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of

equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one. * * *

Contempts are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." Bessette v. W. B. Conkey Co., 194 U. S. 329, 48 L. Ed. 1002, 24 Sup. Ct. 665. But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless there were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in Re Nevitt, 54 C. C. A. 622, 117 Fed. 451, "he carries the keys of his prison in his own pocket." He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promis-

ing not to repeat the offense. Such imprisonment operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience. * * *

The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act), and doing an act forbidden (punished by imprisonment for a definite term), is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.

In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required, but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience. Rapalje, Contempts, §§ 131–134; Wells, F. & Co. v. Oregon R. & Nav. Co. (C. C.) 9 Sawy. 601, 19 Fed. 20; Re North Bloomfield Gravel Min. Co. (C. C.) 11 Sawy. 590, 27 Fed. 795; Sabin v. Fogarty (C. C.) 70 Fed. 483.

But when the court found that the defendants had done what the injunction prohibited, and thereupon sentenced them to jail for fixed terms of six, nine, and twelve months, no relief whatever was granted to the complainant, and the Buck's Stove & Range Company took nothing by that decree.

If, then, as the court of appeals correctly held, the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt. The question as to the character of such proceedings has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or on appeal. Bessette v. W. B. Conkey Co., 194 U. S. 324, 48 L. Ed. 997, 24 Sup. Ct. 665. But it may involve much more than mere matters of practice. For, notwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself. Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. 524; United States v. Jose (C. C.) 63 Fed. 951; State v. Davis, 50 W. Va. 100, 40 S. E. 331; King v. Ohio & M. R. Co., 7 Biss. 529, Fed. Cas. No. 7,800; Sabin v. Fogarty (C. C.) 70 Fed. 482; Drakeford v. Adams, 98 Ga. 724, 25 S. E. 833.

There is another important difference. Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause. The court of appeals, recognizing this difference, held that this was not a part of the equity cause

of the Buck's Stove & Range Company v. American Federation of Labor, and said that:

"The order finding the defendants guilty of contempt was not an interlocutory order in the injunction proceeding. It was in a separate action, one personal to the defendants, with the defendants on one side and the court vindicating its authority on the other." 33 App. D. C. 567.

In this view we cannot concur. We find nothing in the record indicating that this was a proceeding with the court, or more properly the government, on one side and the defendants on the other. On the contrary, the contempt proceedings were instituted, entitled, tried, and, up to the moment of sentence, treated as a part of the original cause in equity. The Buck's Stove & Range Company was not only the nominal, but the actual, party on the one side, with the defendants on the other. The Buck's Stove Company acted throughout as complainant in charge of the litigation. * * * But, as the act of disobedience consisted not in refusing to do what had been ordered, but in doing what had been prohibited by the injunction, there could be no coercive imprisonment, and therefore the only relief, if any, which "the nature of petitioner's case" admitted, was the imposition of a fine, payable to the Buck's Stove & Range Company.

There was therefore a departure—a variance—between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial relief, in the equity cause, the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in an action of "A v. B, for assault and battery," the judgment entered had been that the defendant be confined in prison for twelve months. * * *

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

This power "has been uniformly held to be necessary to the protection of the court from insults and oppression while in the ordinary exercise of its duty, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of citizens." Bessette v. W. B. Conkey Co., 194 U. S. 333, 48 L. Ed. 1004, 24 Sup. Ct. 665. * * *

But, as we have shown, this was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine, payable to the complainant. The company prayed "for such relief as the nature of its case may require," and when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require, and was not entitled to, any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part. Bessette

v. W. B. Conkey Co., 194 U. S. 328, 333, 48 L. Ed. 1002, 1004, 24 Sup. Ct. 665; Worden v. Searls, 121 U. S. 27, 30 L. Ed. 858, 7 Sup. Ct. 814; State v. Nathans, 49 S. C. 207, 27 S. E. 52. The criminal sentences imposed in the civil case, therefore, should be set aside.

The judgment of the Court of Appeals is reversed, and the case remanded, with directions to reverse the judgment of the Supreme Court of the District of Columbia, and remand the case to that court with direction that the contempt proceedings instituted by the Buck's Stove & Range Company be dismissed, but without prejudice to the power and right of the Supreme Court of the District of Columbia to punish by a proper proceeding, contempt, if any, committed against it.

Reversed.*

*See effect of statute on contempt proceedings, in opinion of Stephenson, V. C., in Smith v. Smith et al. (N. J. Ch. 1915) 93 Atl. 893: "It will throw light on the matters under discussion to consider briefly the methods open in New Jersey since the adoption of the Constitution of 1844 for the enforcement of a decree in favor of a vendor of lands or chattels for the specific performance of the contract of sale. Anciently such decree was generally enforced by proceedings in contempt resulting in the incarceration of the contumacious vendee until he obeyed the mandate of the court by paying the price upon tender to him of a proper conveyance. This remedy appears to be at the present day seldom available to the complainant vendor under the constitutional provision abolishing imprisonment 'for debt in any action or on any judgment founded upon contract, unless in cases of fraud.' Aspinwall v. Aspinwall, 53 N. J. Eq. 684, 33 Atl. 470; Walton v. Walton, 54 N. J. Eq. 607, 35 Atl. 289; Grand Lodge, Knights of Pythias, v. Jansen, 62 N. J. Eq. 737, 48 Atl. 526; Adams v. Adams, 80 N. J. Eq. 175, 83 Atl. 190, Ann. Cas. 1913E, 1083. This question in a vendor's suit for specific performance came up before me directly about two years ago in the case of Max Abrash v. Louis J. Kurlantzick, (no opinion filed). In that case the defendant, the vendee, disobeyed the decree by failing to attend at the master's office at the designated time for the delivery of the deed and the payment of the money. My ruling was that contempt proceedings could not be sustained unless a 'case of fraud' could be exhibited which might consist of fraud on the part of the vendee defendant in disposing of his property in order to delay, hinder, or defraud the vendor. Subsequently, upon a petition exhibiting a fraudulent disposition of property by the vendee in anticipation of the adverse decree, I advised an order in contempt proceedings under which the vendee was lodged in jail resulting in a prompt settlement. The proceedings now available to a successful complainant in a vendor's suit for specific performance by which his decree can be enforced are expressly provided by section 46 of the chancery act (1 Comp. Stat. 427), which embraces substantially the provisions of section 48 of Mr. Paterson's chancery act of 1799 (Pat. p. 433), viz., process of sequestration against the real and personal estate of the defendant, the writ of fieri facias against goods and lands, and a capias ad satisfaciendum against the body of the defendant if the case be infected with fraud. I do not pause to consider whether any case can arise in which the vendor's decree can be completely enforced by an injunction, which is one of the methods of enforcing decrees enumerated in Mr. Paterson's law. If applicable to the facts and conditions an injunction of course can be employed. Under the original English practice if the vendee disobeyed the mandate of the decree against him for specific performance, the decree might be enforced by contempt proceedings, or the contract might be declared rescinded, or the complainant if unwilling to rescind 'might obtain a declaration that he has a lien on the property for unpaid purchase money and costs, and an order for the sale of the property for the purpose of paying them.' 2 Dan. Ch. Pr. star page 1220 and note 9 with cases cited. The method of enforcement by contempt proceedings, as we have seen, is of very limited application in New Jersey under our Constitution, and the rescission of the contract certainly cannot often be advantageous to the ven-

dor, the injured party. The establishment of a lien upon the property sold for the amount of the price and the sale of the property for the satisfaction of such lien all in one suit, it seems to me, in very many cases would accomplish exact justice by liquidating the damages of the vendor if the proceeds of the sale did not yield him the purchase price with interest and costs of suit, and by giving the vendee any surplus as the value of his interest under the contract as equitable owner. There seems to be no reason why the Court of Chancery of New Jersey should not adopt, if it has not already adopted, this last-mentioned method of procedure in any appropriate case. The inference, I think, may be drawn that Vice Chancellor Pitney had substantially this method of procedure in contemplation when he invited the motion to stay the execution which would be issued under his decree until the value of the subject-matter of the sale, the New York mortgage, had been realized by proceedings in the state of New York. I can discover no trace of any practice in England or this country which warrants the enforcement of the vendor's right to specific performance by a decree of a court of equity, an absolute decree for the price, with execution in the usual general form, while the vendor is allowed to remain the owner of the property which he agreed to sell and is clothed with power to dispose of the same as he may see fit. The slightest reflection will show how far from the whole theory of specific performance such a procedure must necessarily go. The theory of the vendor's suit for specific performance is that the court will compel the carrying out of the contract on both sides, usually under the direction of a master. It is only on tender of a conveyance of the property at the time designated that the vendee is obliged to pay over the price."

INJUNCTION DISTINGUISHED FROM WRIT OF PROHIBITION.—In City of Lee's Summit et al. v. Jewel Tea Co. (1914) 217 Fed. 965, 133 C. C. A. 637, Hook, Circuit Judge, said (in part): "This is an appeal from a decree on final hearing enjoining the city of Lee's Summit, Mo., and its mayor and city marshal, from enforcing against the Jewel Tea Company, a municipal ordinance imposing a license charge of $1 per day upon vendors of teas, coffees, etc., 'selling at retail from wagon or other vehicle,' and a like sum where the articles are sold 'by solicitor taking orders for future delivery.' The trial court held that the business of the company was in interstate commerce and therefore not subject to the ordinance. (D. C. 1911) 189 Fed. 280; (D. C. 1912) 198 Fed. 532. The Jewel Tea Company is an Illinois merchandising corporation, with headquarters at Chicago, in that state. It employed an agent residing in Missouri. The agent canvassed from house to house in Lee's Summit for orders for future delivery of teas and coffees. * * * These facts were undisputed, and they show that the company was engaged in interstate commerce. * * * It is further urged that the controversy should have been left to the state courts, where prosecutions had been begun and were pending. But those prosecutions were excepted from the decree of injunction. The evidence showed that the city authorities had arrested the agent of the company several times, and threatened to arrest him every time he went there and transacted business. The decree of the trial court was right. It looked to the future, not to pending prosecutions in the local courts, and was to protect the right to engage in interstate commerce. The decree is affirmed."

In State ex rel. Terminal R. Ass'n of St. Louis v. Tracy, Judge, et al. (1911) 237 Mo. 109, at 116, 140 S. W. 888, at 890, 37 L. R. A. (N. S.) 448, the court compared an injunction against proceedings at law with a writ of prohibition, saying: "The remedy by writ of prohibition is of ancient origin in our system of jurisprudence. The principles of law governing its issuance and the facts necessary to warrant relief by that extraordinary writ have frequently been the subject of adjudication in this and other courts of last resort, as well as the theme of much learning by the text-writers. It has been likened to the equitable remedy by injunction against proceedings at law. The object in each case is the restraining of legal proceedings; but, as has been said: 'This vital difference, however, is to be observed between them: An injunction against proceedings at law is directed only to the parties litigant, without in any manner interfering with the court, while a prohibition is directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim.' High's Extraordinary Legal Remedies (3d Ed.) § 763. There is this further similarity between the two remedies thus compared, which is of

## NEWBERY v. JAMES et al.

(In Chancery before Lord Eldon, 1817. 2 Mer. 446, 35 E. R. 1011.)

The Bill stated that Dr. Robert James deceased, "being the inventor and proprietor of certain pills for the gout, rheumatism, &c. and of a certain powder for the cure of fevers, &c., and being desirous to extend the circulation and use of the said medicines, and thereby to increase the profits to arise therefrom," applied to Newbery (the Plaintiff's late father) to assist him in such design, which Newbery agreed to do upon the terms after-mentioned; and that thereupon certain articles of agreement were made and entered into between them, whereby James, for himself, his heirs, &c. covenanted with Newbery, his executors, &c. that he, James, his executors, &c. should, during the term of twenty-one years, prepare and make the aforesaid pills, and sell and deliver the same to Newbery at a certain rate therein mentioned, and should also prepare and make the aforesaid powder, and sell and deliver the same to Newbery at the rate therein mentioned, when and as often as he should have occasion to require the same respectively, to supply his customers; and should not sell or cause to be sold any of the said medicines, during the term, to any other person or persons, (except in the course of his own private practice, and then not in the same form, or under the same title, nor at a lower rate than Newbery should sell the same to his customers); and, in order to protect the secret of preparing all or any of the said medicines from being lost, he thereby further covenanted to instruct Newbery in the true art and method of making and preparing the same, and to be at an equal expense with Newbery in obtaining a patent; Newbery on his part covenanting during the term to take the medicines from James as he should have occasion, and not to make or prepare, or cause or procure to be made or prepared, by any other person or persons, nor to discover or make known to any person or persons the secret, art, or mystery of making or preparing, any of the said medicines, so long as James should continue to supply him; but to be at liberty to leave an account in writing, sealed up, how to prepare the same, to be opened by his representatives after his death, in order to instruct them therein.

importance in the consideration of the case in hand, namely, that, as the right to the remedy by injunction implies a wrong threatened by the parties litigant against whom the relief is sought, so the right to the writ of prohibition implies that a wrong is about to be committed, not by the parties litigant as in the case of injunction, but by the person or court assuming the exercise of judicial power and against whom the writ is asked. Indeed, it may be said generally of all procedure in courts of justice for the enforcement of civil rights that the existence of a remedy on the one hand implies actionable wrong on the other. It follows that, to entitle a relator to a writ of prohibition, it should be made to appear that it is within the power, and that it is the duty, of the person or court proceeded against, to refrain from taking the threatened judicial action which is made the basis of the complaint. The judicial wrong or fault which calls for the writ of prohibition does not mean an infraction of personal rights only, but rather an offending of the court by an assumption of judicial power and jurisdiction not authorized by law."

By Indenture dated the 13th November 1747, between James and Newbery, reciting the articles of agreement, and letters patent of the same date, granted to James for the exercise of his invention during the term of fourteen years, and that Newbery and James had contributed in equal shares to the expense of procuring the same, it was witnessed that James, for the considerations therein mentioned, assigned to Newbery, his executors, &c. one moiety of the invention during the term of fourteen years mentioned in the patent; it being covenanted on the part of Newbery that nothing in the deed should be construed so as to alter or change the articles of agreement, and that neither party should assign his respective interest in the patent without first offering the same to the other.

By Deed poll dated the 5th of May 1755, the term of twenty-one years mentioned in the agreement, was extended to an indefinite period, the agreement being expressed to be continued so long as either of the parties, their executors, &c. or any or either of them, should desire.

Newbery, by his will, dated the 24th of October 1767, bequeathed to the Plaintiff all his share and interest in the preparing and vending the various medicines therein mentioned, and among others, of the pills and powders above mentioned. The bill then stated a similar agreement between James and the Plaintiff, respecting an invention of James, of certain pills called "Analeptic Pills," but for which no patent had been obtained.

James died in the year 1776, having first made his will, and thereby appointed the Plaintiff and another executors, to whom he gave and bequeathed all the powders and pills then in his possession, or which should thereafter be made by his son Robert Harcourt James, as therein mentioned, upon the trusts therein mentioned, and subject thereto to permit the said R. H. James to receive to his own absolute use and benefit the residue of the profits arising from the sale thereof.

Robert Harcourt James continued to make and prepare the several medicines, and to deal with the Plaintiff upon the footing of the agreement during his life; and died in 1801, having by his will given to his executors therein named, the sole use and management of the concern, until his son, the Defendant Robert George Gordon James, should attain twenty-four, upon the trusts therein mentioned; and, upon his attaining twenty-four, then he gave to the said R. G. G. James the right to the sale of the said medicines, and all profits arising therefrom, and directed George James (one of his executors, to whom he had entrusted the secret of preparing the medicines), thereupon to deliver the same to him.

The Bill, (to which the executors, and the said R. G. G. James, and other parties interested in the will of R. H. James, were made parties), charging that the Defendants or some of them, had refused to supply the Plaintiff as usual, according to the terms of the agreement, and that they threatened to communicate the secret of preparing the medicines, insisted on the indefinite continuance of the agreement so long as either

party should desire, and prayed a specific performance, and an injunction to restrain the Defendants from disclosing or imparting the secret of making and preparing the medicines, other than and except to such persons, and in such manner, as in the said several deeds and wills described; and also from selling or vending all or any of the said fever powders, pills, or medicines, to any persons, for sale or otherwise, other than and except to the Plaintiff, or with his consent or approbation.

Upon the filing of the bill, an application was made for an injunction only as to the sale of the medicines, which was granted, expressly without prejudice to any question that might be made as to the possibility of sustaining such an injunction.

The Defendants, by their answer, insisted on various acts of the Plaintiff as evidence of an abandonment or waiver, on his part, of the agreement, in consequence of which they contended that the Defendants were not to be considered as bound by the terms thereof, nor obliged to employ the Plaintiff to vend the said medicines.

A motion was now made, on the part of the Defendants, to dissolve the injunction.

The LORD CHANCELLOR said, the difficulty in such a case was, how to decree the specific performance of the agreement. Either it was a secret, or it was none. If a secret, what means did the Court possess of interfering so as to enforce its own orders?—if none, there was no ground for interfering. The Injunction being already granted ex parte, afforded no reason for its continuance, even though the answer had not materially varied the case made by the bill; it being granted without prejudice to any question that might be made in the cause. In this case, the medicines in question were the subject of a patent which had expired; and the agreement which the bill sought to enforce was an agreement, by which, independently of the patent, the proprietors had entered into covenants not to sell that which was the subject of the patent, except to each other. But, in order to support a patent, the specification should be so clear, as to enable all the world to use the invention as soon as the term for which it has been granted is at an end. Then, with regard to the Analeptic pills, for which no patent had been procured, if the art and method of preparing them were a secret, what signified an injunction, the Court possessing no means of determining on any occasion whether it had or had not been violated? This Court could do nothing but put the parties in a way to try their legal rights by an action. That was the utmost extent to which it would go, and he would not even order the Injunction to be continued in the meantime till an action should be tried. The only way by which a specific performance could be effected, would be by a perpetual injunction; but this would be of no avail, unless a disclosure were made to enable the Court to ascertain whether it was or was not infringed; for, if a party comes here to complain of a breach of injunction, it is incumbent on him first to shew that the injunction has been violated.

His Lordship concluded by saying, that he thought he ought not to continue the injunction; and that, if he did not mention the case again, his opinion must be considered to be that the injunction must be dissolved,—the Defendants to keep an account of what they sell,—and the Court to give the parties the means of trying their rights in an action, by removing out of their way the difficulty arising from the circumstance of the Plaintiff being one of Dr. James's executors.

## SECTION 2.—WASTE

### MOLLINEUX v. POWELL.

**(In Chancery, 1730. 3 P. Wms. 268, note F.)**

A. tenant for years, remainder to B. for life, remainder to C. in fee; A. is doing waste; B. though he cannot bring waste, as not having the inheritance, yet he is entitled to an injunction. See 1 Roll. Abr. Roswell's case, 377. But if the waste be of a trivial nature, and a fortiori, if it be meliorating waste, as by building on the premises, (see 1 Inst. 53.) the Court will not injoin; nor if the reversioner or remainder man in fee be not made a party, who possibly may approve of the waste. By the LORD KING.

### ANONYMOUS.

**(In Chancery before Lord Thurlow, Feb. 11, 1790. 1 Ves. 93, 30 E. R. 246.)**

Solicitor-General moved for an order to prevent the removal of timber wrongfully cut down.

LORD CHANCELLOR. I have no doubt about the interference of this Court to prevent waste; the only difficulty I have, is, as to what shall be done with the timber cut. Trover might be brought for it; but as the Register says, many orders of this kind have been made; take the order.

### COURTHOPE v. MAPPLESDEN.

**(In Chancery before Lord Eldon, 1804. 10 Ves. 290, 32 E. R. 856.)**

A motion was made by a landlord for an injunction to restrain cutting and removing timber, and committing any other waste; the Plaintiff charging collusion by the Defendant with the tenant.

THE LORD CHANCELLOR. I have no difficulty in granting the injunction in this case: but I will not be bound as to what is to be done

upon a mere trespass; though it is strange, that there cannot be an injunction in that case to prevent irreparable mischief; the rather, as there is a writ at Common Law, to prevent the further commission of waste during the trial; whereas, if the Court will not interfere against a trespasser, he may go on by repeated acts of damage, perfectly irreparable. But the ground in this case is, that the trespass partakes of the nature of waste more than in general cases; the tenant colluding; and if the Tenant's Act is waste, the act of the other must have so much of the quality of the Tenant's Act as to make it the object of an injunction.

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## LORD GREY DE WILTON v. SAXON.

**(In Chancery before Lord Eldon, 1801. 6 Ves. 106, 31 E. R. 961.)**

The Solicitor General, supported by Mr. Romilly, moved upon affidavits for an injunction to restrain the defendant, a tenant to the plaintiff, from breaking up meadow for the purpose of building, contrary to the covenants of his lease.

The lease contained covenants not to convert any meadow land, and all the other usual covenants in a lease of a farm, similar to those in Pulteney v. Shelton, 5 Ves. 147, 260, 261, showing clearly the nature of the lease, for the purpose of tillage, as a farm.

LORD CHANCELLOR granted the injunction till appearance and farther order; observing that he did so upon the ground of the covenant not to convert any meadow; otherwise he should doubt, whether it would do upon the ground of waste without an affidavit, that it was ancient meadow.

Mr. Romilly said, that question was much discussed in Brydges v. Kilburne (5 Ves. 689), a case upon the conversion of a mill of one species to a mill of another species.

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## DOUGLASS et al. v. WIGGIN et al.

**(Court of Chancery of New York, 1815. 1 Johns. Ch. 435.)**

This was a bill for an injunction to stay waste. It stated, that the defendants had taken a lease of a dwelling-house in Pearl street, in the city of New York, for four years, from the 1st of May, 1815; that the lease provided, that the defendants were to lay out 300 dollars in improvements, to be approved of by the lessors; that, against the consent of the lessors, the defendants were converting the whole dwelling-house into a store, and were prostrating partitions, and cutting through the ceilings and floors in the second and third stories, and fixing a wheel and tackle in the third story to raise heavy pack-

ages which would be to the great and constant injury of the building, as the timbers in the third story were weak.

THE CHANCELLOR [JAMES KENT]. Let the injunction issue. Motion granted.

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## VANE v. LORD BARNARD.

(In Chancery before Earl Cowper, Chancellor, 1716. 2 Vern. 738, 23 E. R. 1082.)

The defendant on the marriage of the plaintiff his eldest son with the daughter of Morgan Randyll, and £10,000 portion, settled (inter alia) Raby Castle on himself for life, without impeachment of waste (subject to the two several yearly sums of £800 and £200 payable to the plaintiff on the events, and in manner therein mentioned R. L.), remainder to his son for life, and to his first and other sons in tail male.

The defendant, the Lord Barnard, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass-doors and boards, &c., to the value of £3,000.

THE COURT upon filing the bill (and plea and answer put in by Lord Barnard), granted an injunction to stay committing of waste, in pulling down the castle; and now, upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put into the same condition it was in, in August, 1714; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a master to see it done at the expense and charge of the defendant, the Lord Barnard; and decreed the plaintiff his costs.

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## JONES v. CHAPPELL.

(Chancery Division, 1875. L. R. 20 Eq. Cas. 539.)

The plaintiff was the lessee of two houses in Effingham Street under two leases, dated respectively the 19th of May and the 8th of June, 1863, granted by the trustee of the will of Thomas Cubitt. The rooms in these houses were let out to weekly tenants.

These houses at their back adjoined a piece of vacant land from which they were divided by a low wall, and the windows at the back had, at the time of the demise and also shortly before the filing of the bill, free access of light and air. The adjacent piece of land had, by a lease dated the 16th of December, 1852, and granted by the said Thomas Cubitt, been demised to James Smith for the term of eighty-five years and three quarters. The lease contained a covenant by the lessee to keep all future buildings and erections in repair, and also not to erect any steam-engine on the premises, or commit or do anything which might be a nuisance or annoyance to the tenant or

occupier of any messuage or premises near to the premises thereby demised.

The bill alleged that the defendant, who was assignee of the lease of the last-mentioned premises by an assignment subsequent to the plaintiff's lease, had lately erected steam-engines and stone saw-mills, and other machinery thereon, and that the noise, steam, and smoke arising from the working of the machinery were a nuisance, and caused great damage to the plaintiff and his under-tenants, and that the nuisance arising from the works had been so great that several of the plaintiff's tenants had left his houses, and the value thereof had been seriously depreciated.

The bill also alleged that the defendant had erected a staging to carry a travelling crane close to the plaintiff's windows, which obstructed the light that formerly came through the back windows of the plaintiff's houses, and was erecting a wall at a distance of only eight feet opposite to the said windows, which obstructed the access of light and air, and rendered the rooms lighted by the back windows nearly uninhabitable.

The plaintiff charged that he was entitled under his leases to enjoy the access of light and air through the said back windows, and that, as the defendant claimed to be entitled to the land at the back of the plaintiff's premises under a lease granted by the plaintiff's lessors, he was not entitled to obstruct the light and air coming to the plaintiff's premises.

The bill prayed that the defendant might be restrained by injunction from sawing any stone or other material, and from working any machinery upon, and from causing any smoke or steam to be emitted from, and from carrying on any works or business upon the land at the back of the plaintiff's houses, so as to cause any damage or annoyance to the plaintiff or his tenants; and (secondly) that the defendant might be restrained from permitting the wall and staging erected by him to remain erected so as to diminish the access of light and air to the windows at the back of the plaintiff's houses.

Mr. Chitty, Q. C., and Mr. Jason Smith, for the plaintiff:

In this case, although the windows where light is obstructed by the defendant's buildings are not ancient lights, yet, as the assignment to the defendant was subsequent to the plaintiff's lease, he cannot be permitted under such assignment to injure the plaintiff's houses, as they both hold under the same landlord, who cannot derogate from his own grant.

Besides, the defendant, as lessee, had no right to erect these buildings on the vacant land. The law is thus laid down by Coke, Co. Litt. 53a: "If the tenant build a new house it is waste."

(THE MASTER OF THE ROLLS. That is not the law at the present time. In Williams' Notes on Saunders, Vol. ii, p. 652, it is said: "It is a question whether it is waste to build a new house." In Lord Darcy v. Ashworth, Hob. 234 [Ed. 1724], the law is thus stated:

"A lessee may build a new house where none was before;" and thus in Doe v. Earl of Burlington, 5 B. & Ad. 507, 517: "Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or secondly, by increasing the burthen upon it, or thirdly, by impairing the evidence of title. And this law is distinctly laid down by the Chief Justice Richardson in Barret v. Barret, Hetley, 35.") * * *

SIR G. JESSEL, M. R.[12] I am satisfied this bill cannot be maintained. First, as regards the lights. The windows are not ancient lights, and as the lease under which the defendant claims is prior in date to the plaintiff's, the plaintiff is precluded from claiming to be entitled to the lights in question under the well-known doctrine on which the bill appears to be founded, namely, that a landlord cannot derogate from his own grant.

But a very ingenious argument was addressed to me, namely, that although in truth the defendant's lease was prior in date to the plaintiff's, still the defendant, by erecting these great buildings on the land, which are manifestly a great improvement in value to the property, is committing waste. Now, in my opinion, that is not proved. As I understand the law, the erection of buildings upon land which improve the value of land is not waste. In order to prove waste you must prove an injury to the inheritance. I quite agree that it is not mere injury in the sense of value. You may prove an injury in the sense of destroying identity, by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law, which has not been extended in modern times. In the lease in question, not only is there no covenant restraining the lessee from erecting buildings, but there is a covenant that he will keep all future buildings and erections in repair, shewing that the erection of buildings was contemplated. Therefore, so far as the lease goes, it is almost an implied license to erect buildings. But, independently of license, we must consider that if there had been waste at law, the landlord could, before the abolition of the action for waste, have brought an action or obtained an injunction, and that he would be entitled to the latter now if the injury were sufficiently serious. It is plain to my mind, looking at the nature of the works and at what the defendant is doing, that the lessors could neither have done the one formerly, nor could they do the other now. In fact, I am satisfied it is not waste.

With reference to the authorities, the doctrine is so well laid down in Doe v. Earl of Burlington, 5 B. & Ad. 517, that I do not think I need add anything further to it or to the modern expositions of the law on the subject. Therefore, even if it had been pleaded, I do not think that the plaintiff is entitled to say that, because the defendant has done an act which he could not have done lawfully without the

[12] Parts of the opinion are omitted.

license of the landlord, he is entitled to restrain it by injunction when the landlord has given him license. The argument should be carried a step further, and it should be alleged that the landlord has refused a license, and declined to interfere. But the owner in possession of property erecting a building of this kind does not commit an illegal act towards a stranger because somebody else might or might not have a right to stop it. There is no derivation of title under the same landlord in that sense at all. It does not appear to me that if the landlord had refused license, and there had been an act of waste, there is any compulsion upon the landlord to file a bill for an injunction, the action of waste being abolished, and he not being able now to recover possession of the premises by ejectment. The utmost he could do would be to file a bill for an injunction to restrain the defendant from continuing the building.

Upon those grounds, therefore, it appears to me plain, so far as the substance of the case is concerned, as regards the light and air, that the bill cannot be maintained. * * *

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## POWYS v. BLAGRAVE.

(In Chancery before Lord Cranworth, 1854. 4 De Gex, M. & G. 448, 43 E. R. 582.)

This was an appeal by the defendants Anthony Blagrave and John Henry Blagrave from a decree of the Vice-Chancellor Wood, in a cause in which the trustees of certain real estates were the plaintiffs and John Blagrave, the tenant for life of the estates, and the appellants, the tenants in tail in remainder, were the defendants. The questions raised by the appeal were, first, whether a tenant for life in possession was accountable in equity at the instance of a remainder-man for permissive waste; and, secondly, whether, upon the true construction of the will, certain costs of the trustees who raised the question were payable out of the rents and profits, or out of the corpus of the estates. The Vice-Chancellor decided that a Court of Equity had no means of interfering in cases of permissive waste by a tenant for life, and that the costs in question were payable out of the corpus of the estate. * * *

THE LORD CHANCELLOR.[18] * * * But then it was argued, independently of the trust, that it is the duty of a tenant for life to repair. "Equitas sequitur legem." But even legal liability now is very doubtful. Gibson v. Wells, 1 N. R. 291; Herne v. Benbow, 4 Taunt. 764. Whatever be the legal liability, this Court has always declined to interfere against mere permissive waste. Lord Castlemain v. Lord Cra-

[18] The statement of facts is abridged and parts of the opinion are omitted.

ven, 22 Vin. Abr. 523, tit. "Waste," pl. 11. There the Master of the Rolls said:

"The Court never interposes in case of permissive waste either to prohibit or to give satisfaction, as it does in case of wilful waste."

On this ground, relief was refused in Wood v. Gaynon, Amb. 395. In that case, a tenant for life had been guilty of permissive waste, and the plaintiff and one of the defendants, Benjamin Lyme, were the reversioners; Lyme refused to join with the plaintiff in an action at law. The Master of the Rolls refused to assist the plaintiff, saying that as there was no precedent he would not make one; adopting the argument that it would tend to harass tenants for life and jointresses, and that suits of this kind would be attended with great expense in depositions about the repairs. With respect to the case of Caldwell v. Baylis, 2 Mer. 408, it does not sustain the doctrine for which it was cited. The case of Re Skingley, 3 M. & G. 221, was founded on the express obligation of the lunatic to keep in repair. I do not refer to the cases where the question has been as to the right to charge assets. There the decisions have rested on other grounds. There is no precedent for what is asked in this respect; I certainly will not be the first to make one. * * *

I think there is no foundation for the appeal, which must therefore be dismissed with costs.[14]

[14] See Caldwell v. Baylis (1817) 2 Merivale, 408, before Lord Eldon, C., which is reported as follows: "An Injunction was granted in this case 'to restrain the Defendant, his agents, servants, and workmen, from cutting down or felling timber or timber-like trees, except for repairs of buildings on the premises, and from committing or permitting or suffering any further or other waste, until answer, or further order;' upon affidavits to the effect following: Mary Baylis (the Defendant's late wife) being seised in fee simple of the premises, which were copyhold, made her will in pursuance of a power vested in her by a surrender made by her husband and herself to the use of her will, and thereby devised to her husband (the Defendant) for his life, 'he keeping the interest of a certain mortgage charged on the premises paid, and keeping the buildings in tenantable repair, and not felling any timber except for such repairs.' After his decease she gave the same premises to her nephew Richard Ballard, his heirs, &c. (in case he should then be living,) but, if he should die in the lifetime of the Defendant, then to the Plaintiffs, as tenants in common. The Testatrix died in 1796, upon which the Defendant entered into possession, but instead of keeping the premises in repair, permitted the same to go into decay during the life of Ballard, who had intended to commence proceedings against him both at law and in equity in consequence of his neglect, but desisted upon his promise to repair forthwith. In 1808 Ballard died, and the Defendant having neglected to perform his promise either during his lifetime or since his death, the buildings upon the premises, (consisting of a farmhouse and cottages, three barns, a stable, and other edifices,) grew ruinous for want of the needful repairs; which, by an estimate made on behalf of the Plaintiffs in 1816, amounted to £157 and upwards. The affidavit went on to state the information and belief of the Plaintiffs that the Defendant had, both before and since the death of Ballard, 'by himself, his servants, agents, and workmen,' cut down timber to a great amount in value, and carried the same off from the premises, or converted to implements of husbandry and other articles for the use of himself and his tenants, employing a very inconsiderable part in or towards the needful repairs, 'thereby committing or suffering great waste and great damage to the inheritance,' and that he threatened

## DOHERTY v. ALLMAN et al.

(House of Lords, 1878. L. R. 3 App. Cas. 709.)

THE LORD CHANCELLOR [LORD CAIRNS].[15] The question in this case arises upon two leases which are now vested in the Respondent. One of them is dated in the year 1798, and is for the long term of 999 years; the other was granted in 1824, and is for the term of 988 years; the first being at the rent of £10, and the second at a rent of £32. 19s. The reversion to both these leases is vested in the present Appellant.

The property demised is thus described: [His Lordship read the description of the premises contained in each lease, and also the words of the covenant in each.] * * *

There is not in either of these leases any power of entry for breach of covenant, but there is a power that if rent was not duly paid and no sufficient distress found on the premises to satisfy the arrears, it should be lawful to the lessor to re-enter and re-possess himself of his former estate.

That is the substance of the two leases. The property demised, so far as it consisted of buildings, was in the form of stores—and, as we understand, stores for storing corn. It is stated in evidence, and does not appear to be a matter of controversy between the parties, that since the date of these leases a considerable change has occurred with reference to the demand for buildings of this description in the neighborhood of Bandon; and it is stated, and does not appear to be seriously controverted, that in the town of Bandon, which seems to lie at a lower level than where these stores are built, there is now a considerable—perhaps an exuberant—supply of store buildings, access to which, or facility of carriage, is greater than to this higher ground, and that, therefore, there is serious difficulty in obtaining a tenant for this property used as stores. Under these circumstances the Respondent has had specifications prepared, which appear to be prepared in a careful, proper, and business-like way, and he has had a contract made in accordance with those specifications, by which the external walls of this building are to be retained, and those external walls, where one part of the building is of a lower height than the rest, are to be raised, so that the building may be of a uniform height; internal changes are to be made, internal party walls are to be introduced, the flooring is to be altered in its level, and six dwelling-houses are to be made out of this which

'to commit or suffer further and other waste,' &c. This affidavit by the Plaintiffs was accompanied by another, by the surveyor whom they had employed to make the estimate, as to the ruinous state of the buildings, and also as to his having been prevented by the tenant residing on the estate from surveying the whole of such buildings. The Defendant had appeared, but had not put in his answer. Hart and Heys in support of the motion for an injunction."

[15] The statement of facts, parts of the opinion of Lord Cairns, and all of the concurring opinions of Lords O'Hagan and Blackburn are omitted.

now is one long store. Your Lordships have before you a photograph of the building as it now appears, and an elevation of the building as it is proposed to be, has also been put in evidence; and certainly it does appear a strange thing to any spectator that it should ever come to be a matter of grave dispute between two rational men as to whether that which was proposed to be done is not almost as great an improvement as could be effected. However, so it is, and with that state of things your Lordships have to deal.

The Appellant objects to this being done. The owner of the reversion subject to this long term of years objects to that which the holder of the lease proposes to do. He objects upon two grounds. He says, first, that what is proposed to be done is waste; and, secondly, that it is a breach of contract. * * *

If we interfere and say, in aid of this affirmative covenant, that something shall not be done which would be a departure from it, no doubt we shall succour and help the Plaintiff who comes for our assistance. But shall we do that? Will the effect of our doing that be to cause possible damage to the Defendant, very much greater than any possible advantage we can give to the Plaintiff? Now, in a case of that kind, where there is an amount of discretion which the Court must exercise, those are all considerations which the Court will carefully entertain before it decides how it will exercise its discretion.

My Lords, let us then apply those considerations to the present case. Suppose the change which is contemplated by the Respondent here is made in the internal arrangements of this which is now a store, will the injury be irremediable? Clearly not. Beyond all doubt as regards the immediate effect it would be beneficial and not injurious to the reversioner; he will have a much better security for his rent, and the property undoubtedly will be increased in value, and if, when the lease comes to an end, he should have that predilection which he appears now to have for a building of the character which we see represented in this photograph, it would be merely a question of money, and that not a very large sum of money, in order that the building might be brought back to the state in which it now is. Therefore there would be no injury which would be irremediable. Then will damages be a sufficient compensation? The same answer applies there—an expenditure of a sum of money, of a very moderate amount, as we see from the estimate of even that which is proposed to be done by the Respondents, will bring back the building to the state in which the Appellant wishes it to be. Then, again, will there be a necessity for repeated actions for damages? Certainly not; it will be one payment, and one only, and by that means the lessor will get the whole of his right.

But then, my Lords, let us look at the other side—what would be the effect upon the Respondents of the Interposition of the Court? Here

is a lease for 999 years, of which 900 years and more are unexpired, and there is a rental on that lease, and on the second lease, amounting together to £42. 19s. a year. If the evidence is to be believed it is either the case now, or it may become the case, that the premises are absolutely untenantable—that no tenant can be obtained for them, or obtained for them at a rent which will produce the rent which the Respondents have to pay. Repair, then, they must, for they are bound to do so by the covenant, and they have been called upon to do so. They must therefore lay out money in repairing something for which they cannot get, when it is done, an equivalent in the shape of a remunerative rent, and the Court therefore for 900 years will be sentencing them, or those who succeed them, to keep the premises in a shape which will not enable them to get a remunerative rent; while, on the other hand, they would be bound to pay the substantial rent of £42. 19s. a year to the landlord. It will bear hardly upon the person who stands in the position of the lessee, but it will give no present benefit whatever to the Appellant, and even supposing he should ever become entitled to the lease, anything he would be entitled to would be represented by the payment of an extremely moderate sum of money.

Now, my Lords, that being the case, I do not think it is denied at the Bar that on a covenant of this kind the Court of Chancery before it interferes to prevent what was said to be a departure from the terms of the covenant must exercise its discretion with regard to the whole of the circumstances of the case—it appears to me that what I have said will probably convince your Lordships that there is every reason against the exercise, by the Court of Chancery, of its power of giving an injunction, and everything in favour of its leaving this matter to be the subject of damages, for any person who thinks it worth while to bring an action for damages. My Lords, I therefore think that the case, so far as it is founded on the covenant, is one which, looking upon it as an application for an injunction, entirely fails.

Then with regard to the question of waste: there is no doubt that the Court of Chancery exercises a jurisdiction in restraining waste, and where waste is committed in requiring an account of the waste for the purpose of recompensing the person who has suffered; but I apprehend it is perfectly clear that the Court of Chancery, acting in that case in advance of the common law right, will, in the first place, consider whether there is, or is not, any substantial damage which would accrue, and which is sought to be prevented, and will make that inquiry. In the present case it appears to me to be extremely doubtful whether any jury could be found, who, after this work shall be executed in the way that is proposed, would say that any damage had been done by the work to the inheritance. And I doubt, farther, whether it must not be taken as clear from the evidence here that any jury, or any tribunal judging upon the question of fact, would not say

that, if there be technically what in the eye of the common law is called waste, still it is that ameliorating waste which has been spoken of in several of the cases cited at the Bar. That which is done if it be technically waste—and here again I will assume in favour of the Appellant that it is technically according to the common law, waste—yet it seems to me to be that ameliorating waste which so far from doing injury to the inheritance, improves the inheritance. Now, there again the course which the Court of Chancery ought undoubtedly to adopt would be to leave those who think they can obtain damages at common law to try what damages they can so obtain. Certainly, I think here again, the Court of Chancery would be doing very great injury to the one side for the purpose of securing to the other, that slightest possible sum which would at common law be considered the full equivalent to which he was entitled. My Lords, this was the view, in substance, taken by the Lord Chancellor of Ireland and the Lord Justice of the Court of Appeal, who in this respect differed from the Vice-Chancellor. I must say that I entirely concur with the decision at which they arrived, and therefore I would advise your Lordships, and move your Lordships, to dismiss this appeal with costs. * * *

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## WEST HAM CENTRAL CHARITY BOARD v. EAST LONDON WATERWORKS CO.

(Chancery Division. [1900] 1 Ch. 624.)

The defendant company was the demisee of a ninety-nine year lease, dated September 29, 1830, given them by the plaintiff's predecessor in title, by which lease defendant company obtained the use of twelve acres of marshy land for reservoir purposes. The company, not constructing the reservoir, in 1896 sub-demised to Base for his use as a rubbish shoot. Base raised the level about ten feet by the rubbish shot down upon it.

This was an action by the West Ham Central Charity Board, as Plaintiffs, against the waterworks company and Base for an injunction to restrain the defendants, "their officers, contractors, servants, agents, and workmen from bringing, or permitting to be brought, upon the said lands any rubbish, earth, or material, or otherwise committing waste on the said land, and from permitting any rubbish, earth, and material so brought, or permitted to be brought, to remain on the said land," and for damages.

The plaintiffs by their statement of claim alleged that by the aforesaid acts of the defendants the level of the demised premises had been greatly raised and the condition thereof materially and injuriously altered; that the reversion of the plaintiffs in the premises had been and was being permanently injured; that the acts of Base constituted waste, and had been done with the knowledge and connivance of the

waterworks company and in pursuance of an arrangement in that behalf between the respective defendants, and that by the aforesaid acts of the defendants the value of the plaintiffs' reversion in the said hereditaments had been greatly diminished, and also that unless such acts were restrained and discontinued the value of the plaintiffs' reversion in the said hereditaments would be entirely destroyed, and the said hereditaments would be rendered valueless for any purpose whatsoever.

The action was tried before Buckley, J., on February 5, 6, and 7, 1900.

Before the trial the Official Trustee of Charity Lands was added as a co-plaintiff, and at the trial leave to amend was given by substituting for the West Ham Central Charity Board the names of the persons who were then the vicar, churchwardens and overseers. * * *

BUCKLEY, J.[16] In this case the plaintiffs are entitled to the reversion expectant upon the determination of a lease granted on September 29, 1830, by their predecessors in title to the East London Waterworks Company. It is a lease of twelve acres of land situate in West Ham, in the parish of Stratford, and the case of the plaintiffs is that the defendants, the waterworks company, and Mr. Henry Base, trading as J. C. Base, are liable to the plaintiffs for waste permitted on the premises which are the subject of the demise.

Before stating the facts of the case, I think it would be convenient that I should state what I understand to be the law which I have to apply to them. The best definition of waste that I have been able to find is in Lord Darcy v. Askwith, Hob. 234, which is in these words:

"It is generally true, that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor decay the pale of a park; for then it ceaseth to be a park, nor he may not destroy nor drive away the stock or breed of any thing, because it disherits and takes away the perpetuity of succession, as villains, fish, deer, young spring of woods, and the like; but he may better a thing in the same kind, as by digging a meadow, to make a drain or sewer to carry away water."

The test, as there laid down, seems to be whether the act which the lessor says is an act of waste by the lessee is an act which alters the nature of the thing demised. At one time this principle of law seems to have been carried so far that it was supposed that it was waste for a tenant to build a new house on the land demised, and in Co. Litt. 53a, the law is to be found stated thus: "If the tenant build a new house it is waste;" and in a case, which was cited in the course of the opening by Mr. Astbury, of Queen's College, Oxford v. Hallett, 14 East, 489, 13 R. R. 293, I find Lord Ellenborough saying this:

"It is an injury to the title of the reversioners, and a present damage to them. Lord Mansfield held that building a wall, where none was before, was

[16] The statement of facts is abridged and parts of the opinion are omitted.

**sufficient to entitle the reversioner to this kind of action pending the lease, though it might be pulled down again before the lease expired."**

If that was the law at one time, I think it is plain that it is not the law now. For that I may refer to Jones v. Chappell, L. R. 20 Eq. 539, a decision of the late Sir George Jessel, where he held that the lessee of land who erects buildings thereon without the consent of his lessor does not commit waste within the definition in Co. Litt. 53a, unless it can be shewn that such building is an injury to the inheritance. I am content to take the law from the case of Doe v. Earl of Burlington (1833) 5 B. & Ad. 507, 39 R. R. 549, and I will read from page 517:

**"Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burthen upon it, or, thirdly, by impairing the evidence of title. And this law is distinctly laid down by Chief Justice Richardson in Barret v. Barret (1627) Het. 34, cited at the bar from Hetley's Reports."**

If the permanent character of the property demised is not substantially altered, as for instance, by the conversion of pasture land into plough land, by breaking up ancient meadows, or the like, I conceive that the law is that it is not now waste for the tenant to do things which within the covenants and conditions of his lease he is not precluded from doing. * * *

The land, they say, as raised, is more valuable, inasmuch as the increase in value will counterbalance the extra cost of going down to obtain foundations. This is an argument which comes to this:

**"It is allowable to alter the nature of the thing demised provided you so alter it that there is a countervailing advantage which reimburses you the additional expense which you are put to by the alteration."**

It seems to me that that is waste. Directly you admit that you have altered the thing as building land, so that you have to deal with it in a different way as building land, in my judgment you have, within the rule that I have endeavoured to lay down as regards waste, altered the nature of the thing demised. * * *

If the lessee were to use the land for the purpose of erecting a small mountain upon it some 1000 or 1500 feet high, that would be such an alteration of the thing demised as would be waste. I suppose, on the other hand, the plaintiffs would not contend that, if the tenant top-dressed his land from time to time and added so many inches to the field, and altered the level slightly, that would be waste. It must be to a great extent a question of degree. It seems to me that here there has been such an alteration of the level of the soil, and such an alteration of the thing demised, as does amount to waste, irrespective of the question whether the material added has been of an offensive description or an inoffensive description. In other words, I think the waterworks company in authorizing Mr. Base to go there, and to do that which he did, are equally responsible in this action for the consequence of what has been done. Under those circum-

stances, it is unnecessary for me to follow counsel into the consideration of the question whether waste falls under the same category as nuisance, because it could not be denied that the authority given to Base was an authority to tip the material on the land, and to increase the height of the land; and, having given that authority, the company are responsible for the act done.

It appears to me, therefore, that the plaintiffs are entitled to an injunction restraining both the defendants, their officers, contractors, servants, agents, and workmen, from bringing, or permitting to be brought, upon the land any rubbish, earth, or material, or otherwise committing waste on the said land. The statement of claim goes on to ask for a mandatory injunction against permitting it to remain. I need not assign the reasons why I think such an injunction ought not to be granted, because the plaintiffs do not ask for it. But they ask for an inquiry as to damages, and I think they are entitled to an inquiry as to damages in the past and to an injunction as regards the future, and that they are, as against both the defendants, entitled to the costs of the action.

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## GANNON v. PETERSON et al.

(Supreme Court of Illinois, 1901. 193 Ill. 372, 62 N. E. 210, 55 L. R. A. 701.)

Appeal by defendant Gannon from a decree of the Circuit Court for St. Clair County enjoining the opening and working of certain mines.

RICKS, J.[17] (after stating the facts). In this case the seventh clause of the will of Michael Gannon comes before us for construction, and upon that depends the rights of the parties hereto. The first question that is presented is, what estate or interest has Matthew Gannon in the real estate mentioned in that clause of the will? Secondly. Have appellees such an estate or interest in said lands, and has appellant committed such waste, as entitles them to an injunction against waste? * * *

The appellees have no present vested interest. Their estate is in mere expectancy, depending upon the contingency of the death of Matthew Gannon without child or children him surviving. Friedman v. Steiner, 107 Ill. 125. He is 40 years of age, has been married 9 years, and has not now, nor has he had, a child. He is able-bodied, healthy, and strong and in full possession of all his faculties, mental and physical, necessary for procreation. The law indulges no presumption that he will die without leaving a child or children.

"A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties, even though the donees be each of them an hundred years old." 1 Cooley, Bl. (3d Ed.) book 2, p. 124.

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[17] The statement of facts and parts of the opinion are omitted.

It is admitted of record in this case that the coal underlying this land constitutes its chief value, and the remaining question is, does the mining of this coal by appellant constitute such waste, and have the appellees such interest as entitles them to maintain this suit. The chancellor found for the appellees; found that appellant, by mining these lands, was committing waste; granted a permanent injunction; appointed a receiver; authorized him to proceed with the mining of the coal, and directed that the royalties should be withheld from appellant; what royalty he had received should be paid to the receiver, the money invested, and appellant simply to receive the net interest or income during his natural life. Matthew Gannon admits that he has taken out coal to the value of $50,000, and that the royalty at one-fourth of a cent per bushel amounts to $8,000. This land was never mined during the life of the testator, nor was there a mine opened on it till done by appellant.

The authorities are uniform as to the definition, duration, and extent of a base or determinable fee. They are agreed that it is a fee-simple estate; not absolute, but qualified. Upon the death of the donee his widow has dower, although the contingency may have happened that defeats the estate, and that within the general acceptation and meaning of the term the person seised of such an estate is not chargeable with waste. But there has been ingrafted into equity a form of waste not recognized at common law, which is termed "equitable waste," and of which courts of chancery take cognizance, and under the theory of which they grant relief to the holders of contingent and executory estates. Equitable waste is defined by Mr. Justice Story to consist of—

"such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them." 2 Story, Eq. Jur. § 915.

And the learned jurist gives as instances of this class of interference where the mortgagor fells timber on the mortgaged premises to the extent that the security becomes insufficient; where a tenant for life, without impeachment for waste, pulls down houses, or does other waste, wantonly and maliciously; and he adds:

"For, it is said a court of equity ought to moderate the exercise of such a power, and, pro bono publico, restrain extravagant, humorous waste."

And he concludes:

"In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties."

The definition given above is accepted by most of the text writers, and quoted with approval by the courts, and it is this principle the appellees (complainants below) invoke, and insist that under it the decree of the circuit court should be affirmed. * * *

So far as we can learn, this is the first time this question has come before this court, and we have not been cited to a single American case

where the writ against waste was granted against the donee in possession of a fee-simple estate at the suit of an executory devisee. It is true that most of the text writers have recognized the right to such a bill and have uniformly referred to English cases for the authority. On the contrary, there is a very respectable case in a sister state that such a suit will not lie. In Matthews v. Hudson, 81 Ga. 120, 7 S. E. 286, 12 Am. St. Rep. 305, * * * after a full consideration of the case, the court say:

"We think the judgment denying the injunction in the present case ought to be affirmed. It is conceded that, if Hudson [the son] took a fee of any sort, he is exempt from the supervision of chancery in respect to waste, and such undoubtedly is the law. * * *"

With the admitted fact that appellant is but 40 years of age, of good health, and possessed of all his mental and physical faculties for procreation, and with the presumption of law that he will have issue, the expectant estate of appellees is no more than a possibility. As the owner of the fee, appellant owns the soil and all that is beneath and above it. He owns the coal and the other minerals below the sod, as much as the grass that grows upon it. It appears the coal under this land is the more valuable part of the estate. The coal industry of this state is of vast importance and of great extent. We all know that it is becoming a common practice for the owners of lands to divide them into practically two distinct estates, and to sell the coal and retain the surface. The authorities say the writ lies pro bono publico. So far as the public can have any interest in this matter, it lies in the direction of having the mines worked, the coal put on the market to go into consumption and swell the traffic and business of its citizens.

The most valuable use of this land is for mining the coal. Appellant has a fee-simple estate, and to grant the contention of appellees we must hold that appellant must not have the greatest and most beneficial use and enjoyment of it, because it is possible that he may die without leaving children, and his fee be determined. It is also possible that all of the appellees may die before the appellant, and yet by the decree appealed from this valuable estate must be withheld from him who owns it, the funds arising from it kept under the control of the court, and appellant allowed the net interest resulting from such management. Such a course as this is not in unison with the idea of a fee in appellant, and not in keeping with the spirit of American institutions that favors the vesting of estates, opposes entailments, and endeavors to secure to the citizen the greatest immediate enjoyment of property consistent with law. The appellees believed that it would be best to have the mine continue, and the chancellor took the same view, and by his order assumed, through the receiver, perpetual supervision over it. In the light of such facts, are we warranted in saying that appellant was making such use of this property "as a prudent man would not do with his own property?" Can we say that it is such extravagant, humorous waste that a court of

equity ought, pro bono publico, to moderate it? To such contention we cannot assent. Prudent men mine their lands, and sell the minerals and ores. They sell the right to others, and they lease them upon royalties, and we cannot say it constitutes equitable waste.

The decree of the circuit court is reversed, and the cause remanded, with the direction to that court to dismiss appellees' bill. Reversed and remanded.

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## PERROT v. PERROT.

(In Chancery before Lord Hardwicke, 1744. 3 Atk. 94, 26 E. R. 857.)

There was a limitation in a settlement to the defendant for life, to trustees to preserve contingent remainders, to his first and every other son in tail, remainder to plaintiff for life, with remainder to his first and every son in tail, reversion in fee to the defendant.

The first tenant for life cuts down timber, the plaintiff, who is the second tenant for life, brings his bill for an injunction to stay waste.

Mr. Attorney General for the plaintiff shewed cause why the injunction for restraining the defendant from committing any further waste should not be dissolved.

It was insisted by Mr. Solicitor General, for the defendant, that the timber which he has cut down, are decayed trees, and will be the worse for standing, and that it is of service to the public, that they should be cut down; and that it is very notorious that timber, especially oak, when it is come to perfection, decays much faster in the next twenty years, than it improves in goodness the twenty years immediately preceding.

That as the defendant has exercised this power in such a restrained manner, and confined himself merely to decayed timber, which grows worse every day, that this court will not interpose, especially as the plaintiff is not entitled to come into this court as he has not the immediate remainder, and besides has no remedy law.

LORD CHANCELLOR. The question here does not concern the interest of the public, unless it had been in the case of the King's forests and chases; for this is merely a private interest between the parties; and it is by accident that no action at law can be maintained against the defendant, because no person can bring it, but who has the immediate remainder.

Consider too in how many cases this court has interposed to prevent waste.

Suppose here the trustees to preserve contingent remainders had brought a bill against the defendant to stay waste for the benefit of the contingent remainders.

I am of opinion they might have supported it, but here it is the second tenant for life, who has done it, and though he has no right to the timber, yet if the defendant, the first tenant for life, should die without

sons, the plaintiff will have an interest in the mast and shade of the timber.

The case of Welbeck Park, which has been mentioned, was a very particular one, because there, by the accident of a tempest, the timber was thrown down, and was merely the act of God.

But this is not the present case, for here a bare tenant for life takes upon him to cut down timber, and it is not pretended that they are pollards only: and though the defendant's counsel have attempted to make a distinction between cutting down young timber trees that are not come to their full growth, and decayed timber, I know of no such distinction, either in law or equity.

Therefore upon the authority of those cases which have been very numerous in this court, of interposing to stay waste in the tenant for life, where no action can be maintained against him at law, as the plaintiff has not the immediate remainder, the injunction must be continued till the hearing.

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## MICKLETHWAIT v. MICKLETHWAIT.

(In Chancery, 1857. 26 Law J. Ch. [N. S.] 721.)

This was a motion, on the part of the defendant, the tenant for life in possession of certain estates in Norfolk, called respectively the "Beeston" and the "Taverham Hall" estates, to dissolve an ex parte injunction obtained by the plaintiff, who was the next tenant for life, restraining him from felling, or injuring, or selling and disposing of 153 trees. The facts may be shortly stated as follows:

Nathaniel Micklethwait being seised in fee of both estates, executed a settlement in 1812, whereby the estates were settled on himself for life, with remainder, after the death of his eldest son, without issue, to himself in fee. At this time, he was residing at the mansion house on the Beeston estate, but in 1823 he removed, with his family, from Beeston to Taverham Hall, which was seven or eight miles from Beeston; and in 1845, with the consent of his eldest son, who was unmarried, he took down the Beeston mansion-house, leaving the shrubbery, gardens and garden walls about the house in the same state as they had theretofore been in, and the garden was let to a market gardener.

By his will, dated the 9th of May, 1852, Nathaniel Micklethwait devised the Beeston and Taverham Hall estates, subject to the settlement of 1812, to his second son, the defendant, for life, without impeachment of or for any manner of waste, other than and except voluntary waste in pulling down houses or buildings. * * *

Two or three handsome trees upon the estate had been cut down by the testator in his lifetime, and the defendant now proposed to cut down 153 of the old oak trees, many of which were standing in the avenue and park. The trees had all arrived at maturity, and if not

ornamental timber, were such as might properly be felled, and several of them might have been advantageously felled many years ago.

The plaintiff having obtained an injunction to restrain the waste as above mentioned.

WOOD, V. C.[18] * * * There must be an injunction restraining the defendant from cutting trees forming either side of the avenue, or any other trees planted or left standing for ornament on the Beeston estate. Then there must be an inquiry such as was suggested in Wombwell v. Belasyse, 6 Ves. 110, note, as to what trees have been planted or left standing for ornament or for the purpose of the estate, and whether any and which of the trees are proper to be cut for the purpose of repair or sale, having regard to the purpose for which they were planted, or left standing.

From this order the defendant appealed, and on the appeal coming on an arrangement was made by which it should be brought on together with a motion for a decree, and the same accordingly came on before the Lords Justices on the 27th, 28th and 29th of July.

LORD JUSTICE KNIGHT BRUCE. * * * The injunction should, in my opinion, be dissolved, and the bill as to the timber dismissed. * * *

LORD JUSTICE TURNER. The questions in this case are new and important, and are not, as I think, free from difficulty. By far the most important question in point of law is that as to the timber, as it involves the extent of the doctrine of this Court with respect to equitable waste. * * *

This doctrine of equitable waste, although far too well settled in this Court to be now in any way disturbed, is, it is to be observed, an encroachment upon a legal right. At law, a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate; but the Court controls him in the exercise of that power, and it does so, I apprehend, upon this ground, that it will not permit an unconscientious use to be made of a legal power. It regards such an unconscientious use of a legal power as an abuse, and not as a use of it. When, therefore, the Court is called upon to interfere in cases of this description, it is bound, I think, in the first place, to consider whether there are any special circumstances to affect the conscience of the tenant for life; for in the absence of such special circumstances, it cannot be unconscientious in him to avail himself of the power which the testator has vested in him. We have, then, to consider what are the special circumstances which the Court will regard as affecting the conscience of a tenant for life, and I apprehend that which is principally to be regarded is the intention of the settlor or devisor. If by his disposition or by his acts he has indicated an intention that there should be a continuous enjoyment in

[18] The statement of facts is abridged, and parts of the opinions of Wood, V. C., Lord Justice Knight Bruce, and Lord Justice Turner are omitted.

succession of that which he himself has enjoyed, in the state in which he has himself enjoyed it, it must surely be against conscience that a tenant for life claiming under his disposition should by the exercise of a legal power defeat that intention. We have here, I think, the clue by which the difficulty in this case may be solved. If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house, and it cannot be presumed that he meant it to be denuded of that ornament which he himself enjoyed. This Court, therefore, in such a case, protects the trees against the acts of a tenant for life; but if, on the other hand, the devisor or settlor himself pulls down the mansion-house, upon what ground is it to be presumed that he intended that which is incident to the mansion-house to be preserved? Is it to be presumed that he meant that the incident should be preserved when he has himself destroyed the principal? It was said for the plaintiff that the testator may have intended that the trees should be preserved as an ornament to the estate, without reference to the mansion-house; and it was argued that if the trees were in fact planted or left standing for ornament, it could make no difference whether there was a mansion-house on the estate or not; but there is a plain difference between cases in which there is and cases in which there is not a mansion-house on the estate. In the former case continued residence may well be presumed to have been contemplated, in the latter case it cannot. There is another consideration which seems to me to have an important bearing upon this case. These trees are assumed to have been planted for ornament to the mansion-house: are they to be preserved for ornament to the estate when the mansion-house is pulled down? Are trees which are planted for one purpose to be protected for another? The difficulty in which the Court will be involved if it carries the doctrine of equitable waste to the length contended for by the plaintiff, is, I think, also a matter not unworthy of consideration. It is already difficult in many cases to determine whether trees have been planted or left standing for ornament, but the existence of the mansion-house generally furnishes some criterion for determining the point. How is the loss of that criterion to be supplied? I have hitherto dealt with the case without reference to the testator's acts and conduct. It appears that he not only pulled down the mansion-house, but wholly dismantled the place. The ornamental garden had been protected by a wire fence. He took away the fence and removed it to his other residence. He appears to have planted extensively, and to have taken into the plantation about 100 yards of the avenue nearest to the mansion-house. After he left the mansion-house he cut down and sold several of the trees which were in the line of the avenue and had been

taken into the plantation. He also cut down at other times other trees standing about the mansion-house and in the park which were at least as well entitled to be considered as having been planted or left for ornament as the trees which are now in question. The gardens and pleasure grounds were suffered to grow wild and left without protection, with the exception of what I suppose was the kitchen garden, which was let to a market gardener. The testator was fond of sporting, and after he had removed to Taverham he seems to have regarded the estate at Beeston merely as a covert for game. These acts and this conduct on the part of the testator furnish, I think, the strongest evidence that the trees on the estate were not left standing for ornament. If the testator was, as I think he was, to be considered between the parties as tenant in fee, I hardly see what better evidence we could have of his intention. * * *

Upon the whole, therefore, finding no authority to support the plaintiff's case, I am driven to the conclusion that what we are asked in this case to do is to extend the doctrine of equitable waste. I am not disposed to do so; and upon the grounds I have stated I think that, so far as respects the trees, this bill ought to be dismissed and the injunction, of course, dissolved. I have satisfaction in adding that if this case had come before us as it came before Vice-Chancellor Wood upon motion only, I should probably have thought it right to grant the injunction (without reference to the grounds upon which the Vice Chancellor proceeded), considering the question proper to be discussed at the hearing of the cause. His Lordship then referred to the remaining question upon the bill, and agreed in the decree already pronounced.[19]

[19] In Halliwell v. Phillips (1858) 4 Jurist (N. S.) 607, 608, a limitation on the subject-matter of equitable waste was pointed out by Sir W. P. Wood, V. C.: "There is not here any question to be considered as to how far timber is or not ornamental, in the sense of being connected with the residence, and the residence being pulled down, as in Micklethwait v. Micklethwait (1857) 3 Jur. (N. S.) 765; it is open to contention that the ornamental nature of the timber, and the consequent protection, is lost. Here there is a residence, and it is not denied by the defendant that the timber is ornamental to the residence. But in order to protect the timber I apprehend that it must be ornamental in the strict legal sense of the term, viz. planted or left standing for the purposes of ornament. The question I have now to try is, therefore, a question of fact, whether the trees, as to which this litigation has arisen, were or are trees planted or left standing for ornament. The onus is on the plaintiffs to prove that this is the case; and further, to prove that the defendant is about to make such a use of his powers, as tenant for life without impeachment of waste, as would be inequitable as against the plaintiffs, the remaindermen. * * * It was argued that the father of the defendant, who was the original purchaser of these other portions, both of which are in sight of the house, must be taken to have acquired these properties either with a view of their being ornamental, or in order to turn them to a profit; that he did cut and sell other portions of the timber, but reserved these; and that it is, therefore, to be inferred that he left these standing for ornament. That is going a great deal too far: it is asking me to declare that any person having one estate and purchasing a neighboring estate, must, if he does not cut down all the timber on it, be taken to have dedicated to ornament every stick which he leaves

## WHITFIELD v. BEWIT.

(In Chancery before Lord Macclesfield, 1724. 2 P. Wms. 240, 24 E. R. 714.)

One seised in fee of lands in which there were mines all of them unopened, by deed conveyed those lands and all mines, waters, trees, &c., to trustees and their heirs, to the use of the grantor for life (who soon after died), remainder to the use of A. for life, remainder to his first, &c., son in tail male successively, remainder to B. for life, remainder to his first, &c., son in tail male successively, remainder to his two sisters C. and D. and the heirs of their bodies, remainder to the grantor in fee.

A. and B. had no sons, and C., one of the sisters, died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance.

A. having cut down timber sold it and threatened to open the mines; the heir of the grantor being seised of one moiety ut supra by the death of one of the sisters without issue, brought this bill for an account of the moiety of the timber and to stay A.'s opening of any mine.[20] * * *

CUR'. The right to this timber belongs to those who at the time of its being severed from the freehold were seised of the first estate of inheritance, and the property becomes vested in them.

standing. There must be some act of dedication. If the court finds an owner cutting out vistas, or planting avenues or clumps, or erecting statues or columns, or the like, the case is clear. Anything short of such clear indications of intention it is very unsatisfactory to act on; and this very case shows the fallacy to which any less positive indications may lead. * * * As to interference with cutting trees in the hedge-rows, that is going very far beyond the original cases, which only extended to those trees planted not at all for purposes of profit, but which were as much for pure ornament as an obelisk or tower. Such trees were not to be sacrificed and sold whenever an opportunity occurred for getting a good price. But as to hedge-rows, there never was any notion that trees were planted in them for mere ornamentation. Ornamental they are, no doubt, as every tree is more or less a handsome object; but it must be shewn that they were specially placed for mere ornament."

To the same effect is the opinion of Lord Eldon in Burges v. Lamb (1809) 16 Vesey 174, 183: "The question upon the principle as to ornamental timber, in the extent, to which it has been pushed in this argument, appears to be new; that by building a house near a wood the wood is devoted to the protection of that principle of Equity; and so, the effect of making walks through a wood, is, that no part of that wood is to come down. The Court has not gone further than protecting what is planted or growing for ornament; and has frequently refused to act upon affidavits, stating merely, that the timber is ornamental. Upon this subject I have anxiously guarded my expression against the inference, that all the trees, which are ornamental, were within the principle. In the instance of a Park, once full of wood, if timber had been felled, leaving vistas and rows, and some scattered trees, it would be difficult to say, the Court would protect the former, and not the latter. Upon these affidavits it is difficult to apply that equitable doctrine. At least the timber must be described, not as ornamental merely, but as planted and growing for ornament. Let this motion be mentioned again at the next Seal; and the other Defendants must have distinct notice of it."

[20] The statement of facts is abridged.

As to the objection that trover will lie at law, it may be very necessary for the party who has the inheritance to bring his bill [21] in this Court, because it may be impossible for him to discover the value of the timber, it being in the possession of, and cut down by the tenant for life. This was the very case of the Duke of Newcastle versus Mr. Vane, where at Welbeck (the Duke's seat in Nottinghamshire) great quantities of timber were blown down in a storm; and though there were several tenants for life, remainder to their first and every other son in tail, yet these having no sons born, the timber was decreed to belong to the first remainder-man in tail.

Neither do I think the defendant ought (as he insists) to be allowed out of this timber what money he has laid out in timber for repairs, since it was a wrong thing to cut down and sell the same, and shews quo animo it was done, not to repair but to sell.

2dly, It was urged, that the mines being expressly granted by this settlement with the lands, it was as strong a case as if the mines themselves were limited to A. for life, and like Saunders's Case in 5 Co. 12, where it is resolved, that on a lease made of land together with the mines, if there be no mines open, the lessee may open them; so in this case, there being no mines open, the cestui que use for life might open them.

But LORD CHANCELLOR contra: A. having only an estate for life subject to waste, he shall no more open a mine than he shall cut down the timber-trees, for both are equally granted by this deed; and the meaning of inserting mines, trees, and water, was, that all should pass, but as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him.

Of which opinion was LORD CHANCELLOR KING on a rehearing.[22]

[21] In Lee v. Alston, 1 Bro. C. C. 194, 3 Bro. C. C. 37, 1 Ves. Jun. 82, Lord Thurlow was of opinion that the mere circumstance of timber having been wrongfully cut down gave a right to an account, and accordingly, though the bill prayed an injunction, the decree was for an account only. Reg. Lib. B. 1782, 534. But the later cases have decided, according to Jesus College v. Bloom, that the right to an account depends upon the right to an injunction. Pulteney v. Warren, 6 Ves. 89; Universities of Oxford and Cambridge v. Richardson, 6 Ves. 689; Grierson v. Eyre, 9 Ves. 346; Richards v. Noble, 3 Mer. 673. This rule, however, does not extend to cases where there is no remedy at law for waste already committed; an account may there be decreed without an injunction. Garth v. Cotton, ub. sup.; Marq. of Lansdowne v. Marchioness Dowager of Lansdowne, 1 Madd. 116. * * * [*Rep.*]

[22] Lord Hardwicke, Chancellor, speaking on the matter of account for timber cut down as waste, said in the case of Jesus College v. Bloom (1745) Ambler, 54: "On this bill there arise two questions: 1st, Whether bills are to be maintained in this Court merely for timber cut down after the term is gone out of the tenant by assignment? or, Whether such bills can only be brought for an account of such waste done, without at the same time praying an injunction? And I am of opinion that they cannot. Waste is a loss for which there is a proper remedy by action; in a court of law the party is not necessitated to bring an action of waste, but he may bring trover; those are the remedies, and therefore there is no ground of equity to come into this Court, for satisfaction of damages is not the proper ground for the Court to

## WILLIAMS v. DUKE OF BOLTON.

(In Chancery before Lord Thurlow, 1784. 1 Cox, 72, 29 E. R. 1068.)

On the hearing of this exception, the Registrar did not understand the Lord Chancellor to have given a final opinion, and had taken no minutes; it therefore stood for judgment in the paper this day.

LORD CHANCELLOR. I have not the particular circumstances of the case now in my head; but the general ground, upon which I intended to go when I made the order, was this: The duke was tenant for life (not without impeachment of waste), with contingent remainders to his own children, with remainder to Miss Pawlett (afterwards Mrs. Orde) for life, with remainder to her first and other sons in tail, with remainder to the Duke in fee. The Duke being seized for life, and also of a vested remainder in fee, while the contingent estates were in expectancy, cut down timber, and the question is to whom the timber shall belong. If any other person entitled in remainder to an estate of inheritance had been in being at the time, the law would have thrown the timber on that remainder; but I was of opinion, that although the Duke had a vested remainder, yet as it was not competent for him to cut down the timber in respect of his life estate, he could not take advantage, in respect of his estate in remainder, of his own wrong. I thought if the case had been so shaped in the pleadings, it would have been a fraud on the settlement (especially considering the express words of the settlement). If he then was not entitled to the timber, the question was, who should be? Mr. Orde had had a son born, who died soon afterwards; the father administered to him, and it was argued, that the timber belonged to his son (and consequently to his father as his administrator) by a sort of analogy to what would have been the case if the timber had been cut down during that estate tail. My opinion was, that it did not belong to him by the operation of the law; and I did not see any rule of equity to bring him quasi within that situation. My opinion was that the fund would be part of the estate tail: another son is born of Mrs. Orde, does it belong to him? I think at present, no. He takes an estate tail, always subject to be divested by a subsequent estate of a child of the Duke's coming into being. The timber is part of the realty; by an accident (as to all but the Duke, and him therefore I bar) it is severed from the realty, and becomes in its

admit of these sort of bills, but the staying of waste; because the Court presumes, when a man has done waste he may commit the same again, and therefore will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray at the same time an account of the waste done; for though a court of law may give damages, yet it cannot prevent further waste; and it is upon this ground, to prevent multiplicity of suits, that this Court will decree an account of waste done at the same time, with an injunction; just like the case of a bill brought for discovery of assets, an account may be prayed at the same time; and though originally the bill was only brought for a discovery of assets, yet, to prevent multiplicity of suits, the Court will direct an account to be taken."

nature personalty, but yet bound as far as it can to the uses of the realty. In this I follow the rule laid down in a case which was much contested, that of Pelham and Gregory. The Duke may now have sons; if so, there is no estate but what is subject to be divested, for though the remainder vests only in expectancy, and is liable by the rules of law to other uses springing to the prejudice of such expectancy. The master must therefore take an account of the timber, and compute interest at £4 per cent. The money is to be paid into the bank to the credit of the cause, and subject to further order; and any person to be at liberty to apply to the court. I do not at present see the person to whom I can give it, but if any think they have a right they must apply. I do not think there ought to be any costs given.

His Lordship directed that the Duke should pay into the bank to the credit of the cause, the sum of £2943, for which the timber had been sold, and ordered that the master should inquire into and ascertain the time at which the said sum or any part thereof was received by the Duke, and should compute interest thereon at 4 per cent, from such times respectively, and that the Duke should pay into court in like manner what should be found to be the amount of such interest, and that such principal and interest should be laid out, with liberty for any person interested to apply. Reg Lib. B. 1783, fol. 326.

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## MARQUIS OF LANSDOWNE et al. v. MARCHIONESS DOWAGER OF LANSDOWNE.

**(In Chancery, 1815. 1 Madd. 116, 56 E. R. 44.)**

William Marquis of Lansdowne died the 7th of May, 1805, and thereupon said John Henry Marquis of Lansdowne came into possession, or into the receipts of the rents and profits of the aforesaid hereditaments, by virtue of the limitations aforesaid; and he continued in such possession or receipt during his life: and said John Henry Marquis of Lansdowne, at different times since the death of his said late father, that is to say, during the winter of the years 1805, 1806, 1807, and 1808, cut down, or caused to be cut down, large quantities of timber trees, and other ornamental trees, standing and growing near said capital mansion-house at Bowood; and he also cut down divers young trees and saplings, which had been planted before the death of said William late Marquis of Lansdowne, and were growing for timber upon the lands of which said John Henry Marquis of Lansdowne was tenant for life, as aforesaid; and he sold and disposed of a large part thereof for large sums of money; and same were received by him, or by his orders, or for his use; and particularly he cut down, or caused to be cut down, after the death of said William Marquis of Lansdowne, a large avenue of elm and ash trees, leading towards and up to said mansion-house at Bowood, on the north-east front thereof, and all the

trees on the pleasure-ground and lawn thereto belonging; and he also, since the death of said William late Marquis of Lansdowne, cut down, and caused to be cut down, divers, oak, ash, and other tellers and saplings, standing and growing upon other parts of said premises, of which he was tenant for life as aforesaid; and same were standing and growing for timber; and same were in a thriving and improving condition; and they would have been good timber trees if they had been permitted to stand and grow; but same were so small as not to be measured as timber according to the usage of timber-merchants, and same were not fit to be cut down.

In consequence of such waste, said John Eardley Wilmot and Sir Francis Baring, in February, 1809, filed their bill against said John Henry Marquis of Lansdowne, and the Plaintiff Henry Marquis of Lansdowne, by his then name of Lord Henry Petty, stating the foregoing facts and praying that an account might be taken by and under the direction of the Court, of the ornamental trees, young trees, and saplings, so improperly cut down by said John Henry Marquis of Lansdowne, and of the value thereof: And that said John Henry Marquis of Lansdowne might be decreed to account and answer for the value thereof, or for the monies which had been received by him, or by his orders, or for his use, on account thereof; and to pay to the Plaintiffs in such bill, or to the Accountant-General of the Court what should be found due from him on taking such account, for the benefit of the person who might become entitled thereto: And that the said John Henry Marquis of Lansdowne, his agents, servants and workmen, might be restrained from cutting any timber or other trees growing upon the said premises, which were growing there for the shelter of the mansion-houses, or for their ornament, or which were growing in lines, walks, or vistas for the ornament of the lawns and pleasure-grounds, and from cutting down saplings and trees not fit for the purposes of timber, and from cutting down timber trees at unseasonable times, and in an unhusbandlike manner; and for general relief.

Upon the bill being filed, together with affidavits in support of the same, an injunction was granted by the Court, according to the prayer of said bill. John Henry Marquis of Lansdowne afterwards put in his answer to the bill, and counter affidavits were filed by John Henry Marquis of Lansdowne; and an application was made to dissolve the injunction; but before any order was thereupon made, or any further proceedings were had in the suit, and on or about the 14th of November, 1809, said John Henry Marquis of Lansdowne died, and thereby the suit abated.

The present supplemental bill was filed after his death, stating the former proceedings. * * *

THE VICE-CHANCELLOR [SIR THOMAS PLUMER].[23] * * * The late marquis was tenant for life, without impeachment of waste, and

[23] The statement of facts is abridged and parts of the opinion are omitted.

as such had a right at law to cut timber on the estate, and had a property in the trees, but having abused that power by cutting ornamental trees, and trees not ripe for cutting, a Court of Equity says he shall not do these things with impunity, but interposes to restrain the legal right; and equity not only restrains him from doing further waste, but directs an account of the waste, done, and will not suffer the individual to pocket the produce of the wrong, but directs the money produced by such waste to be laid up for the benefit of those who succeed to the estate. * * *

Demurrer overruled.

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## LIPPINCOTT v. BARTON et al.

(Court of Chancery of New Jersey, 1886. 42 N. J. Eq. 272, 10 Atl. 884.)

BIRD, V. C. This bill is filed by the executor of Ann H. Pancoast, deceased, to recover the value of trees cut by her husband, David C. Pancoast, who continued in possession as tenant by the curtesy of her lands after her death. The defendants against whom the suit is instituted are the executors of the tenant for life. It is claimed that this suit may be maintained in this court for the waste committed, on the ground of equitable conversion, and upon the ground of injustice to Clement G. Lippincott, one of the grandsons of David C. Pancoast, by whose will he has but $100 bequeathed him, while by the will of Ann H. Pancoast he has an equal interest with the other legatees.

Neither of these alleged grounds brings the case within the jurisdiction of this court. I have examined a number of authorities, and none of them goes so far as to sustain the complainant's insistment. In Ware v. Ware, 6 N. J. Eq. 117, the doctrine which is expressed in all the other authorities is that an account for waste done is only incidental to relief by injunction against further waste. 1 Lead. Cas. Eq. 1024; College v. Bloom, 3 Atk. 262; Winship v. Pitts, 3 Paige (N. Y.) 259; 1 Story, Eq. Jur. §§ 515, 518.

From these and other cases it appears that this court only has jurisdiction to compel an account as incidental to the right of an injunction to stay the commission of further waste, and that only in order to prevent a multiplicity of suits. Grierson v. Eyre, 9 Ves. 341, 346; Watson v. Hunter, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295; 1 Add. Torts, 319. Nor can I conceive of any principle upon which this complainant can stand in this court for the recovery of these moneys. If he is entitled to them, he can recover them by an action at law for money had and received, or for the trespass in cutting, or trover in converting. Revision, p. 396, § 5.

## HILL v. BOWIE.

(High Court of Chancery of Maryland, 1829. 1 Bland, 593.)

This bill was filed on the 14th of December, 1826, by Morgan Hill against Daniel Bowie. It states that the plaintiff was in possession of a part of a tract of land called Grammar's Chance, to which he had a good title in fee simple; that the defendant had committed waste upon it by cutting down timber trees; and that he, this plaintiff, had brought an action of quare clausum fregit against the defendant to try the title to the land; which action was then depending. Whereupon the plaintiff prayed for an injunction to stay waste, &c. An injunction was granted as prayed.

The defendant put in his answer, in which he admitted, that the plaintiff was entitled to a certain part of the tract of land as stated; but he averred, that a part of the same tract of land belonged to his, the defendant's wife, the boundaries of which part had been well ascertained; and the defendant denied, that he had committed any waste as charged by the bill.

On the 11th of September, 1828, the plaintiff filed a supplemental bill in which he alleged, that he had obtained a verdict and judgment in his action of trespass; and thereupon prayed, that the injunction might be made perpetual.

The defendant, by his answer to this supplemental bill, admitted, that the plaintiff had recovered a judgment as stated; but averred, that although by the verdict it had been ascertained, that a part of the land, on which it appeared the defendant had trespassed, was the property of the plaintiff; yet it had not ascertained the claim and pretensions of the plaintiff to be as extensive as in his bill he had supposed.

BLAND, CHANCELLOR. This case having been submitted on bill and answer, the proceedings were read and considered.

An injunction of this description is in the nature, and in all respects performs the office of the ancient writ of estrepement. It is an attendant upon the action at common law; and, as its inseparable ally, follows its fortunes, and must submit to its fate. Duvall v. Waters, 1 Bland, 569. The restriction of this kind of injunction, in its commencement, must, from its nature, be coextensive with the pretensions of the plaintiff as made in his bill in equity and action at common law. But if, in that action, the plaintiff fails to recover entirely according to his pretensions, the injunction can be perpetuated to the extent of his recovery only and no further; and upon the same principle, if the plaintiff fails in his action at law altogether, the injunction must be totally dissolved.

In this case it does not distinctly appear, by the proceedings, how far the plaintiff has failed in sustaining his pretensions at law. The defendant by his answer, which is to be taken for true in this mode of submitting the case on bill and answer, avers that the judgment at law

does not ascertain the plaintiff's pretensions to be as extensive as in his bill it would appear he supposes. Hence although it must be taken for true, that there is some difference between the extent of the plaintiff's pretensions, which he asked to have protected by an injunction, and his actual recovery, yet that difference is in no manner designated by this vague allegation of the defendant, or by any thing to be found in the proceedings. If the unequivocal extent of the future operation of this injunction be of the importance the parties now seem to consider it, the exact extent of the plaintiff's pretensions, as established by his judgment at law, should have been clearly and distinctly shewn to this court to enable it to limit the injunction accordingly. But a judgment in the general terms that this appears to be, must, without some equally authentic evidence to the contrary, be taken as sufficiently shewing, that the injunction should continue to operate to the full extent of its original scope.

Whereupon it is decreed, that the injunction heretofore granted in this case be and the same is hereby made perpetual; and that the said defendant pay unto the said plaintiff the costs of this suit to be taxed by the register.

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## DENNETT v. DENNETT.

(Supreme Judicial Court of New Hampshire, 1862. 43 N. H. 499.)

In Equity. The bill sets forth, that the defendant, by the last will of Jeremiah Dennett, proved August 17, 1818, is seized as tenant for life of a certain farm and buildings in Portsmouth, bounded, &c., containing about eighty acres; that the plaintiff is seized of the remainder thereof, expectant on the defendant's decease; and the defendant on or about the 1st of July, 1860, entered upon and took possession of said premises as tenant for life, and has ever since been in possession of it.

There were then a great number of timber and other trees on said farm, and the defendant has lately caused divers of said trees, namely, one hundred and sixty pine trees and one elm tree, to be felled and cut up for fuel, the same not being fit to be cut, and said wood amounting to forty cords pine and two cords elm wood: and the said quantity of wood is not needed for use upon said farm, and the defendant intends to sell and dispose of the same to his own use, and to the damage of the plaintiff's reversion, and the defendant intends and threatens to cut down and use for fuel other trees there growing, to the injury of the plaintiff's reversion. The bill then prayed an injunction to restrain the defendant from committing waste upon said premises, and from felling and cutting down timber or other trees growing on said premises, except at seasonable times, in proper quantities, for use on said premises, and in a husbandlike manner; and for other relief.

The defendant's answer admits he is in possession of the premises

described, under a decree of the court in the case reported 40 N. H. 498, but denies that he is a mere tenant for life, and says he owns in fee two-thirds of the reversion after his life estate, unless the court shall decide that the reversion belongs to his oldest male heir. He admits he has cut one elm on said premises, but it was in great danger of falling, and a quantity of pine wood not measured, he supposes forty cords. He says the buildings have been long neglected, and in need of repair, and he commenced cutting wood to sell, to obtain money to make said repairs, as he believes he has a right to do, and that in so doing he intends only to cut such trees as are suitable for the purpose. The defendant believes the bill vexatious and oppressive, because, so far as he knows or believes, the plaintiff can not, under any construction of the will, claim more than one sixth part of the reversion of the property; by the amended answer not over one forty-eighth.

It is agreed that either party may refer to the will of Jeremiah Dennett, the material words of which are:

**"I give and devise to my son, Mark Dennett, all the residue of my estate, to descend to the youngest son of his body begotten, and from him to the oldest male heir of said youngest son of his body lawfully begotten, and in failure of such issue, then to the heirs of said Mark Dennett for ever."**

Joseph F. Dennett, the defendant, was the youngest son of Mark Dennett.

William H. Dennett, the plaintiff, was an older son, who claimed the property by virtue of a deed from his father.

This deed was impeached on the ground of want of capacity of the grantor. And much evidence was taken relative to his mental condition. He was subject to fits; for the last eight or ten years of his life not always temperate, and his health and mind feeble. Some of the witnesses thought him capable, others incapable of transacting business.

BELL, C. J.[24] * * * The great question of the case is, whether the defendant's interest is merely a life estate. * * *

Our conclusion then, is, that Joseph F. Dennett took, by the will here in question, a life estate and nothing more, and that there is no implication in his favor of any estate whatever. Having but a life estate, he cannot justify the waste he has committed. * * *

The remainder to the heirs of Mark Dennett united with his life estate, and he was seized in fee, subject to the intervening estate of Joseph F. Dennett, &c. This interest he had consequently the power to convey.

We have examined the evidence in relation to the capacity of Mark Dennett to execute the deed under which the plaintiff claims the reversion; and though the evidence shows his mental powers somewhat impaired from age, disease, and other causes, it falls very far short of proving incapacity to contract or to convey his property. His deed,

[24] **Parts of the opinion are omitted.**

then, conveyed his interest, and the title is now vested in the plaintiff, who is consequently the proper party to commence a suit to prevent waste, and the injunction, as prayed in the bill, is consequently to be made perpetual.

The right to an account for waste already committed is incidental to the right to file a bill to prevent future waste, though no bill will lie merely for an account for waste done, because the plaintiff has an ample remedy at law. Will. Eq. Jur. 139; 1 Stor. Eq. Jur. § 518; Jer. Eq. Jur. 510; 1 Mad. Ch. 149.

Upon a motion for that purpose, a master may be appointed to take an account of the wood cut, beyond what the defendant might rightfully cut for the use of the farm, if the parties are unable to agree.

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## POERTNER v. RUSSEL et al.

(Supreme Court of Wisconsin, 1873. 33 Wis. 193.)

Appeal from the County Court of Milwaukee County.

Appeal from an order adjudging the appellants in contempt for violating an injunction order.

The plaintiff commenced an action against the appellants and others, and alleged in his complaint that he leased to the defendants certain premises and a certain mill thereon, situated in the city of Milwaukee, for one year from March 1, 1872; that it was provided in such lease "that all improvements which might be put on said premises by said lessees during the said term, should, by said lessees, be left upon said premises, and should be and become the property of the plaintiff so soon as they should be annexed to said premises, and without any charge or expense to said plaintiff"; that the lessees put into said mill "certain machinery known as and called a middling separator, and machinery and fixtures connected therewith and appurtenant thereto, and that the same has become and is annexed to said premises, and constitutes part of the machinery of said mill, and is now, by virtue of said agreement, the property of this plaintiff"; that the defendants threaten and are about to remove such machinery from the mill, and a portion of them "are now at work, by the instruction and procurement of said other defendants, in removing said improvement and machinery from said premises, and that it is the intention of said defendants not to leave such improvements on the said premises as required by said agreement, but to carry off the same and wholly deprive the said plaintiff thereof, to his irreparable damage and injury"; and that the plaintiff is informed and believes that the defendants are pecuniarily irresponsible, and an action for damages would not afford him adequate relief. The complaint prayed for an injunction.

On the 17th day of February, 1873, the county judge granted an injunction against the defendants, restraining them and each of them,

their agents and attorneys and each of them from removing, separating or interfering with such machinery and fixtures, until the further order of the court. The injunction order was duly served on the defendant George W. Shepard during the afternoon of said February 17, and on the defendants Ashkell K. Shepard and Harvey Russel about noon of the following day.

On the 5th day of March, 1873, upon certain affidavits which tend to show that the injunction order had been violated by the appellants, the county judge made an order upon them to show cause before the county court (that being the court in which the action was pending) why they should not be punished for the alleged misconduct. * * *

LYON, J.[25] It is claimed by the learned counsel for the appellants, that the complaint does not state a case proper for equitable relief, and hence that the county court has no jurisdiction to grant the injunction which, it is alleged, the appellants have violated.

The jurisdiction of a court of equity to entertain an action brought by the owner of the reversion, against the tenant, whether for life or for years, to stay waste threatened or being committed, and to interpose its injunction to prevent such threatened waste, cannot be doubted. This jurisdiction has been so universally asserted and exercised by courts of equity, that all of the legal remedies for waste have nearly fallen into disuse. The common law action for waste is of rare occurrence in modern times, and the various remedies given by the statute of Gloucester (13 Edw. I, ch. 22) and other English statutes, have given way to the action on the case for waste; and the latter, in its turn, has been very nearly superseded by the action in equity to stay waste. This equitable jurisdiction is sustained on the ground that the remedy at law is at best an inadequate one. Of course there can be no remedy at law until the waste is actually committed, and it is well settled that the reversioner need not wait until waste has actually been committed before bringing his action.

"If he ascertains that the tenant is about to commit any act which will operate as a permanent injury to the estate, or if he threatens or shows any intention to commit waste, the court will at once interfere and restrain him by injunction from doing so." Bouvier's Law Dictionary, title "Waste," subdivision 9, and cases cited.

To illustrate the inadequacy of the remedy at law for waste, it may be observed that at common law the action could only be maintained against tenant in dower, tenant by the courtesy, and guardian in chivalry, and the remedy was extended by statute against tenants for life and for years, and some others. Jefferson v. The Bishop of Durham, 1 Bos. & P. 105; Eden on Injunctions, ch. VIII, p. 104, 1st Am. Ed. An action on the case will not lie at law for permissive waste (that is, the neglect or omission to do what will prevent injury); but in equity an injunction will be granted to restrain permissive as well as voluntary waste. 2 Story's Eq. Jur. § 917, and cases

[25] The statement of facts is abridged and part of the opinion is omitted.

cited. In the same section Judge Story sums up the whole question of equitable jurisdiction in such cases in the following language:

"From this very brief view of some of the more important cases of equitable interference in cases of waste, the inadequacy of the remedy at common law, as well to prevent waste as to give redress for waste already committed, is unquestionable, and there is no wonder that the resort to the courts of law has, in a great measure, fallen into disuse. The action of waste is of rare occurrence in modern times; an action on the case for waste being generally substituted in its place, whenever any remedy is sought at law. The remedy by a bill in equity is so much more easy, expeditious and complete that it is almost invariably resorted to. By such a bill not only may future waste be prevented, but, as we have already seen, an account may be decreed and compensation given for past waste."

And again in section 919, the learned author says:

"The jurisdiction, then, of courts of equity, to interpose by way of injunction in cases of waste, may be referred to the broadest principles of social justice. It is exerted where the remedy at law is imperfect, or is wholly denied: where the nature of the injury is such that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief; and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject matter."

In this case, the complaint shows that certain machinery, the property of the plaintiff and part and parcel of the realty, was about to be taken down and removed by the defendants, to the great and irreparable mischief and injury of the plaintiff and his property. Within the principles above stated, this is enough to give the court jurisdiction to award the injunction, without the further averment of the insolvency of the defendants. * * *

BY THE COURT. The order of the county court is affirmed.

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## LOWNDES v. BETTLE.

(In Chancery, 1864. 33 Law J. Ch. [N. S.] 451.)

This was an injunction suit. The bill was filed, by William Selby Lowndes the elder and William Selby Lowndes the younger, against Jonathan Bettle, to restrain him from paring, cutting or otherwise injuring any grass, turf or sods upon the plaintiffs' estates, or any part thereof, and from cutting, felling or otherwise injuring or destroying any of the timber or timber-like, trees, brushwood, underwood or shrubs, growing, standing and being on the said estates, and each and every part thereof; and from doing or permitting any other act, matter or thing which might interfere with or be prejudicial to the free and uninterrupted rights of the plaintiffs to the ownership and enjoyment of the said estates, and each and every part thereof; that he might pay the costs, and for further and other relief. * * *

William Selby Lowndes the younger had never been married. Notwithstanding the time during which the plaintiffs and their ancestors

had been in possession of the estates, continual claims had been made to them, and amongst others, by a family named "Bettle."

In September, 1861, the defendant sent a notice to the plaintiffs to the effect that the tenants of the estates were not to pay their rents to "the present trustee, Mr. William Selby Lowndes." In May, 1862, he wrote to Mr. Lowndes stating his intention of "attending in a few days to assert his right to the estates and to take such steps as he might be advised to dispute and disturb the possession." In the same year he wrote another letter to a similar effect, more strong in its terms than the former, alluding to a destruction of twelve trees on the estates, by a claimant to the property, a few years previously, and threatening, "so soon as it suits my convenience and that of my friends, to proceed to different parts of your estates (so called) and there cut down trees," &c., as an assertion of "my just claim, and as the real owner of the Selby estates."

The bill charged that the defendant had no right or claim to the estates whatever, but that even if he had he was barred by the Statute of Limitations; that the estates had valuable timber upon them, and choice shrubs, and ornamental trees, the cutting down or injuring of which would do irreparable mischief and damage; that the defendant threatened to cut sods and trees; and the bill prayed an injunction to the effect already stated.

On the 12th of June, 1862, a motion was made and an order for an interim injunction obtained on an affidavit of service, the defendant not appearing. Subsequently the defendant appeared and put in his answer, which contained allegations of his right to the estates as heir-at-law, and stated that he did not now intend, by himself or his agents, to enter forcibly, but to prosecute his claims as heir-at-law under the direction of this Court. He had not, however, entered into any evidence in support of his claims.

The cause now came before the Court upon an application to make the interim injunction perpetual.

KINDERSLEY, V. C.[26] * * * It was contended, for the defendant, that assuming the truth of all those facts, the Court could not, according to the law as administered by it, interfere to restrain such acts as had been threatened; and several cases were cited, although only some of the many which exist on the subject. * * *

The difficulty arises (in part, no doubt) from the very considerable change which has taken place in the views of this Court on the subject of granting injunctions to restrain injury to property, and from the fact that the Court will now do what in the time of Lord Thurlow, and the earlier days of Lord Eldon, it would not have done. Lord Eldon, in the earlier part of his time, alluded to the change even then in progress, and to the facility in granting injunctions as being even then greater than in former times. The other Judges subsequently

[26] The statement of facts is abridged and parts of the opinion are omitted.

advert to the continuous modifications, which in some degree also, and not unnaturally, accounts for the conflict of authorities that now exists. Another cause for such apparent conflict is, the not distinguishing the cases under certain heads. Now the proper mode of arranging them, I think, is this,—at least, it would be convenient thus to distinguish them. There should be two distinct classes of cases: the one where the party against whom the application for the injunction is made is in possession; and the other, where the plaintiff is in possession and is asking the Court to protect the estate. A priori, it is obvious that the Court will draw a clear distinction between the two classes of cases. If a man claims to be the owner of an estate of which he either is in possession, or in a position tantamount to that, the Court will be very slow to interfere to restrain such an apparent owner from doing those acts which an owner so situated may properly do. There is a wide difference between such a case and that of a person claiming to be owner (whatever the ground of this claim), not taking proceedings at law to recover, but coming on the owner's estate, and doing acts injurious to it. Therefore, it appears to me the cases are to be arranged under these two heads. I have endeavoured to do that, but at the same time I am bound to say, that the great difficulty is to ascertain which party is in possession; notwithstanding that these are the two obvious heads (which I have mentioned), and having so divided them, the next thing is to discover the law of this Court on the subject, so far as it can be extracted from the authorities. First, then, I may observe that, according to the older cases, a wide distinction was taken between what was then called waste and trespass. The term "waste" was used in the sense of spoliation, though with a technical and personal application. It was considered waste when the plaintiff and defendant had a privity of title, such as that of tenant for life and remainderman. If the tenant for life committed waste the remainderman could ask for an injunction. So in the case of landlord and tenant; then there was a privity, and the tenant in possession doing acts amounting to waste the landlord could have got an injunction. It was by reason of the privity of title that the law called it waste. But when parties did not claim in that way, but by an adverse title, any act done by the one or by the other of them was then called "trespass." That act might have been one of destruction or spoliation. That broad distinction runs through all those cases.

I am not now going to consider the cases of waste, but only those of trespass, as distinguished from waste, which, in strictness, ought to be called spoliation, and not waste. Referring then only to cases of trespass, those ought to be ranged again under two heads, viz., the one where the defendant is in possession and the plaintiff seeks the injunction, and the other where the plaintiff is in possession and asks to restrain some acts done by the defendant who claims adversely.

With respect to the cases where the defendant is in possession, of

course, one can hardly conceive a plaintiff asking for an injunction unless on an adverse claim, each claiming to be the real owner of the estate. The earliest case under this head was that of Hamilton v. Worsefold, before Lord Thurlow. * * *

Lord Thurlow at first considered it as trespass, but ultimately did restrain the defendant and the tenants (Reg. Book, [A] 1786, fol. 1).

The next case was Pillsworth v. Hopton, in 1801. There, the defendant being in possession, the plaintiff claimed under an adverse title, and Lord Eldon refused the injunction. * * *

I now come to the cases which resemble the present one, where the plaintiff was in possession. Those again are to be divided under two subordinate heads: First, where the defendant claims under a colour of right; and secondly, where he is an absolute stranger. It is not easy to distinguish these cases; the latter may be cases of mere spite: still there are such. In Mogg v. Mogg, 2 Dickens, 670, the injunction was refused on the ground that the defendant was a mere trespasser, and an action would lie. In Mortimer v. Cottrell, 2 Cox, 205, the injunction to stay waste was refused, because it was a case of trespass and the defendant might at law have been turned out immediately. Mitchell v. Dors, 6 Ves. 147, was a case of coal-mines in work; there it was held to be trespass and not waste, and yet an injunction was granted, because being coal-mines the mischief was considered irreparable. * * *

I now come to the cases which more immediately resemble the present one. In this case Mr. Lowndes and his ancestors have been in possession of the property for eighty years, and the defendant claims a title, not as a mere stranger, but saying that he is heir to the property, and that the statute is no bar, because he has removed it by having come, and by claiming to come upon the estate, and by having cut down trees as he pleased in order to assert his right. With respect to cases of this kind, I may observe that an injunction was granted in all cases but one; but there were elements in some of the cases which are not to be found here.

Those cases are six in number: one was before Lord Camden, not reported originally, but cited in Mogg v. Mogg. No name is there given to it; but it was a case where persons were cutting timber under colour of a right to estovers. The plaintiff, who was the lord of the manor, probably alleged the cutting to be beyond what was wanted for estovers; at all events, the injunction seems to have been granted. Lord Thurlow, however, said that the case did not apply to Mogg v. Mogg; for in that case (as referred to by the plaintiff's counsel in Mogg v. Mogg), there appeared to be a right to something in the defendants, though perhaps they carried it beyond what such right went to; and that until such right was determined, it was very proper to stay them from doing an act which, if it turned out that they had no right to do, would be irreparable. But in Mogg v. Mogg the defendant had no interest; he was a mere trespasser. As such, an

action of trespass would lie against him; and therefore Lord Thurlow would not grant the motion. It was not, as I take it, because the mischief might not have been capable of compensation, but because it was a destruction of part of the inheritance. In the case of Robinson v. Lord Byron, 1 Bro. C. C. 588, the plaintiff was in possession of his own water-mill. The defendant was the owner of the stream above the mill, and in order to vex the plaintiff, sometimes kept back water from the mill, and sometimes deluged it with water. In that case it was difficult to say which was in possession; but Lord Byron was restrained from so using the stream as to do mischief to the plaintiff's mill. * * *

In all these cases (except Smith v. Collyer, 8 Ves. 89), where the plaintiff was in possession and the motion was made for an injunction to restrain the defendant, who claimed under an adverse title, the injunction was granted. Many other cases might be referred to containing dicta which tend to shew the continually-increasing feeling and opinion among the learned Judges, of the impropriety of preserving the distinction between trespass and waste, and the injustice of refusing to interfere in all cases of trespass.

But I have now to consider what the Court is to do in this case, where the plaintiff is in possession, as it seems lawfully, and is asking for an injunction to restrain the defendant who is out of possession, but who claims a title (however incapable it may be of being supported) as heir-at-law to the property. He has also given notice that whenever it suits his convenience he will cut down trees, cut sods, &c., and he has reminded the plaintiff of twelve trees cut down by him or his family on a former occasion, which is as much as to say that he will do the same thing again. If a person desires to do a certain act for the purpose of asserting a right, or keeping alive a claim, this Court will not restrain him from doing the act if it is necessary to his title, and for his benefit, but nothing can be more absurd than the notions, not to say the delusion of the defendant; he has only to refer to any lawyer, who would say to him, "How can you do any good by cutting down trees?" &c.; but his own opinion was, that although the plaintiff has an eighty years' title, he had a right to the property as heir. Then, again, even assuming that he is the heir, and means to shew his title, he has not shewn it. No doubt, under the old rule, his acts would have been tantamount to a trespass. He might, as it is, come on the land and do irremediable damage, incapable of being compensated by money. He might injure the most valuable and ornamental trees, the cost of which could not be compensated for by money. The question, then, would be, whether such acts were against his conscience? That would be the test. It appears to me that the case comes under the head of "irremediable waste," as defined by Lord Eldon, that is, a destruction of the substance of the inheritance; and I think it comes within the cases in which the plaintiff being in possession and the defendant not, an injunction has been granted. I

think, therefore, that under the circumstances, and having regard to what appears to me to be the constant tendency of the decisions upon the subject, viz., to break down the unreasonable distinction between trespass and waste, that this is a case in which the injunction ought to be granted.

I have gone into this case at great length, because of the difficulty of finding the principle upon which to act; I should say, however, that it is this: where a defendant is in possession, and a plaintiff claiming possession seeks to restrain him from committing acts similar to those here complained of, the Court will not interfere, unless, indeed, as in Neale v. Cripps, 4 Kay & J. 472, the acts amount to such flagrant instances of spoliation as to justify the Court in departing from that general principle. Where the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under the colour of right, then the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate, the Court will grant it. But where the person in possession seeks to restrain one who claims by an adverse title, the tendency of the Court will be to grant the injunction, at least when the acts done either do or may tend to the destruction of the estate, I am of opinion therefore that this injunction must be made perpetual.

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## PALMER v. YOUNG.

(Appellate Court of Illinois, 1903. 108 Ill. App. 252.)

January 1, 1882, appellant, Palmer, with one C. Marion Hotchkin, now deceased, leased from Walter R. Roche certain premises described in the bill of complaint for a term ending the last day of April, 1902. In accordance with provisions of the lease the lessees erected a building thereon, and maintained the same. May 1, 1900, appellee, Young, entered into a lease with Sarah Roche and Harriett Albee, successors in title to Walter P. Roche, of the said real estate, for a term of ninety-nine years, "commencing on the 1st day of May, 1902." There was no covenant in this latter lease that there should be a building on the land.

April 11, 1902, appellee filed his bill of complaint setting out the two leases, the erection of the building on the property, and alleging that Palmer claimed the right to remove from the building the elevators, the steam plant, the radiators, the plate glass, the marble staircase and marble wainscoting in said building and threatened to do so. The court was asked to enjoin Palmer from carrying out these alleged threats, on two grounds: first, that such removal would be a violation of appellant's lease with Roche; and, second, that such removal would,

by depreciating the value of said building, greatly injure the rights of complainant.

The court below, on the face of the bill and the recommendation of a master in chancery, issued a preliminary writ of injunction without notice. Defendant Palmer shortly afterward appeared and filed a motion to dissolve the preliminary injunction, and a demurrer to the bill. Both were argued at the same time. The court below overruled the demurrer, dismissed the motion to dissolve the preliminary injunction, and, appellant electing to stand by his demurrer, entered a decree of perpetual injunction against him, granting relief in accordance with the prayer of the bill, and costs against the appellant.

From this decree appellant took an appeal to this court.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

Appellant insists that the injunction was improperly granted and should be set aside because, first, the complainant in the bill was not privity of title with the defendant, and because the complainant had no title to the land upon which it was alleged the defendant was threatening to commit waste; and because appellant has a complete and adequate remedy at law; and because no irreparable injury to the premises was or is threatened. Waste can only be committed by one in the rightful possession of land. That which is waste by such person, if done by a mere intruder or trespasser, would ordinarily be merely trespass. For waste, the remedy by injunction is fully established, and has not only virtually superseded the common law action of waste, but has to a great extent taken the place of the action on the case for damages.

In modern equity practice an injunction to restrain waste will be granted in many instances where no legal action could be maintained, although the interest of the injured party is legal, and also where the estate of the injured party is entirely equitable. An injunction may also be granted to restrain threatened waste although none has been committed. Pomeroy's Equity Jurisprudence, §§ 237 and 1348.

Anything is waste which changes the character of the inheritance; hence, even acts which increase the pecuniary value of an estate may amount to waste; such waste is called meliorating waste. Bispham's Principles of Equity, 430–432.

The common law remedies for waste were insufficient; for, among other reasons, that they did not stop the injury that was going on; hence, course of equity interposed by injunction to restrain the defendant from continuing to commit waste; and its remedy has been found so simple and so effective that it has to a great extent superseded the common law action. At common law the only parties liable for waste were the tenants of legal estates, i. e., estates which were created by act of law as distinguished from those created by act of party, and which were termed conventional estates.

At common law, when a limited estate was created by deed, the particular tenant was not liable for waste, unless it was so expressly stipulated; because the law would not protect parties who did not care to protect themselves. The liability for waste was afterward, by statutes of Marlbridge, 52 Henry III, chapter 23, and of Gloucester, 6 Edward I, chapter 5, extended to conventional tenants for life and to tenants for years.

The injunction to restrain waste may be granted in other cases besides those of particular tenants and remaindermen. At common law an action for waste would not lie by a remainderman against the tenant for life, if there were a mesne remainderman; but in equity the ultimate remainderman was allowed to maintain a bill for an injunction. Bispham's Principles of Equity, § 433; Story's Equity Jurisprudence, § 913.

The interference of courts of equity by injunction to restrain waste was originally confined to cases founded in privity of title, but at present the courts have enlarged the jurisdiction so as to reach cases of adverse claims and rights not founded in privity—even to instances of cases of trespass attended with irreparable mischief. Story's Equity Jurisprudence, § 918.

The relief obtainable at equity has been extended to cases wherein the titles of the parties are purely of an equitable nature and to restrain waste by persons having limited interests in property, on the mere ground of the common law rights of the parties and the difficulty of obtaining an immediate preservation of the property from destruction or irreparable injury by the course of the common law. Story's Equity Jurisprudence, § 912.

There are many cases where a person is not punishable at law for committing waste, and yet a court of equity will enjoin him at the instance of a party who could not maintain an action at law against him for such waste; as, where there is a tenant for life, remainder for life, remainder in fee, the tenant for life will be restrained, by injunction, from committing waste, although if he did so no action of waste would lie against him by the remainderman for life, for he has not the inheritance; nor would an action for waste lie by the remainderman in fee, by reason of the interposed remainder for life. High on Injunctions, §§ 686, 687; Story's Equity, § 913.

A ground landlord, may have an injunction against an under lessee to stay waste. So a lessee may be enjoined from making material alterations in a dwelling house. Story's Equity Jurisprudence, § 913.

It was anciently held that a court of equity would not restrain waste except upon unquestionable evidence of plaintiff's title. The more modern doctrine and the common practice is, in cases where irremediable mischief is being done or threatened, going to the substance of an estate, to issue an injunction though the title to the premises be in litigation. Beach on Modern Equity Jurisprudence, § 730.

In this state it is not necessary to the issuing of an injunction restraining waste that the party in possession should be shown to be insolvent. Williams v. Chicago Exhibition Company, 188 Ill. 19, 58 N. E. 611.

The portions of the building which appellant is enjoined from restraining are clearly a part of the realty which, so far as appears, appellant could not lawfully remove. Bass v. Metropolitan W. S. El. R. R. Co., 82 Fed. 857, 27 C. C. A. 147, 39 L. R. A. 711.

Upon the expiration of a lease, should the lessee fail to remove from the premises or surrender possession of the same, it does not devolve upon his landlord to obtain and give possession of the premises to a succeeding tenant to whom he has leased. Gazzolo v. Chambers, 73 Ill. 75; Cobb v. Lavalle, 89 Ill. 331, 31 Am. Rep. 91.

It does not appear that appellee has a plain and adequate remedy at law for the waste threatened by appellant. Among other reasons, why appellee has not such remedy is appellant's threat to do to the property of appellee that which he has no right to do, even if such action would pecuniarily add to the value of appellee's estate in expectancy.

Without reference to these conditions, appellant's insistence that appellee has a plain and adequate remedy at law is not properly urged upon this appeal, because no such objection was made to complainant's bill in the court below.

The decree of the Circuit Court is affirmed.

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## CROWE v. WILSON.

**(Court of Appeals of Maryland, 1886. 65 Md. 479, 5 Atl. 427, 57 Am. Rep. 343.)**

BRYAN, J. The appellant is possessed of a leasehold interest in a lot of ground in the city of Baltimore, which by the terms of the original lease was demised for 99 years, with a covenant for perpetual renewal. The appellee is seized of the reversion in fee. A bill in equity was filed by the appellee to restrain the appellant from tearing down and removing from the lot a certain dwelling-house which had been erected thereon; and it was alleged in the bill of complaint that if the dwelling-house should be torn down and removed, that the reversioner's security for the rent reserved on the lease would be greatly and irreparably impaired.

We prefer to consider the general question of the rights of the parties to this lease, without at present adverting to the structure of the pleadings. By the common law a lease for any number of years is merely a chattel interest, and is inferior, in legal contemplation, to an estate for life. In England many leases have been made for a thousand years; but they stand on the same footing as leases for one year. The lessees have no freehold in the land, and are described in

legal language as possessed, not of the land, but of the term of years. Many important consequences follow from this principle. The present inquiry does not make it necessary to mention them in detail. It suffices to say that the commission of waste by tenant for years involved the forfeiture of his estate, according to the express provisions of the statute of Gloucester. And waste is defined to be "spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in simple or fee-tail." If such a doctrine should be rigidly applied to the present case, it would follow that the destruction of the house in question would forfeit the estate of the appellant. The doctrines of the common law, however, require considerable modification when they are applied to social, domestic, and political conditions different from those which prevail in the country of its origin. And their inherent wisdom was strikingly manifested in the ease and flexibility with which they were adopted to new and altered circumstances. The law of waste, as understood in England, would have made it impossible for tenants to cultivate the wild lands of this country. It is also inapplicable to the renewable leases in the city of Baltimore. It is a part of the public history of the state that a very large portion of the real estate in this city is held subject to these leases. In a vast number of instances the rent reserved bears a very small proportion to the annual value of the land. In a considerable number it is only "one cent, payable if demanded."

The right of the reversioner depends on fixed principles of law, and is in no way modified by the amount of the rent reserved. If the reversioner can enforce a forfeiture of the lease for waste where the rent is a thousand dollars, it must be no less his right to do so where it is one cent. The lessee has a right, according to the terms of the covenant for perpetual renewal, to make his interest endure forever. It is totally inconsistent with this right to suppose that he has not the absolute control and management of the property. And such has always been the understanding. It may be considered as the local common law of the city of Baltimore, founded on a fixed, uniform, invariable usage reaching back much longer than a century. The covenant of the reversioner is that the tenant and his representatives may hold, occupy, and enjoy the land throughout all future time, provided they pay the stipulated rent. If they continue to pay the rent, and elect to hold the premises by renewals of the lease, the reversioner can never, under any circumstances, obtain possession of the demised premises. It would be utterly and entirely inconsistent with the covenanted rights of the parties to hold that he could interfere with the management of the property by the tenant in any way, which his interest or wishes might suggest. By the common law it is waste, and a forfeiture of the lease, when a tenant converts one species of edifice into another, even though its value is improved. The application of

such a doctrine to the perpetual leases of the city of Baltimore would shock and startle the profession, and would do immeasurable injustice. The forms usually adopted for these leases secure the rights of the reversioner.

In the present case, the lease, following the ordinary course, stipulates for the right of distraint for rent in arrear; and, if any part of the rent shall be 60 days in arrear, for the right to re-enter and hold the property until all arrearages are paid; and, if the rent is in arrear for six months, for the right to re-enter and annul the lease. In certain contingencies, not unlikely to occur, the reversioner may find it requisite to repossess the premises demised. It is sufficiently obvious that his security for his rent is much enhanced by valuable buildings erected upon them, and that this security would be impaired by the destruction of them. Justice, of course, requires that no impediments should be placed in the way of the collection of his rent. Anything which tends to defeat it, or to render it more difficult or uncertain, operates, to such extent, to work him injustice.

We may find some analogies to the present case in the practice of courts of equity in regard to what is called equitable waste, which is defined to be such acts as work manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party who commits them. Among the instances given are such as these: Where a mortgagor in possession fells timber on the estate, and thereby renders the security insufficient; and where a tenant for life, without impeachment of waste, pulls down houses, or does other waste wantonly and maliciously; and where tenants for life, without impeachment of waste, or tenants in tail, after possibility of issue extinct, commit acts in destruction of the estate, or cut down trees planted for the ornament and shelter of the premises. These cases are mentioned in Story, Eq. Jur. § 915. It will be observed that the acts enumerated are within the legal competency of the party who does them. But most of the acts which a court of equity will enjoin, might be committed at law with impunity; and this is usually the ground for equitable interposition. The learned jurist states that the party doing the acts described is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other persons, and is for this reason restrained in equity.

We do not know that a clearer example of equitable waste could be found than the case which the appellee has stated to the bill of complaint. The court below granted the injunction prayed for in the bill. An answer was filed, and the cause was set down for final hearing on bill and answer; no motion having been made to dissolve the injunction. When a motion for the dissolution of an injunction is heard on bill and answer, all the allegations of the bill, which are not denied by the answer, are taken to be true. This is as well settled as any rule of practice can be. But the rule is different if the final hear-

ing is on bill and answer. In such case the answer is to be considered as true in regard to all matters which are susceptible of proof by legitimate evidence; and, if any material matter charged in the bill of complaint has been neither denied nor admitted by the answer, it stands for naught. Warfield v. Gambrill, 1 Gill & J. 503; Dugan v. Gittings, 3 Gill, 138, 43 Am. Dec. 306; Briesch v. McCauley, 7 Gill, 189; Warren v. Twilley, 10 Md. 39. Taking the answer as true in all its statements of fact, as we are bound to do, we find that it clearly appears that the appellant intended to remove the building on the leased premises, and that this removal would greatly impair and endanger the security for the rent reserved. We think, therefore, that the court below was correct in its decree making the injunction perpetual. It will be seen that the right to interfere with the tenant in the management and control of his own property exists only under circumstances which would justify the exercise of the preventive jurisdiction of a court of equity. We do not think that it is just for him to exercise his legal right in such a manner as to render the reversioner's rent insecure. But, as long as this is secured, his power ought not to be questioned to take down and build up, alter, remodel, and reconstruct at his own pleasure.

Decree affirmed, with costs.[27]

[27] "Grey, V. C. (orally). * * * The complainant files her bill, and seeks to restrain the defendant from the removal of a back building, which at present is detached, by severing from the front building, but still remains on her premises. * * * The tenant is put into possession by the landlord, and thereby obtains control of the demised premises. His possession is that of his landlord. It is inequitable that he should be permitted so to use his possession as to destroy the landlord's reversion, leaving him to an action of law for his remedy. On the question, then, of jurisdiction, the question presented is simply this: Has the court of chancery power to enjoin a tenant in possession from removing a portion of the real estate off the demised premises, and thereby destroying them for their accustomed use? I do not think there ought to be any question that this court has in such cases full jurisdiction, and that the court ought, under such conditions, to issue a writ, and restrain the removal. * * * There is also in the bill a suggestion as to a restoration of this hardware building as it was before the defendant severed it. As to that, I think a sufficient remedy can be obtained by the recovery of damages. I am not willing to advise the issue of a mandatory injunction for restoration. If relief for damage done is sought, the complainant has a complete remedy in the courts of law. I will advise the issue of an injunction to restrain the defendant from removing the back building of the hardware store from the complainant's premises.

"Mr. Pancoast: A perpetual injunction?

"The Vice Chancellor: Yes; this is on final hearing." Fortescue v. Bowler et al. (1897) 55 N. J. Eq. 741, 38 Atl. 445.

## PEER et al. v. WADSWORTH et al.

(Court of Chancery of New Jersey, 1904. 67 N. J. Eq. 191, 58 Atl. 379.)

EMERY, V. C.[28] The complainants, as owners of the fee and lessors, file this bill against Wadsworth, their lessee, and the Goerke Company, a sublessee of part of the leased premises, to enjoin the violation of a covenant in the lease relating to cutting through the walls of the building on the premises, and to compel the restoration of the walls to their original condition when leased. The premises leased to Wadsworth comprised a four-story building, No. 157 Market street, in the city of Newark, and a building adjoining it in the rear, in the shape of an L, fronting on another street; this L extension being known as No. 12 Library court. * * *

After the execution of this sublease, and about the middle of September, 1902, the defendant company cut down to the floor a window in the eastern wall of the second story of 157 Market street, converting it into an open passageway, and constructed from it a bridge connecting with a similar opening in 155 Market street. Subsequent to the filing of the bill, similar connections by the conversion of windows into passageways and by bridges built into the wall, have been made between the third and fourth stories of these buildings. The former entrance to the second story of No. 157 Market street from the first story has been closed up by the lessee and the subtenant, and the entire access to the second, third, and fourth stories of the complainants' building is now from the defendant company's other buildings in Market street. The bridges over the alley, which are fastened at one end in the complainants' buildings, are now used for providing the sole ingress and egress into the three upper stories of their building from the defendant's other buildings. All of these alterations or erections and this use of the building have taken place without the written consent of either of the complainants, and the first bridge was constructed during the absence of both the owners from the city, and without their knowledge. These alterations come within the reach of the covenants in both of the leases, and, as I think, they constitute such a substantial alteration of the building, and in its use, as to constitute a waste of the premises. At law there is no privity of estate or contract between the original lessor and the subtenant. 1 Taylor, L. & Ten. (8th Ed.) §§ 109, 448. But in equity a subtenant who enters on the land is chargeable with notice of the covenants in the lease relating to its use. Id. § 109; Coster v. Collinge, 3 Myl. & K. 283. And the landlord has the same remedy in equity against the subtenant as against any other purchaser with notice. In this case the sublease was expressly made with reference to the covenants of the orig-

[28] Parts of the opinion are omitted.

inal leases, restricting the right to open the walls of the building without written consent of the lessors. * * *

Independent of the jurisdiction to enforce covenants, the injunction in this case may properly be granted on the ground that the changes made by the defendant company are material alterations of the building, which constitute waste. Windows admitting light are discontinued, and openings for doors substituted—a material difference in the easement in the adjoining alley. A subtenant may be enjoined from committing waste. Farrant v. Lovel, 3 Atk. 723. Complainants are therefore entitled to a mandatory injunction requiring the removal of the bridges from the walls and alley, and the restoration of the windows, and a perpetual injunction against the erection of bridges in the future. On the application for preliminary injunction, the defendant company, as a condition for denying it, gave a bond to pay damages, to be assessed by this court. I will hear counsel on the order or decree to be made in reference to the damages.

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## FREEMAN et al. v. UNITED STATES TALC CO.

**(Supreme Court of New York, Appellate Division, Third Department, 1912. 151 App. Div. 732, 136 N. Y. Supp. 233.)**

Appeal from Special Term, St. Lawrence County.

Action by Frank N. Freeman and another, individually and as executors of the will of Nelson H. Freeman, deceased, against the United States Talc Company. From an order vacating a temporary injunction, plaintiffs appeal.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

SMITH, P. J. The action is brought to restrain the defendants from removing from leased property certain timbers, tracks, supports, and other structures in a talc mine. The property had been leased by the plaintiff to the defendant, with a right to terminate the same by the defendant, and with the provision that, in case of terminating the lease, the party should have the right and privilege "to take and remove any and all buildings, machinery, and tools of whatsoever nature that they may have on said premises, or may have put thereon." The lease further provided that upon the termination thereof the said property "shall be left in a good and workmanlike condition." The papers show that to remove the staircases, the tracks, and the supports in the mine would endanger the mine, and make possible the caving in thereof, and render it impossible to get the water out, thus greatly impairing its value. If this be true, it would seem that it was not within the contemplation of the lease that such supports, stairs, and tracks should be removed. Whether or not the lease contemplated that certain particular structures should be allowed to

remain, in order to leave the mine in a good and workmanlike condition, depends so largely upon the nature of those structures, and upon the necessity thereof to protect the mine and keep the walls safe from falling, that in our opinion it should properly be left to the trial court for the determination upon the evidence there to be produced.

The criticism is made that the affidavits are insufficient, as stating the facts upon information and belief, without alleging why the affidavit of the informant is not produced. The affidavit shows, however, that defendant's workmen were found removing the buildings and timbers, and shows their statements that they had been instructed to remove these other structures, the removal of which is claimed to impair the value of the mine. This information would seem to be sufficient to authorize the granting of the injunction, without attempting to get the affidavits of these parties that such was their instruction. See Finegan v. Eckerson, 32 App. Div. 233, 52 N. Y. Supp. 993.

These views lead to a reversal of the order vacating the injunction, with $10 costs and disbursements.

Order vacating injunction reversed, with $10 costs and disbursements, and motion denied, with $10 costs. All concur, except KELLOGG, J., who concurs as to the supports, and otherwise dissents.

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## USBORNE v. USBORNE.

**(In Chancery before Lord Hardwicke, Chancellor, 1740. Dickens, 75, 21 E. R. 196.)**

The order of this date states, that the plaintiff, under an assignment, was entitled to a mortgage term of 500 years of two farms and premises, for securing £630 and interest from the defendant Usborne, subject to redemption: that Usborne had sold the timber standing and growing on the mortgaged premises to the defendant Bathurst: that he had entered on the mortgaged premises, and cut down several trees, and threatened to cut down more, by means whereof the mortgage security would be lessened. It was therefore ordered that an injunction should be awarded to stay the defendants, &c., from committing any waste or spoil on the premises, &c., until answer and further order.

NOTE.—A similar order in Hopkins v. Monk, A. D. 1742, and in Uvedale v. Uvedale, 7 March, 1740; and by Lord Thurlow, C., in Gross v. Chilton, 25 April, 1782, after a doubt and consideration, thinking it was the mortgagee's fault in permitting the mortgagor to continue in possession.

## SECTION 3.—TRESPASS

### COULSON v. WHITE.

**(In Chancery before Lord Hardwicke, 1743. 3 Atk. 21.)**

LORD CHANCELLOR. Every common trespass is not a foundation for an injunction in this court, where it is only contingent and temporary; but if it continues so long as to become a nuisance, in such a case the court will interfere and grant an injunction to restrain the person from committing it.

### FIELDEN v. COX.

**(Chancery Division, 1906. 22 Times Law Rep. 411.)**

This was the trial of an action brought by Mr. John Ashton Fielden, of Holme Wood-house, Holme, Huntingdonshire, against Mr. G. L. Cox, Mr. Rupert Brooke, Mr. Neville Brooke, and Mr. Justin Brooke, for an injunction and damages in respect of alleged trespasses by the pursuit of moths and other insects on the Holme Wood estate and a public road or highway called the Holme Lode-road, by which the estate is intersected.

The plaintiff's estate contains a great amount of game, and at the time of the defendants' visit to the neighborhood there were pheasants sitting close to the road running across it, which is a public highway. Mr. Cox, one of the defendants, was at the time of the visit a medical student, and is a B. A. of Cambridge. He is now 22 years old. The other defendants were three brothers, rather younger than Mr. Cox. The visit took place in June and July of last year, and one of the brothers was only down one day, returning home the following day. As Mr. Buckmaster observed, he "went to catch a butterfly and caught a writ." During their visit the defendants occupied a considerable time in catching moths and other insects; and the principal complaint against them was that they had visited the road and trespassed thereon by using it, not for passing and repassing as wayfarers, but in a wrongful manner by frequenting and stopping upon it for hours at a time by night as well as by day, and setting appliances and lights thereon for the purpose of carrying on their pursuit of attracting and collecting moths or other insects. There was also a complaint that Messrs. Rupert and Justin Brooke had actually entered one of the coverts and traversed it with lighted lamps. This gang of desperate men, as one of their own counsel described them, had, when tackled by a solicitor's clerk in pursuit of their solicitors' names, &c., and armed with a solicitor's letter for three of the four, obtained from the

clerk a definition of an injunction, and told him that they had no solicitor, and would accept personal service. They had also performed a dance to relieve their feelings, but had ultimately accepted a suggestion from the clerk that they should leave the neighborhood, and give their word of honour not to repeat their acts. Some evidence was adduced to show damage. Some peculiar kind of grass abounding on the estate, and said to be highly inflammable, was produced, and it was also alleged that sitting hen pheasants would be disturbed by the flashing of lights, and that the damage by a nest being deserted was 25s. It was not alleged that the defendants, all of whom gave evidence, behaved otherwise than in a civil and gentlemanly manner.

Mr. Rawlinson, in support of his case as to the trespasses by what was done on the highway—putting up sticks and a sheet and using lamps—referred to Harrison v. Duke of Rutland, [1893] 1 Q. B. 142, and Hickman v. Maisey, [1900] 1 Q. B. 752. He also referred to Merest v. Harvey, 5 Taunt. 442.

Mr. Buckmaster, for the defendants, submitted that as there was no threat or intention to repeat even what had been done, the High Court would not interfere by injunction; that no damage had been shown; and that the action was frivolous, vexatious, and contemptible.

MR. JUSTICE BUCKLEY, in delivering judgment, said that the plaintiff had a passion for sporting, and the defendants had a passion for catching moths. The plaintiff was the owner of land near the line of the Great Northern Railway, and not far from Whittlesey Meer, which was drained in or about 1848. This land was a valuable pheasant ground. Pheasants were there in considerable quantities, and there were many hen pheasants sitting at the time when the matters complained of took place. The coverts were crossed by a public road, and the defendants, using it properly, had a perfect right to be upon the road. The action was brought for "an injunction to restrain the defendants and each of them from using the said road otherwise than in a reasonable and usual manner as a highway, and from repeating" certain alleged "acts of trespass thereon, and from breaking, or entering, or otherwise trespassing upon the lands of the plaintiff," and for damages. The four defendants were really lads, whose ages were from 18 to 22 years. The first defendant, Mr. Cox, was a B. A. of Cambridge, and the other defendants were three brothers. All of the defendants were persons who might be expected to behave civilly and properly. On June 19, 1905, the defendant Cox, who was putting up sticks and a sheet on the road, for the purpose of catching moths, was addressed by one Tant, an under-keeper of the plaintiff's. Tant told Cox that in the rough ground at the side of the road there were pheasants' nests, and he obtained from Cox a promise that he would not go on the fen at night. From that date to July 1 Cox was at the same place, and although Tant appeared, nothing further was said. On July 1, which was a Saturday, Tant spoke

again to Cox and complained of the untidiness of the highway, and Cox, who had turned out the contents of an acetylene lamp and whittled a stick, answered the man civilly and expressed his regret. On July 2 (Sunday) the plaintiff's keepers told these youngsters that they had received orders to express the plaintiff's wish that they would refrain from erecting a sheet and using other methods of catching moths on the estate or the highway, and to tell them that if they did not so refrain the keepers were to take "the necessary steps" to prevent them. On that day Cox was on the railway embankment on which the plaintiff had shooting rights. He was asked for and gave his own name and address, and was asked by one of the keepers for the names and addresses of his friends, two of the Brookes, who had been on the road and were in the woods; but he refused to give this information. Then two defendants lit their lamps and caught some moths, and on being met by the keepers and told they had no business there they said they had done no harm and that if they had done any damage they would pay for it. It was technically wrong to go on the coverts, and the principal acts of trespass had now been stated. Cox had said he would not go on the fen, but he had gone to look at an iron post and a wheelbarrow. Cox had trespassed, and Neville Brooke had also gone on to look at the post. On Monday, July 3, Brown, a clerk of the plaintiff's solicitors, gave to three of the defendants a letter from the solicitors, in which, after complaints about the moth-catching, there was the following passage:

"We have to request that you will kindly hand the bearer the name of your solicitor, who will accept service of proceedings which Mr. Fielden feels compelled to institute against you in his Majesty's High Court, claiming an injunction to restrain you from entering his property, and this in order to avoid a personal service of the writ."

The boys at this had been taken aback, and at first executed something like a war dance. But they had soon sobered down, and asked Brown what they ought to do. He suggested that they should at once leave the neighborhood and give their word of honor not to do it again; and this they did. Whether Brown told his employers what had occurred his Lordship did not know, but the frame of the boys' minds was to give their word and to act upon it. On July 5 the writ in the action was issued. Now an injunction was a formidable weapon and one which was not to be invoked lightly. An order for an injunction was not made unless the Court was satisfied that there was an intention to do the act sought to be restrained. In an old bill in Chancery for an injunction there was always and necessarily, an allegation that the defendant threatened and intended to do the act sought to be restrained. But these defendants never had threatened or intended from first to last, and had never intended to infringe any rights of property. So much for the injunction. But the plaintiff also asked for damages; and two of the defendants, Rupert and Justin Brooke, in their pleading, while denying that the plaintiff had

suffered any damage, said that they brought into Court the sum of 1s., tendered before action brought, and pleaded that that sum was sufficient to satisfy the plaintiff's claim in respect of their trespasses. In Merest v. Harvey, 5 Taunt. 442, the Court, in 1814, held, upon a declaration for breaking the plaintiff's close, treading his grass and hunting for game, and other wrongs, that £500 were not excessive damages for a trespass in sporting, persevered in in defiance of notice, and accompanied with indecent and offensive demeanour; and one of the Judges, Mr. Justice Heath, observed that it went to prevent the practice of duelling if juries were "permitted to punish insult by exemplary damages." That had no application to the case now before the Court. The defendants had not been insolent or asserted any rights, but had thought that they were doing no harm to any one. They had not asked for leave, because they believed that leave would not be given. There was no evidence of any damage. It was said that the lamps might have set fire to the place; but there was no necessity to bring an action for damages. It followed that the writ ought never to have been issued against these four schoolboys, as they might be called, after they had given their word of honor, and the action was oppressive to the last degree. The plaintiff was entitled to an order for payment out of Court of the 1s. paid in, but he must pay the defendants' costs of the action.

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## LIVINGSTON v. LIVINGSTON.

**(Court of Chancery of New York, 1822. 6 Johns. Ch. 497, 10 Am. Dec. 353.)**

The bill stated, that the plaintiff was seised and possessed, by himself and his tenants, of a tract of land in the manor of Livingston, being part of great lot No. 4, in the town of Livingston, and lying to the north and west of Ruleff Janse's Kill. That he derived title by the will of his father; which he set forth, and the title, as far back as 1728. That the defendant has, in his own right, and in right of his wife, a number of tenants, in the town of Clermont; and they, by authority derived from or under him, had, shortly before filing the bill, entered upon the land of the plaintiff, and cut wood and timber; and the defendant declared, and directed his tenants to declare, that he and they had right so to do, for the use of their houses and upon their farms in Clermont. That the plaintiff's father and grandfather always held and enjoyed the said manor as an absolute and unencumbered estate, in fee, saving only the rights of their own tenants, holding under them; and no right to cut wood there, by any person residing in Clermont, had been assented to or exercised. That in 1812, Elias Hicks, who resided in Clermont, as tenant of R. R. Livingston, father of the wife of the defendant, and under whom the defendant claims, cut wood on lot No.

4, and in that part now possessed by the plaintiff, and the father of the plaintiff sued him in trespass; that Hicks undertook by plea, to justify, as tenant of R. R. L., who claimed, for himself, and his tenants of Clermont, a right to cut and carry away wood from the manor of L., necessary for their families and farms in Clermont; and the agent of R. R. L. defended the suit. That the cause was tried at the Columbia circuit, in August, 1815; and, after the defendant, had given his proof, the Chief Justice ruled, that the plaintiff was entitled to recover; but a verdict was taken for the plaintiff, at his request, subject to the opinion of the Supreme Court, upon a case to be made, and the damages were assessed at $100 for the wood and timber cut. A similar verdict was taken, also, in another similar case, against Marks Platner. That the case against Platner was argued and decided in the Supreme Court, in favour of the then plaintiff, (a tenant of the father of the plaintiff,) and the defendant, and all claiming under him, have desisted, since, from trespasses on the wood, &c., until the death of the father of the plaintiff, in November last. That the plaintiff has given directions to have the case brought to argument in the suit against Hicks; but the trespasses, in the meantime, will greatly injure the value of the plaintiff's estate. Prayer, for an injunction to restrain the defendant and his tenants from cutting timber, &c.

E. Williams for the plaintiff.

THE CHANCELLOR [JAMES KENT]. This is not the case of a stranger entering upon the land, as a trespasser, without pretence of right, and cutting down timber. In such a case, Lord Thurlow, in Mogg v. Mogg, Dickens' Rep. 670, refused to interfere by injunction. This is analogous to a case before Lord Camden, referred to by the counsel in Mogg v. Mogg, and which Lord Thurlow seemed to approve of. It was, where a defendant claimed a right to estovers and, under that right, cut down timber; there was a claim of right, and, until it was determined, it was proper to stay the party from doing an act, which, if it turned out he had no right to do, would be irreparable. So also, in Harson v. Gardiner, 7 Vesey, 305, the injunction was granted, where the defendant claimed common of pasture and estovers; and, in that case, Lord Eldon observed, that the law, as to injunctions, had changed very much, and they had been granted much more liberally than formerly. They were granted in trespass, when the mischief would be irreparable, and to prevent a multiplicity of suits.

In Mitchell v. Dors, 6 Ves. 147, the defendant, in the process of taking coal, had begun to work into the land of the plaintiff, and though this was strictly a trespass, yet the injunction was granted, because irreparable mischief would be the consequence if the defendant went on. In Hamilton v. Worsefold, and in Courthope v. Mapplesden, 10 Ves. 290, and note, ibid., injunctions were granted against a trespasser entering with permission, or by collusion with the tenant, and cutting timber.

Injunctions granted against trespasses, as well as against waste, under special circumstances.

Lord Eldon repeatedly suggested the propriety of extending the injunction to trespasses as well as waste, and on the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance. The distinction, on this point, between waste and trespass, which was carefully kept up during the time of Lord Hardwicke, was shaken by Lord Thurlow, in Flamang's Case, respecting a mine, and seems to be almost broken down and disregarded, by Lord Eldon. This protection is now granted in the case of timber, coals, lead ore, quarries, &c., and "the present established course," as he observed in Thomas v. Oakley, 18 Ves. 184, "was to sustain the bill for the purpose of injunction, connecting it with the account, in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages."

Cases of trespass, in which injunctions have been granted, in order to preserve the estate from destruction.

The injunction was granted in Crockford v. Alexander, 15 Ves. 138, against cutting timber, when the defendant had got possession under articles for a purchase; and in Tworl v. Tworl, 16 Ves. 128, against cutting timber between tenants in common; and in Kender v. Jones, 17 Ves. 110, where the title to boundary was disputed; and in the case of Earl Cowper v. Baker, 17 Ves. 128, against taking stones of a peculiar and valuable quality at the bottom of the sea, within the limits of a manor; and in Gray v. Duke of Northumberland, 17 Ves. 281, against digging coal upon the estate of the plaintiff; and in Thomas v. Oakley, ubi supra, against exceeding a limited right to enter and take stone from a quarry. In all these cases, the injury was considered a trespass, and in two of them it was strictly so; and the principle of the injunction was to preserve the estate from destruction. But I can safely allow the injunction in the present case, without going to the extent of these latter cases, or following the habit, as Lord Eldon termed it, in Field v. Beaumont, 1 Swanston, 208, of the English Chancery, in granting injunctions in cases of trespass as well as of waste. Here has been one action of law, in which the claim of the defendant to estovers in the lands of the plaintiff has received a decision against him, and there is another suit at law still depending, in which the same question arises. It is just and necessary to prevent multiplicity of suits, that the further disturbance of the freehold should be prevented, until the right is settled; and the case decided by Lord Camden, is a sufficient authority for the interposition asked for in this case.

An injunction is not granted in case of mere trespass, and where there is legal remedy for the intrusion.

The recent decision of the Vice-Chancellor, in Garstin v. Asplin, 1 Madd. Ch. Rep. 150, shows, that it is not the general rule, that an injunction will lie in a naked case of trespass, where there is no privity

of title, and where there is a legal remedy for the intrusion. There must be something particular in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy.

Injunction granted.

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## WALDRON et al. v. MARSH.

**(Supreme Court of California, 1855. 5 Cal. 119.)**

HEYDENFELDT, J., delivered the opinion of the Court. MURRAY, C. J., concurred.

An injunction ought not to be granted in aid of an action of trespass, unless it appear that the injury will be irreparable, and cannot be compensated in damages.

In this case, how the cutting of a ditch through the plaintiff's land would be such an injury I cannot imagine. It is not sufficient that the affidavit alleges that the injury would be irreparable—it must be shown to the Court how and why it would be so, otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's rights.

The injunction in this case ought not to have been granted, and the order dissolving it is affirmed.

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## DAUBENSPECK et al. v. GREAR et al.

**(Supreme Court of California, 1861. 18 Cal. 444.)**

Injunction to restrain defendants from entering within plaintiff's enclosure and digging up and washing away fruit trees, etc., and for damages.

Plaintiffs, some eight years since, took up a tract of about two hundred and twelve acres of land under the Possessory Act of this State, enclosed it and planted it with fruit trees. The complaint avers, in substance, that plaintiffs and those under whom they claim now are and from the year 1852 have been the owners and in possession of a certain tract of land about two hundred and forty feet long by one hundred and sixty feet wide; that in 1857 they planted on said tract one hundred and sixteen apple and peach trees of two years' growth, which are now fruit-bearing trees; that plaintiffs took up, enclosed, and hold said land under the Possessory Act of this State for agricultural purposes; that there is on the land a frame house, the residence of one of the plaintiffs, fifteen ornamental trees and a large quantity of shrubbery, which are permanent and valuable improvements; that defendants on the twenty-first of December, 1860, and at other times entered upon

said premises and dug a ditch thereon for mining purposes, thus washing away and destroying the trees, and that they threatened to continue so to do; that these acts if continued will cause irreparable injury, etc.; that defendants are insolvent; that plaintiffs have already sued defendants for similar trespasses and obtained judgment. Prayer for perpetual injunction, and for damages.

The answer denies insolvency, and then substantially sets up that plaintiffs hold as agriculturists only under the Possessory Act, and that defendants, being miners, have a right to enter for mining purposes; that they have paid the judgment against them for the value of trees heretofore destroyed, and have offered and are ready to pay the value of all trees destroyed, which they put at three dollars per tree.

The case was tried before a jury. The evidence is not in the record, but the agreed statement of facts is as follows, to wit:

Plaintiffs some eight years since took up a possessory claim under the laws of this State, containing two hundred and twelve acres on the mineral lands, fenced and enclosed the same for the purposes of a fruit orchard, and planted the same with fruit trees.

Defendants, being miners, about four years since took up a mining claim inside this enclosure, consisting of a piece of ground about two hundred feet long by one hundred and thirty feet wide, containing about one hundred and thirteen of these fruit trees, most of them bearing fruit, which was sold by plaintiffs. Defendants having destroyed some of these trees in their mining operations, plaintiffs began suit against them, obtained a temporary injunction, and subsequently a judgment for the sum of forty-two dollars, as the value of the trees destroyed. The Court refused to make the injunction perpetual. In pursuing their mining operations defendants again dug up and destroyed several other trees growing on the same piece of ground, having previously tendered to plaintiffs the value of the trees they were about to destroy, which tender plaintiffs declined to accept, and the money was deposited in Court. Plaintiffs again brought suit and obtained another temporary injunction. The verdict on trial was: "We, the jury, award the plaintiffs forty-two dollars damages." Judgment accordingly. Plaintiffs then moved the Court on the pleadings, the foregoing facts and judgment, to make the injunction perpetual against digging up the trees. Motion denied, and an order made refusing to continue the injunction. From which refusal and order plaintiffs appeal. * * *

COPE, J., delivered the opinion of the Court. FIELD, C. J., and BALDWIN, J., concurring.

There is no doubt that the plaintiffs are entitled to the equitable relief prayed for. The verdict is conclusive of the rights of the parties, and the only remedy from which the plaintiffs can derive adequate relief is by injunction. They are threatened with injuries which must, if committed, result in the destruction of their property, and it is the duty of the Courts in such cases to interpose and prevent the

perpetration of the injurious acts. We can hardly conceive of a more appropriate case than the present for the administration of this species of justice; the mischief against which the plaintiffs seek protection is irreparable in its nature, and destructive of interests for which no equivalent can be returned. The fact that the defendants are willing to pay for the property is immaterial, for there are no means of determining whether the value of the property in money would compensate the plaintiffs for its destruction. It may possess a value to them which no other person would place upon it; and there is neither justice nor equity in refusing to protect them in the enjoyment of it, merely because they may possibly recover what others may deem an equivalent in money. The nature of the property, which consists of fruit trees, ornamental shrubbery, etc., gives them a peculiar claim to this protection.

The order appealed from is reversed, and the cause remanded for a judgment in accordance with this opinion.

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## THOMAS v. OAKLEY.

(In Chancery before Lord Eldon, 1811. 18 Ves. 184, 34 E. R. 287.)

The case, stated by this bill, was, that the Plaintiff was seised in fee-simple of an estate, in which there was a stone quarry; and the Defendant, having a contiguous estate, with a right to enter the Plaintiff's quarry, and take stone for building and other purposes, confined to a part of his estate called Newton farm, had taken stone to a considerable amount for the purpose of using it upon the other parts of his estate; praying an injunction and account.

To this bill the Defendant demurred.

THE LORD CHANCELLOR. The case has this specialty: the bill admits the Defendant's right of entry into this quarry, and of taking stones for all the purposes of Newton farm; though, if he takes for any other purpose, undoubtedly an action would lie: but is there any distinction between this case and that of a coal-mine? Is not this taking away the very substance of the estate just as much as in the case of a coal-mine? After the decisions, that have taken place, this demurrer cannot be maintained. The Plaintiff represents himself to be seised as tenant in fee of an estate, in which there is a stone-quarry that is parcel of the estate. He then states, which upon this occasion I must take to be true, that the Defendant, having an estate in his neighbourhood, consisting of Newton farm, among other lands, as owner of that farm has a right to enter into the quarry for the purpose of taking stone, as far as he has occasion for building and other purposes upon that farm: but the Plaintiff represents, that the defendant has taken stone, for the purpose of application, not upon Newton farm only, but also upon his other estates, and to a very considerable amount. That is trespass beyond all doubt, and not waste: as there is no such privity

between the parties as would make it waste. His entry for the purpose of taking stone with reference to Newton farm is lawful: but, if under colour of that right he takes stone for the enjoyment, not of his farm only, but his other estates, his entry to that extent is unlawful, and his act a trespass; and, if it is settled, that the Court will interfere by way of injunction and account, this demurrer cannot prevail.

The distinction, long ago established, was, that if a person, still living, committed a trepass by cutting timber, or taking lead-ore, or coal, this Court would not interfere; but gave the discovery; and then an action might be brought for the value discovered: but, the trespass dying with the person, if he died, the Court said, this being property, there must be an account of the value; though the Law gave no remedy. In that instance therefore the account was given, where an injunction was not wanted. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was acknowledged: and I have frequently alluded to the case, upon which Lord Thurlow first hesitated: a person, having a close demised to him, began to get coal there; but continued to work under the contiguous, close, belonging to another person; and it was held, that the former, as waste, would be restrained: but as to the close, which was not demised to him, it was a mere trespass; and the Court did not interfere: but I take it, that Lord Thurlow changed his opinion upon that; holding, that, if the Defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief, to which in Equity he was entitled. The interference of the Court is to prevent your removing that which is his estate. Upon that principle Lord Thurlow granted the injunction as to both. That has since been repeatedly followed; and whether it was trespass under the colour of another's right actually existing, or not.

If this protection would be granted in the case of timber, coals, or lead-ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course is to sustain a bill for the purpose of injunction, connecting it with the account in both cases: and not to put the Plaintiff to come here for an injunction, and to go to Law for damages.

The demurrer was overruled.

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## NICHOLS v. JONES et al.

**(Circuit Court of the United States, N. D. Alabama, 1884. 19 Fed. 855.)**

In Equity.

The complainant's bill shows that on the seventh of May, 1873, Henry Clews being the owner and in possession of certain mineral lands in Calhoun county, in this state, sold and conveyed for value the same to John M. Guiteau, who afterwards, on the sixth of June,

1876, sold and conveyed to John P. McEwan, and that the latter, with his wife, on the sixth of March, 1880, by proper deed, sold and conveyed the same to complainant, and that all of the said conveyances were properly acknowledged and recorded in the county of Calhoun prior to the year 1880, except the one last mentioned. Further, that the defendants claim title to the same premises by virtue of an attachment suit instituted in the circuit court of Calhoun county early in the year 1880, by defendant Jones against said Henry Clews, a citizen of New York, in which suit said lands were attached, a judgment recovered, and the lands sold by the sheriff of Calhoun county under execution to said Jones on May 31, 1880. Further, that at a former term of this court complainant had instituted a suit for the possession of said lands against one Ashley, a tenant of defendant Jones in possession of the same, and recovered a judgment, which was executed by the marshal, who, under a writ of habere facias possessionem, placed complainant in possession, and that complainant took possession and held the same by his agent and tenant, and that thereafter the defendant, with fraud and illegal influence over the said tenant, dispossessed complainant, possessed himself, and has ever since detained and now holds the same. Further, that complainant has instituted an action for damages against said Jones in the circuit court of Calhoun county, because of his said trespass, which action is now pending. The bill also alleges that the lands are valuable only as mineral lands; that defendants are mining and removing ore, and thereby inflicting irreparable damage; that defendant Jones is insolvent, and defendant Morgan has little, if any, means; and that only by a multiplicity of suits at law can complainant, if at all, protect his rights.

The defendants, by answer not sworn to, deny that complainant is owner of the lands described, and allege fraud and collusion in the conveyances from Clews to complainant's grantor, and the fraud and collusion of complainant and Ashley in obtaining the judgment in this court for possession, which judgment has been set aside and defendants admitted as parties, and that the suit is still pending; and they deny all fraud and illegal influence in obtaining possession from complainant's tenant as set forth in the bill; and all other matters charged in the bill are admitted, the defendants particularly claiming bona fide title under the attachment proceedings set forth in bill and answer.

An admission is now filed in the record that when the bill in this case was filed an action of ejectment by the complainant against the defendants for the land in controversy was pending in this court; that on November 5, 1883, the complainant dismissed his said action of ejectment, and that there is now no action of ejectment pending by the complainant for the land in controversy. An inspection of the record shows that the said action of ejectment was dismissed under an order of court rendered at last term compelling the complainant to elect between his action of ejectment and this equity action. At this time a motion, after due notice, is made for an injunction to restrain, pendente

lite, the defendants from wasting the lands in controversy by removing the mineral deposits therefrom. The defendants admitting the facts of removal of minerals, resist the motion on the two grounds—of want of equity in the bill, and of diligence on the part of complainant.

PARDEE, J. It seems clear that if complainant has brought his case within our equity jurisdiction a proper and meritorious case for an injunction is shown. The admitted damages committed and being committed by defendants are irreparable, restitution being impossible, and the money value not being ascertainable, and the defendants are insolvent, or next door to insolvency. The defendants first urge that as no suit in ejectment is pending, and no specific fraud alleged in the bill, the action is one of ejectment in the form of a bill in chancery. Were this all of the case there would be nothing further to do than to refuse the motion and, sua sponte, direct the bill to be dismissed. Lewis v. Cocks, 23 Wall. 469, 23 L. Ed. 70. But the complainant shows one suit for damages now pending, the recovery of one judgment in ejectment, and possession obtained thereunder, which was lost by the fraud and illegal influences of the defendants, and the case shows that a multiplicity of suits at law will be necessary for the complainant to obtain at law an adequate remedy. Equity will entertain bill to prevent a multiplicity of suits. Garrison v. Ins. Co., 19 How. 312, 15 L. Ed. 656; Story, Eq. Jur. § 928. Injunctions are granted to prevent trespasses as well as to stay waste, where the mischief would be irreparable and to prevent a multiplicity of suits. Livingston v. Livingston, 6 Johns. Ch. (N. Y.) 497, 10 Am. Dec. 353; Story, Eq. Jur. §§ 928, 929.

That the defendants deny complainant's title, and that no suit at law is pending to settle the question of title, is a very serious objection to the granting of the injunction asked; but it seems the effect of this is avoided from the following facts apparent on the record: (1) The defendants do not deny nor assert title under oath. Griffin v. Bank, 17 Ala. 258; Rainey v. Rainey, 35 Ala. 282. (2) The title claimed by defendant as defeating complainant's, appears to be one obtained by attachment against a bankrupt, issued long after the bankruptcy and seizing property sold by the bankrupt months before the bankruptcy, making a very doubtful pretense of title, nearly a sham on its face. Rev. St. §§ 5119, 5120; Bank v. Buckner, 20 How. 108, 15 L. Ed. 862. (3) The defendants compelled the complainant to elect between his bill in equity and his suit in ejectment, and now object to the state of litigation as forced by themselves.

In the case of West Point Iron Co. v. Reymert it was held that mines, quarries, and timber are protected by injunction, upon the ground that injuries to and depredations upon them, are, or may cause, irreparable damage, and with a view to prevent a multiplicity of suits; nor is it necessary that the plaintiff's right should be first established in an action at law. 45 N. Y. (6 Hand) 703. And in that case the court further said:

"It was a proper case for relief by injunction if the plaintiff's right to the mine was established, and it was not necessary that the right should be first established in an action at law. The injury complained of was not a mere fugitive and temporary trespass, for which adequate compensation could be obtained in an action at law, but was an injury to the corpus of the estate." Page 705.

See, also, Thomas v. Oakley, 18 Ves. 184; Story, Eq. Jur. 929; and see McLaughlin v. Kelly, 22 Cal. 211.

The want of diligence urged against the complainant is that, as the defendants filed their answer September 14, 1883, the complainant should have had his case ready for hearing at the October term following. The complainant had until the October rules to demur, or reply, and then he was entitled to three months to take testimony before he could be charged with want of diligence. Besides the October term seems to have been used up in determining whether complainant should elect between his action at law and his bill in equity, and from affidavit on file, it seems the chancery docket was not called from press of other business.

On the whole case, I do not see, in view of the insolvency of the defendants, rendering a multiplicity of suits necessary for the complainant to protect himself at law, and that the injuries complained of are to the body of the estate, and considering that this court has forbidden the complainant to prosecute his suit at law and his bill in equity at the same time, how, in equity, an injunction preserving the rights of the parties, pending the suit, can be refused.

The rights of the defendants will be saved by complainant's giving bond in the sum of $1,000.

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## OLIVELLA v. NEW YORK & H. R. CO. et al.

(Supreme Court of New York, Special Term, New York County, 1899. 31 Misc. Rep. 203, 64 N. Y. Supp. 1086.)

Injunction by Susanna Olivella against the New York & Harlem Railroad Company and others.

GILDERSLEEVE, J. The plaintiff demurs to the fourth separate defense of the answer, which is as follows, viz.:

"For a further fourth and separate defense, the defendant alleges, upon information and belief, that for the pretended injuries or causes of action alleged in the complaint the plaintiff has a complete and adequate remedy at law, and that the plaintiff has no right to invoke the equitable interference of this court."

The plaintiff demurs to this defense "on the ground that it is insufficient in law upon the face thereof." The demurrer is based on section 494 of the Code of Civil Procedure, which is as follows, viz.:

"The plaintiff may demur to a counterclaim or defense, consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof."

The plaintiff's claim is that a demurrer admits as true only such relevant facts as are well pleaded, and not a conclusion of law (see

Masterson v. Townshend, 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816); and that the defense in question avers no facts, but simply and purely a conclusion of law, and is, therefore, demurrable. See Hammond v. Earle, 58 How. Prac. 438.

It is further urged by the plaintiff that the allegations of the complaint show that the cause of action is in point of fact properly an equitable one, inasmuch as the complaint alleges that the injuries complained of will be constant and continuous trespasses; and that, to prevent a multiplicity of suits, and to afford the plaintiff adequate relief, the equitable interference of the court is necessary; and the complaint asks for a perpetual injunction restraining defendants from maintaining a structure, and from operating thereon trains of cars, in front of plaintiff's premises, and for a judgment directing the removal of said structure, together with damages for the trespass committed by defendants. It is well settled that, although trespasses on real property effected by an illegal structure thereon are continuous in their nature, and give to the owner separate successive causes of action at law for damages, from time to time, as the injuries are perpetrated, still the owner may also resort to equity to prevent continuance of the trespass and a multiplicity of actions at law. See Pappenheim v. Railroad Co., 128 N. Y. 436, 28 N. E. 518, 13 L. R. A. 401, 26 Am. St. Rep. 486. See, also, Golden v. Health Department, 21 App. Div. 420, 47 N. Y. Supp. 623.

In opposition to the demurrer the defendants urge that the defense in question does not consist of new matter, and therefore the demurrer is not warranted by section 494 of the Code, above quoted. This section, however, does not require that the defense should "set up new facts," but simply should "consist of new matter." I am inclined to the opinion that the defense does "consist of new matter." It sets up a conclusion of law, not an answer to any of the allegations of the complaint. The demurrer must be sustained, with costs.

Demurrer sustained, with costs.

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## MURPHY v. LINCOLN et al.

**(Supreme Court of Vermont, 1891. 63 Vt. 278, 22 Atl. 418.)**

Appeal in chancery from Rutland county; R. S. Taft, Chancellor.

Bill in chancery by Patrick Murphy against William F. Lincoln and others to enjoin a trespass. There was a pro forma decree dismissing the bill, and the orator appeals.

THOMPSON, J.[29] 1. The defendants contend that this case is not within the jurisdiction of a court of equity, for the reason that the orator has an adequate remedy at law. The bill charges the committing of several continuous trespasses by defendants by drawing wood and logs from their land across the pasture and meadow land of the

[29] Parts of the opinion are omitted.

orator, and that the defendants threaten to continue to commit these trespasses. The defendants, in their answer, either expressly or tacitly, by their failure to deny them, admit the truth of these allegations. * * * These facts bring the case within the jurisdiction of a court of equity. The rule applicable to cases of this kind is stated in 3 Pom. Eq. Jur. § 1357, as follows:

"If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts taken by itself may not be destructive, and the legal remedy may, therefore, be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction on the ground of avoiding a repetition of similar actions."

The use of this way across the orator's land by defendants under a claim of right, if continued long enough would ripen into an easement. Equity will interfere to enjoin such wrongful acts, continued or threatened to be continued, to prevent the acquisition of an easement in such a manner. * * *

The pro forma decree is reversed, and cause remanded, with directions to enter a decree for the orator in accordance with mandate on file.

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## FELTON et al. v. JUSTICE et al.

**(Supreme Court of California, 1876. 51 Cal. 529.)**

Appeal from the District Court, Seventeenth Judicial District, County of Los Angeles.

The plaintiffs, in their complaint, alleged that they owned the Azusa rancho; that there was and had been for twenty years, on said rancho, a ditch for the conveyance of water through which water from the San Gabriel river was appropriated; that for twenty years plaintiffs had been in possession of the ditch and used the water to run a mill and irrigate a vineyard on the rancho; that, in October, 1873, defendants, with force and arms, ousted plaintiffs from the possession of the ditch and converted to their own use the water flowing therein, and threatened to continue the trespass, and that plaintiffs' vineyard would be destroyed and the mill rendered valueless if the defendants carried out their threats. There was a prayer for damages and an injunction. The court overruled a demurrer to the complaint. On the trial the plaintiffs waived damages. The court gave judgment, granting the injunction. The defendants appealed.

BY THE COURT. The purpose of this action is to enjoin the commission of trespasses upon lands alleged to be the property of plaintiffs. The plaintiffs allege that the defendant had entered upon the lands, and ousted and removed plaintiffs therefrom, prior to the time when the alleged trespasses were committed and threatened.

An action at law cannot be maintained for trespasses committed on land when the plaintiff is totally disseised and the defendant is in the adverse possession thereof. Raffetto v. Fiori, 50 Cal. 363.

A fortiori, in such case a court of equity will not intervene to restrain the commission of threatened trespasses.

Judgment reversed and cause remanded.

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## STANFORD v. HURLSTONE.

(In Chancery, 1874. 30 Law Times, 140.)

Appeal Motion.

The plaintiff, Mr. Stanford, was the owner in fee simple of a farm at Slaugham, in the county of Sussex, which his father had purchased in 1828, and to which he had become entitled under his father's will. He claimed, as part of this farm, a wood, which was bounded by the farm on two sides, and by the property of the defendant Mr. Hurlstone on another side.

Mr. Hurlstone claimed to be entitled to one moiety of the wood in question, and in 1859 two actions of ejectment were commenced by him, and by persons claiming to be entitled to the other moiety of the wood, against Mr. Stanford to recover the wood.

At the trial of one of these actions in 1860, Mr. Stanford adduced evidence that his father and he had been in undisputed possession of the wood for more than twenty years, namely, from 1828 to 1859, and the plaintiffs in the action elected to be nonsuited.

The other action, brought by Mr. Hurlstone, was not brought on for trial, but was discontinued in 1861.

In August, 1860, Mr. Hurlstone went to reside in a cottage on his property adjoining the wood, and it appeared that he had ever since resided there for a portion of each year; and had from time to time gone into the wood and walked and sat in it, and that he had frequently turned his cattle into the wood, and cut away the underwood, that he might walk there more conveniently.

On the 10th of October, 1873, Mr. Hurlstone got two of his servants to cut down a tree in the wood, having called in the police to prevent Mr. Stanford from forcibly resisting; and he told Mr. Stanford's bailiff that he would cut down twenty more trees.

Mr. Stanford did not resist by force, but on the 21st Oct. filed his bill, praying for an injunction to restrain Mr. Hurlstone from cutting any timber in the wood, or otherwise interfering with the plaintiff's possession.

An ex parte injunction was granted on the following day. A motion to dissolve this injunction was made by Mr. Hurlstone, who in his affidavit in support of the motion stated that he had, from 1860 down to the present time, frequently walked in the wood, turned his cattle into it, and performed other acts of ownership without any interference on the part of Stanford or his servants.

The Master of the Rolls refused the motion, with costs. In giving judgment his Honour said:

A more perverse proceeding on the part of anybody who professes a knowledge of the law I never heard. This defendant, it appears, is a barrister of nearly forty years' standing; a gentleman certainly not without experience as regards the decisions of the courts—I do not say of this court, but of courts of law in general—because he has been for many years a reporter in one of the Superior Courts of law. If there ever was a man placed in a position that would have made it his bounden duty to respect the law, I think it is the defendant; but his conduct appears to me to have been so thoroughly wanton and unjustifiable that I am only surprised that he did not allow himself to be restrained by the advice which I am sure he must have received from his legal advisers, from attempting to dissolve this injunction. Now before going into a statement of what the defendant has done, I think it right to say upon what legal grounds I intend to maintain this injunction. I subscribe almost entirely to the words, and entirely to the substance, of the decision of Kindersley, V. C., in Lowndes v. Bettle, 10 L. T. Rep. (N. S.) 55, and to the doctrines there laid down. The marginal note states that:

"Where a defendant is in possession of an estate and a plaintiff claiming possession of it, seeks to restrain him from cutting down trees, and digging sods and other such like acts, the court will not interfere unless the acts complained of amount to such flagrant instances of spoliation as to justify the court in departing from the general rule. Where a plaintiff is in possession and the person doing the acts complained of is an utter stranger not claiming under colour of right, then the tendency of the court is not to grant an injunction unless there are special circumstances, but to leave the plaintiff to his remedy at law, though if the acts tend to the destruction of the inheritance the court will grant an injunction. But where a plaintiff in possession"—which is this case—"seeks to restrain one who claims by an adverse title, the tendency of the court will be to grant an injunction, at least when the acts committed do or may tend to the destruction of the estate."

I said that I subscribed entirely to the doctrine or the substance of the doctrine, though I have some difficulty about the words, and the difficulty I feel about the words is that for "tendency" I should substitute, that it is the "duty" of the court; but in substance, I entirely agree with the decision, and I think that is the law. Then the marginal note of the case proceeds thus:

"Where, therefore, a person not being in possession of the estate claimed it as heir-at-law"—which is very much like this case, except that the defendant here claims as a purchaser—"and entered upon it, cut down trees and cut sods, and threatened to repeat his conduct in order to establish his alleged title"—which is exactly this case, the defendant here having cut down a tree, and threatened to cut down more—"as against the possessor who, by himself and his ancestors, had been in possession of the estate for upwards of eighty years, it was held upon a bill filed by the possessor against the claimant, that, as the acts of the defendant might be injurious to the inheritance, he must be restrained by the injunction of the court from committing them."

I may say that the court acted in that case as I intend to act in this case, until I am told that I am acting wrongly by a higher authority. [His Honour then stated the facts of the case at some length, and concluded:] I feel it to be my duty to follow up and mark my disap-

probation of the defendant's conduct by refusing this motion, and ordering him to pay the costs of it.

THE LORD CHANCELLOR [SELBORNE] said: I think a more proper order than that of the Master of the Rolls in this case was never made by the court. Upon the evidence before us, so far as the case has now gone, it appears, and without contradiction, that the plaintiff, if he had no other title, had been sixty years in possession—in undisturbed possession—and had done all necessary acts of ownership to prove it for more than twenty years. Therefore, under the present Statute of Limitations, he had then, unless something were shown, which is not shown, to prevent the operation of the statute, a good title in fee simple. At that time two actions were brought, one by persons in the same interest as the defendant to this suit, as to one undivided part, and another by the defendant to this suit, admitting that state of possession; and in one of those actions the plaintiffs elected to be nonsuited; in the other the plaintiff (the present defendant) discontinued the action, and did not venture to go to trial. Then it is said that, having acquired the means of residing near the wood in some cottage, the title of which is not in question, he has given evidence to show that from time to time since 1860 he has done certain acts in the wood which would be evidence of ownership if there were a title as owner, but which were ordinary trespasses if there was not such a title. As the case stands upon the evidence, those acts were, in my opinion, mere ordinary trespasses, and in no way whatever acts which could bring the legal possession, which had existed for more than twenty years before 1860, into controversy. In that state of things the defendant takes upon himself to cut down a tree in the plaintiff's wood, and he takes measures, by the aid of the police (the plaintiff in that respect properly acquiescing) to prevent the resistance by force on the part of the plaintiff to that illegal act. So that the plaintiff, unless the court should help him, is powerless to prevent the irreparable destruction of his timber; and the defendant threatens upon his own statement to bring down a body of navvies from London to cut an opening through the wood, which, in my judgment, means to cut down trees in the wood; and the plaintiff's witness proves that the defendant threatened to cut down twenty more trees. A clearer case for the interference of the court, unless there is authority to prevent it, I cannot imagine. It is true that there have been authorities on analogous subjects which are in a condition that may well be said, as to some of them, to be not entirely reasonable or satisfactory, but the most doubtful of those authorities in modern times are cases where a person out of possession, alleging it might be a bona fide, incontrovertible title, sought to prevent ordinary acts of ownership of a person, also alleging title bona fide, who was in possession; and in those cases the court would not think fit to interfere, and even allowed demurrers when there were suggestions of what would be equitable waste. It is not for us to say whether, in those particular cases, the court rightly exercised their discretion, if it was a question

of discretion, or rightly decided the law, if it was matter of law. It is enough to say that the present case is not like them, and that this case resembles one (Lowndes v. Bettle, 10 L. T. Rep. [N. S.] 55) in which a very learned and accurate judge, Sir R. Kindersley, very righteously and properly granted a similar injunction. We have very great satisfaction in expressing our approval of that decision of Kindersley, V. C., and following its authority, and we dismiss the appeal motion with costs.

LORD JUSTICE JAMES concurred.

LORD JUSTICE MELLISH also concurred.

Appeal motion accordingly dismissed with costs.

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## COX v. DOUGLASS.

**(Supreme Court of Appeals of West Virginia, 1882. 20 W. Va. 175.)**

JOHNSON, P.[80] D. S. Cox on the 2d day of March, 1882, obtained an injunction against the defendant, Andrew Douglass. The bill alleges, that the plaintiff is the owner of one hundred and ninety-five acres of land in Ritchie county, describing it by reference to a deed filed as Exhibit A; that there was a dispute as to the title; and that Andrew Douglass has entered upon the said land and claims title thereto; that plaintiff has instituted in the circuit court of Ritchie county an action of ejectment against said Douglass to settle the title to said land, which suit is still pending and undetermined; that there is valuable timber growing on said land, which said defendant, Douglass, is cutting and destroying and removing from said land, which, if permitted, will injure the value of said land; and that said Douglass is insolvent. The bill prays an injunction restraining said Douglass from cutting and destroying the timber growing on said land and from removing any that is cut, until the said ejectment suit is heard and determined. * * *

The answer of Douglass denies, that Cox is the owner of the land; but avers, that he is owner of said land under a grant from the commonwealth of Virginia. It denies the charge, that defendant is cutting and destroying the timber on said land and removing it therefrom, and also denies the charge of insolvency; but admits that the plaintiff has instituted an ejectment suit against him in the circuit court of Ritchie county to recover said land and try the title thereto, and that the same is still pending and undetermined. He prays, that the injunction may be dissolved, and the bill be dismissed. * * *

An injunction is not granted to restrain a mere trespass to real property, when the bill does not on its face clearly aver good title in the plaintiff; nor even then, as a general rule, where the injury complain-

[80] Parts of the opinion are omitted.

ed of is not destructive of the substance of the inheritance, of that which gives it its chief value, or is not irreparable, but is susceptible of complete pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. McMillan v. Ferrell, 7 W. Va. 223. But a court of equity will enjoin a mere trespass to real property, where good title in the plaintiff is alleged, and it is also alleged in the bill, that the trespasser is insolvent; because in such case the party could have no adequate remedy at law.

The bill in this cause does not allege good title. The plaintiff alleges, that he is the owner of the land, and vouches as proof thereof a deed. * * *

It is a general rule in equity, that an injunction will be dissolved at the hearing of a motion to dissolve on the bill and answer sworn to, if the answer fully, fairly, plainly, distinctly and positively denies the allegations of the bill on which the injunction was granted, and if the material allegations of the bill are not supported by proof other than the affidavit verifying the truth of its allegations. Hayzlett v. McMillan, 11 W. Va. 464. Every allegation of the bill in this case was fully, fairly, plainly, distinctly and positively denied by the answer. The court therefore erred in refusing to dissolve the injunction, unless the mere fact of the pendency of the ejectment suit gave the court jurisdiction and required it to continue the injunction in force until the determination of said ejectment suit. It is insisted by counsel for appellee, that the denial of the plaintiff's title in the answer does not warrant the dissolution of an injunction against waste, pending an ejectment suit between the parties as to the same land; and he cites Duval v. Waters, 1 Bland (Md.) 569. That case I think fully sustains the position of the counsel. In that case the chancellor says (18 Am. Dec. 363):

"The writ of injunction in case of this kind to stay waste, pending a suit to try the right, has, in Maryland, taken the place, and performs the office in all respects, of the ancient writ of estrepement. It is an injunction not founded on any privity of title or contract, whatever; it is an attendant upon, and an auxiliary of, the action at common law, or the suit in this court, in which the title has been or may be called in question; it follows and shares the fate of that suit, and can not be dissolved upon an answer, in any way denying the plaintiff's title, until that suit has been fully determined in favor of the defendant. * * * It must however be recollected, that there is no instance of this court's ever having interfered by an injunction, to prevent a mere trespass not instant, and irreparable, when no suit has been instituted, here or in a court of common law involving the title."

The chancellor does not claim, that an injunction was ever granted for such cause in England, and cites no authority outside of Maryland to sustain him, that does so, except Shubrick v. Guerard, 2 Desaus. (S. C.) 616. He relies on the practice and decision of Maryland from a very early period. The case in South Carolina supra was much like the one at bar, and Mr. Desaussure, resisted the application, and said:

"This is the common case of trespass and a dispute about the title between persons claiming by adverse titles where there is a plain and adequate remedy at law. The defendant is in possession and the actual cultivation of the land; and the right is triable at law. That the complainant has brought a

suit to try the title which is now depending; and if the court should interfere in this case to restrain the defendant, from cutting down timber and cultivating the land, till the legal title should be established at law, it might as well do so in every case of trespass and a disputed title, which would be a very injurious interference with the rights of property."

The reporter, Judge Desaussure, says:

"Chancellor Rutledge granted the injunction in this case restraining the defendant from cutting timber or committing other waste till the trial and determination at law of the rights of the parties. No note has been preserved of the grounds of the decree. The defendant afterwards filed a demurrer, but it was never argued, the parties having compromised. This is the only case, which is remembered, of the court of equity in this State having ever granted an injunction to restrain a defendant in possession, and claiming by an adverse title, from cutting down timber, or exercising other act of ownership, over his property, till the trial and determination of the right, at law."

In a note to the report he reviews many English cases, none of which countenance such a practice, and says at the close of his review:

"The only case, which I find decided in America on this point is that of Stevens v. Beekman and others, 1 Johnson Ch. (N. Y.) 318. It was argued before Chancellor Kent of New York, who refused to grant the injunction against the repetition of the trespass, by defendants who claimed under an adverse title, or had no title. That eminent judge said it was the case of an ordinary trespass on land and cutting down timber, the plaintiff was in possession, and had complete and adequate remedy at law."

* * * * * * * * * *

He concluded his able note as follows:

"It appears from this review of the decided cases, that the court has relaxed the ancient strictness of the rule, and has granted injunctions to restrain the commission of trespass in certain specified cases. These are where irreparable damage might be the consequence, if the act continues, or where the trespass has grown into a nuisance; or where the principle of the prevention of a multiplicity of suits among numerous claimants was applicable; or where the persons cutting timber got possession under articles to purchase as in 15 Ves. 138; or where the trespasser colluded with the tenant. But that without the special circumstances which have induced the relaxation, the rule remains in force, to-wit, that in case of trespass committed by a person who is a mere stranger, or claims under an adverse title, the court will not enjoin but leave the plaintiff to his remedy at law."

We have searched the Virginia Reports in vain for any countenance given the Maryland decision on this subject; and, so far as I know, the Maryland practice has not obtained in the other States. We can see no reason for an injunction to restrain the cutting of timber on land pending a suit to try the title to the land, unless the defendant is insolvent, or it appears, that if the injunction is not granted, the plaintiff will suffer irreparable damage. Where there is a complete and adequate remedy at law, a court of equity will not interfere. When the party invokes the aid of a court of law to try his title to land, that is no reason in itself, why a court of equity should restrain the defendant from cutting timber on the land pending the suit. It would be very inconvenient to adopt such a practice; and in many cases it would work the grossest injustice. A man owns or thinks he owns 1,000 acres of timber-land; he has made a contract to deliver at a certain time 1,000,000 staves to be taken therefrom, he has hired his men and has nine-tenths of the staves manufactured; he is worth ten thou-

sand dollars over and above the value of the land. Is it not unjust to permit a man, who has not any claim of title to the land, and who has instituted an action of ejectment against him for the recovery of the land, to obtain an injunction to prevent him from cutting any more timber or taking off the land the staves already manufactured, until his suit at law is determined, without any charge in the bill, that the defendant is insolvent, or that the plaintiff would suffer irreparable damage? The man might be ruined by such an injunction, and the plaintiff not injured by its refusal.

We think the same allegations must accompany the bill to authorize an injunction to restrain the cutting of timber on land, whether there is or is not an action at law pending between the parties to try the title to the land.

The circuit court of Ritchie erred in refusing to dissolve the injunction. The order refusing to dissolve the injunction is reversed with costs to the appellant; and this Court proceeding to make such order as the judge of the circuit court of Ritchie county should have made upon the hearing of the motion to dissolve said injunction made in chamber, the said injunction is dissolved; and this cause is remanded to the circuit court of Ritchie county for further proceeding therein to be had.

The other Judges concurred.

Order reversed. Cause remanded.

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## WHEELOCK v. NOONAN.

**(Court of Appeals of New York, 1888. 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405.)**

Appeal from general term, superior court, city of New York.

Suit for mandatory injunction, by William A. Wheelock, respondent, against Michael Noonan, appellant.

FINCH, J. The findings of the trial court establish that the defendant, who was a total stranger to the plaintiff, obtained from the latter a license to place upon his unoccupied lots, in the upper part of the city of New York, a few rocks for a short time, the indefiniteness of the period having been rendered definite by the defendant's assurance that he would remove them in the spring. Nothing was paid or asked for this permission, and it was not a contract in any just sense of the term, but merely a license which by its terms expired in the next spring. During the winter, and in the absence and without the knowledge of plaintiff, the defendant covered six of the lots of plaintiff with "huge quantities of rock," some of them 10 or fifteen feet long, and piled to the height of 14 to 18 feet. This conduct was a clear abuse of the license, and in excess of its terms, and so much so that if permission had been sought upon a truthful statement of

the intention it would undoubtedly have been refused. In the spring the plaintiff, discovering the abuse of his permission, complained bitterly of defendant's conduct, and ordered him to remove the rocks to some other locality. The defendant promised to do so, but did not, and in the face of repeated demands has neglected and omitted to remove the rocks from the land. The court found as matter of law from these facts that the original permission given did not justify what was done either, as it respected the quantity of rock or the time allowed; that after the withdrawal of the permission in the spring, and the demand for the removal of the rock, the defendant was a trespasser, and the trespass was a continuing one which entitled plaintiff to equitable relief; and awarded judgment requiring defendant to remove the rocks before March 15, 1886, unless for good cause shown the time for such removal should be extended by the court.

The sole question upon this appeal is whether the relief granted was within the power of the court, and the contention of the defendant is mainly based upon the proposition that the equitable relief was improper since there was an adequate remedy at law. The plaintiff objects that no such defense was pleaded. If it arises upon the facts stated in the complaint, it can scarcely be said to be new matter required to be stated in the answer, and I doubt whether, under the present system of pleading, the technical objection is good. It is better, therefore, to consider the defense which is interposed. One who would justify under a license or permission must bring his acts within the terms of the license. He exceeds them at his peril. There is no equity in allowing him to strain them beyond their fair and reasonable interpretation. The finding shows permission asked for "a few stone," described as "a portion" of what defendant was getting from the boulevard. The plaintiff was justified in inferring that for the bulk of his stone the defendant had a place of deposit and only wanted additional room for a small excess,—for a few stone. Under this permission defendant was not justified in covering six lots with heavy boulders to a height of 14 to 18 feet. The thing done was gravely and substantially in excess of the thing granted, and the license averred does not cover or excuse the act. Beyond that the permission extended only to the spring of 1880, and expired at that date. The immediate removal of the stone was then demanded, and from that moment its presence upon plaintiff's lands became a trespass, for which there was no longer license or permission. Such parol license, founded upon no consideration, is revocable at pleasure, even though the licensee may have expended money on the faith of it. Murdock v. Railroad Co., 73 N. Y. 579. And this was a continuing trespass. So long as it lasted it incumbered the lots, prevented their use and occupation by the owner, and interfered with the possibility of a sale. It is now said that the remedy was at law, that the owner could have removed the stone and then recovered of the defendant for the expense incurred. But to what locality could the owner remove them?

He could not put them in the street; the defendant presumably had no vacant lands of his own on which to throw the burden; and it would follow that the owner would be obliged to hire some vacant lot or place of deposit, become responsible for the rent, and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority. On the contrary, the law is the other way. Beach v. Crain, 2 N. Y. 97, 49 Am. Dec. 369. And all the cases which give to the injured party successive actions for the continuance of the wrong are inconsistent with the idea that the injured party must once for all remove it. Such is neither an adequate remedy nor one which the plaintiff was bound to adopt.

But it is further said that he could sue at law for the trespass. That is undoubtedly true. The case of Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661, demonstrates upon abundant authority that in such action only the damages to its date could be recovered, and for the subsequent continuance of the trespass new actions following on in succession would have to be maintained. But in a case like the present, would that be an adequate remedy? In each action the damages could not easily be anything more than the fair rental of the lot. It is difficult to see what other damages could be allowed, not because they would not exist, but because they would be quite uncertain in amount and possibly somewhat speculative in their character. The defendant, therefore, might pay those damages, and continue his occupation, and if there were no other adequate remedy, defiantly continue such occupation, and in spite of his wrong make of himself in effect a tenant who could not be dispossessed. The wrong in every such case is a continued unlawful occupation, and any remedy which does not or may not end it is not adequate to redress the injury or restore the injured party to his rights. On the other hand, such remedy in a case like the present might result to the wrong-doer in something nearly akin to persecution. He is liable to be sued every day, die de diem, for the renewed damages following from the continuance of the trespass; and while, ordinarily, there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided, and especially under circumstances like those before us. The rocks could not be immediately removed. The courts have observed that peculiarity of the case, and shaped their judgment to give time. It may take a long time, and during the whole of it the defendant would be liable to daily actions. For reasons of this character it has very often been held that while, ordinarily, courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the Murdock Case, supra, and the rule

deemed perfectly settled. That case, and those referred to, it is true, were cases of intrusion where no consent had been given for the entry of the intruder, but whether the trespass was such from the beginning, or became one after a revocation of the license, can make no difference, as it respects the adequacy of the legal remedy. That is the same in either event. Two cases of the former character were cited in the Uline Case. Bowyer v. Cook, 4 Man., G. & S. 236; Holmes v. Wilson, 10 Adol. & E. 503. In one stumps and stakes had been left on plaintiff's land and in the other buttresses to support a road; in each an action of trespass had been brought, and damages recovered and paid; and in each, after a new notice to remove the obstruction, a further action of trespass was brought and sustained,—so that as I have said, the legal remedy is identical, however the trespass originated.

It is a general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law; but that rule has its exceptions. Railroad Co. v. Railroad Co., 86 N. Y. 128. Where the facts are in doubt, and the right not clear, such, undoubtedly, would be a just basis of decision, though the modern system of trying equity cases makes the rule less important. Where, as in an intrusion by railroad companies whose occupation threatens to be continuous, the injury partakes of that character, an action at law to establish the right has not been required. Indeed, I am inclined to deem it more a rule of discretion than of jurisdiction. In Avery v. Railroad Co., 106 N. Y. 142, 12 N. E. 619, to which we have been referred since the argument, we were disposed to sustain a mandatory injunction requiring defendant to remove so much of a fence as obstructed plaintiff's right of way, although the obstruction was not a nuisance, but an invasion of a private right. In that case the equitable remedy was not challenged by either counsel or the court, and evidently stood upon the grounds here invoked; those of a continuing trespass, the remedy for which at law would be inadequate, and involve repeated actions by the injured party for damages daily occurring.

These views of the case enable us to support the judgment rendered. It should be affirmed, with costs. All concur, except RUGER, C. J., not voting.

## DUNKER v. FIELD & TULE CLUB.

(District Court of Appeal of California, Third District, 1907. 6 Cal. App. 524, 92 Pac. 502.)

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by Chris. Dunker against the Field & Tule Club. From a decree in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals.

CHIPMAN, P. J.[31] Action to restrain defendant from trespassing upon certain land. Plaintiff had judgment, from which, and from the order denying its motion for a new trial, defendant appeals.

The complaint avers: That on and prior to February 2, 1903, one McMaster was the owner of the land in question, and on said day plaintiff and McMaster entered into a lease, whereby the latter leased said land to plaintiff for the term of five years from November 1, 1904, "for hunting purposes only"; that plaintiff entered into possession of said land on November 1, 1904, and still is in possession, "and has, under said lease, the right of possession of same"; that on April 4, 1903, McMaster conveyed the land to one Goosen, subject to and with notice of said lease, and on that day McMaster assigned to Goosen "all his rights and privileges under said lease"; that during the term of said lease defendant, "its servants, agents, and employés, at various times and on numerous occasions have interfered with plaintiff's quiet and peaceable possession and enjoyment of said leased land, and has attempted and threatens to further interfere with plaintiff's quiet and peaceable possession and enjoyment of said property"; that, during the term of said lease, defendant, its servants, employés, and agents, have without plaintiff's consent entered upon said premises for the purpose of hunting and shooting thereon, and have wrongfully hunted and shot large numbers of wild geese and wild ducks on said premises and threaten to continue so to do, thus interfering with plaintiff's use for the purposes for which he leased said premises; that, if plaintiff is permitted to carry out its said threats, it "will render the said premises valueless to this plaintiff as a hunting and shooting ground and preserve, and cause great and irreparable damage to this plaintiff." Damages are alleged in the sum of $1,000.

Defendant denies most of the material averments of the complaint, and alleges that at all times mentioned in the complaint "defendant has been in the occupation, possession, and enjoyment of the premises under a lease from the owner thereof, and that the plaintiff has never at any time been in the quiet or peaceable possession or enjoyment of said leased premises, but has attempted at various times and on various occasions to interfere with the quiet or peaceable possession and enjoyment of defendant." * * *

[31] Parts of the opinion are omitted.

It seems to us that the only question in the present case not disposed of by Kellogg v. King, is the one principally urged, namely, that injunction will not lie to enjoin the commission of a trespass when plaintiff is not in actual possession and the defendant is in possession. To this proposition defendant cites Felton v. Justice, 51 Cal. 529, claiming further that courts never enjoin a defendant in possession from mere use of the premises, citing 5 Pomeroy's Equity Jurisprudence, §§ 504, 507. In discussing the question it must be borne in mind that in Kellogg v. King [114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74] the court held that "the property right which is here the subject of inquiry is of a peculiar and exceptional character," and that "the sole value of the invaded premises to the plaintiff is as a game preserve, by reason of its feature as a resort for wild game," which by the acts of defendant "is being taken from it, and its value largely, if not wholly, destroyed." And the court further held that this showing "makes out a case of irreparable damage from the destruction of the very substance of the property right which plaintiff holds under the lease." We have before us the case of an injury, amounting to the destruction of the very substance of the property right under circumstances which, in the opinion of the court in the Kellogg Case, make out a case of irreparable damage. The question, then, is not whether the rule in ordinary cases applies, but whether the rule in this particular kind of a case is as claimed by defendant.

Mr. Pomeroy, with his usual clearness, in his Equity Jurisprudence (volume 5, c. 23, §§ 493–511), shows how and when the English chancellors broke through the ancient rule that chancery refused to interfere and restrain any trespasser. He divides into four classes the many cases in which trespassers to realty are enjoined, where: (1) The legal remedy is inadequate because the injury is irreparable in its nature. (2) The legal remedy is inadequate because the trespass is continuous, or because repeated acts of wrong are done or threatened, although each of these acts, taken by itself, is not destructive. (3) Insolvency of the defendant. (4) The legal remedy is inadequate in a miscellaneous class of cases because the courts for one reason or another cannot give any or, at best, not accurately estimated or sufficient damages, though damages would be a perfectly adequate kind of remedy. The essential features, marking an injury as irreparable are: (1) That the injury is an act which is a serious change of, or is destructive to, the property it affects, either physically or in the character in which it has been held and enjoyed. (2) That the property must have some peculiar quality or use such that its pecuniary value, as estimated by a jury, will not fairly recompense the owner for the loss of it. Id. § 495.

In Kellogg v. King these essential features were found to exist, and they exist in the present case. The jurisdiction of equity to restrain continuous or repeated trespasses rests upon the ground of a repetition of similar actions, and this class of cases is comprehended in

the broader jurisdiction of equity to prevent multiplicity of suits. This was one of the distinct grounds upon which the decision in Kellogg v. King was placed. Among the nonclassified cases is Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580, where the court gave the following criterion of jurisdiction:

"It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity."

We come, then, to the specific question of a defendant, an admitted trespasser, in possession without right, with knowledge of plaintiff's right, and acting in defiance of it. * * * Trespassing sportsmen have, in a number of instances, felt the restraining hand of a court of equity. In Lamprey v. Danz, 86 Minn. 317, 90 N. W. 578, plaintiff was the owner of certain swamp land, the chief value of which was the shooting opportunities it offered. Defendant and his friends were in the habit of shooting on this land from a place of concealment on defendant's land, thus interfering with the feeding, roosting, and breeding of ducks and impaired the value of plaintiff's land. The court enjoined defendant from continuing this conduct. In Simpson v. Moorhead, 65 N. J. Eq. 623, 56 Atl. 887, where the defendant intruded upon plaintiff's tide land, it was held that the injury suffered by the owner, in lessening the quantity of game, increasing the danger of accidental shooting, and interfering with his exclusive shooting rights, is not adequately remediable in damages. To like effect is Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828. We quote from the syllabi:

"Equity may be at once resorted to for appropriate relief, where numerous acts of trespass are being committed, and their continuance threatened under claim of right, and when the injury arising from each act is trifling, and the damages recoverable therefor inadequate as compared with the expense necessary to prosecute separate actions at law."

See extended note, upon the subject of injunction against trespass on realty, reported in Moore v. Halliday, 99 Am. St. Rep. 724 (43 Or. 243, 72 Pac. 801). See, also, valuable note to the leading case of Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315, reported in 11 Am. Dec. 484.

We invite attention, also, to Fabian v. Collins, 3 Mont. 215, where Felton v. Justice, supra, and Raffetto v. Fiori, 50 Cal. 363, on which the former rests, relied upon by appellant, are dealt with. Suffice for us to say that the principle announced in these cases has no application to, nor should it control, the case we have here. Impotent, indeed, would be the most valuable arm of the law if equity could in no case, however flagrant, be invoked against a trespasser, in aid of the owner or one entitled to the possession, to protect his estate from destruction, simply because he happens to be out of actual possession. It ought not to be, and we think it is not the rule.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

## STOCKER v. PLANET BLDG. SOCIETY.

(Court of Appeal, 1879. 27 Wkly. Rep. 877.)

The plaintiff was tenant to the defendant society of certain houses under a lease containing usual covenants to repair, with a power of re-entry on breach, but with no power for the lessor to do repairs on the tenant's default.

The tenant neglecting to repair after notice from the lessors, the society obtained leave of the weekly tenants, to whom some of the houses were sub-let, and began to repair, giving notice to the lessee that they intended to charge him with the cost. The lessee thereupon issued the writ in this action to restrain the society.

The society themselves held from a superior landlord, and under their lease were liable to forfeiture for non-repair.

Jessel, M. R., granted an ex parte injunction, and on motion continued it.

The society appealed.

JAMES, L. J. I am of opinion that the order of the Master of the Rolls must be affirmed. The real question is upon the claim raised by the society. Where a reversioner has granted a lease with no power of re-entry reserved on breach of a covenant to repair, can he give himself the right to enter and do the repairs? It is a plain invasion of the rights of property. He has no more right than any stranger has. There is no excuse in point of law for what has been done. As a matter of law, according to the present legal rights in this country, there is no right in a reversioner to go in and do necessary repairs. As to the other point, the Master of the Rolls was of opinion that the case was one where the Judicature Act, following the Common Law Procedure Act, 1854, gave power to the court to grant an injunction. It is hardly necessary to consider that question. The jurisdiction is indisputable. It is quite clear that under the old law the Court of Chancery could have granted an injunction. Then it is said that the balance of convenience at all events was against the exercise of the jurisdiction. Balance of convenience has nothing to do with a case of this kind; it can only be considered where there is some question which must be decided at the hearing. Here the defendants say, "Allow us to commit a trespass." I think the injunction is quite right. The right claimed, if it existed, would apply to all the property, a large number of houses. I may add that I was not particularly struck with the catalogue of dilapidations. They were trifling things to which, in a trial at nisi prius, a jury would not pay much attention.

BRETT, L. J. I am of the same opinion. I think this is one of the clearest cases I ever heard. There was a wrongful act for which an action of trespass would lie. Lord Justice James says it is a case where the Court of Chancery would have granted an injunction. But

suppose not. Suppose it had said there was a sufficient remedy at law. The Common Law Procedure Act, 1854, gave power to the courts of common law to grant injunctions in such cases, and therefore there would have been still less reason for the Court of Chancery to interfere, because the courts of common law had such ample power. The Master of the Rolls, therefore, had power to grant the injunction both under the Common Law Procedure Act, 1854, and under the Judicature Act.

COTTON, L. J. If there was a mere act of trespass, there could be no question. But there is this claim to a qualified right of entry, and the defendants say there ought not to be an injunction because this right must be decided at the hearing. In reality it is an attempt to add a clause to the lease, and there is no justification for the defendants' act, and no question of balance of convenience.

Appeal dismissed, with costs.

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## STARR v. WOODBURY GLASS WORKS.

(Court of Chancery of New Jersey, 1901. 48 Atl. 911.)

GREY, V. C. (orally). The complainant owns and is in possession of a piece of meadow and pasture land in Woodbury adjoining the property where the defendant has located its glass works, in which it uses large quantities of crude kerosene oil. All the affidavits show that the waste from the use of this oil was by the defendant permitted to flow over and upon the complainant's lands. That the presence of such material upon a meadow is destructively injurious, fouling the waters, and ruining the vegetation, goes without saying, but is also proven without denial. The affidavits annexed to the bill of complaint, together with the contents of a bottle containing a sample of the water on complainant's lands, offered as an exhibit, show the condition of his premises immediately before the filing of the bill in this cause. These exhibit a foulness which is wholly impossible in nature, rendering the flowing water worse than useless for any purpose. This condition is shown by the defendant's letters of explanation and denial, and substantially by the affidavits it offers to be attributable to the overflow of waste oil and oil water from defendant's premises over to and upon the complainant's lands.

The defendant's affidavits do not deny that the waste oil thus came over upon complainant's lands, nor that it fouled the waters there flowing. The defendant practically admits that it has done the injury complained of, but it declares that it has so arranged its use of the oil that since July, 1900, there has been no overflow of oil waste. It does not seem to be possible that an oil so volatile and difficult to retain as kerosene could be found, just before the filing of the bill, deposited

in such great quantity, when there had been no overflow for more than eight months. In such a period the previous deposit lying open to the weather and on the surface of the earth, would either have evaporated or percolated out of sight.

The proof is that it is presently on complainant's lands in considerable quantities, and that the overflow has continued up to the filing of the bill, and that it could come from no other source. The weight of the evidence supports this view. The injury to the complainant is irreparable, not in the sense that no amount of money could compensate him for it, but as a deprivation of the enjoyment of his property for which no adequate satisfaction can be given. It is a continuing injury to his property right. He cannot use his meadow for pasture, he cannot cultivate his lands, his stock cannot be watered in the ditch or stream. For such inconvenience, vexation, and deprivation no damages that could be recovered would afford any adequate satisfaction.

There is the less reason to hesitate to allow an injunction in this case because there is no denial by the defendant that the waste material has flowed from the defendant's lands upon the complainant's premises, nor is there any claim of any right to maintain such an overflow. The denial is limited to the claim that the defendant has now so fixed its works and the use of the oil that the injury does not continue. This claim is not sustained, but, if it be true, the injunction cannot harm the defendant, as it will only prohibit the permittance of future foul overflows, and this the defendant contends it has already arranged; whereas, if it be false, and no writ is allowed, the admitted injury to the complainant's premises will continue.

I will advise the allowance of an injunction.

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## PRESTON v. PRESTON et al.

**(Court of Appeals of Kentucky, 1887. 85 Ky. 16, 2 S. W. 501.)**

Appeal from circuit court, Johnson county.

LEWIS, J.[82] Appellant brought this action in equity, and in his petition states that he and those under whom he claims have been in the actual adverse possession of a tract of land over 40 years, which, previous to the acts of appellees complained of, was entered, surveyed, and patented; that recently appellee Preston, without his knowledge, made an entry of ——— acres within his boundary and inclosure, and he and appellee Fields, who is county surveyor, and, as is averred, knows the land described in the entry is not vacant and unappropriated, have fraudulently colluded, both being insolvent, to get the title and possession of appellant's land, and, against his objection, have gone inside his inclosure, and surveyed the land described in the entry

[82] Part of the opinion is omitted.

by removing old and making new lines and corners inside his boundary, and will, unless enjoined, proceed to carry said survey into grant. He says that appellee Preston is setting up claim to his land, and by his acts has disturbed him in the use and enjoyment of it, lessened its vendible value, and cast a cloud upon his title. He therefore prays the judgment of the court enjoining appellees entering on or surveying land inside his boundary, or depositing the plat and certificate of such survey in the register's office for the purpose of carrying it into grant, and that he be quieted in the title and possession of his land. To the petition both a general demurrer and a demurrer to the jurisdiction of the court were filed. By the judgment the demurrer to the petition was sustained, but whether because the petition does not state facts sufficient to constitute a cause of action, or upon the ground set out in the special demurrer, that the remedy is by a caveat filed in the register's office, does not appear.

It seems to us that not only do the facts stated, which must be taken as true, constitute a cause of action, but make this a case clearly within the jurisdiction of a court of chancery, and that the remedy sought cannot be amply afforded elsewhere. To enter upon land forcibly and against the consent of the person having the title and actual possession, and deface his landmarks, or make new ones, is as much a trespass as to cut and carry away his timber. This court has more than once held—the latest case being Hillman v. Hurley, 82 Ky. 626, 6 Ky. Law Rep. 682—that an injunction will lie to restrain a defendant from continuing to trespass on land, by cutting and carrying away timber, when the plaintiff is the owner and in the actual possession, and the defendant is insolvent, or other circumstances exist whereby complete remedy cannot be had in an action at law. There is equal reason for restraining the commission of trespass by marking lines and corners upon land already appropriated, whereby a confusion of the boundary may be produced; and, if such survey has already been made, a court of equity certainly has jurisdiction to enjoin the surveyor from making out and recording a plat and certificate, and the defendant from depositing a copy thereof in the register's office with a view to carry the survey into grant; for not only do such acts disturb the owner in the possession of his land, but they cast a cloud upon the title, and consequently lessen the vendible value. * * *

In our opinion, the court had jurisdiction of this case, and upon the facts stated in the petition he is entitled to the relief asked, and the court erred in sustaining the demurrer. Wherefore the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

## BOSTON & M. R. R. v. SULLIVAN et al.

(Supreme Judicial Court of Massachusetts, 1900. 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275.)

Report from Supreme Judicial Court, Essex County.

Plaintiff, the Boston & Maine Railroad, was the owner in fee of premises used for its passenger station and depot grounds, and for a long time had permitted defendants, who were hackmen and baggagemen, to enter such grounds for the purpose of soliciting passenger and baggage business. Plaintiff having sold the exclusive privilege of soliciting passengers and baggage on its premises to another, notified defendants of such fact, and that they would not thereafter be permitted to solicit passengers and baggage on the company's premises. Defendants ignored such notice and continued to enter the station to solicit passengers and baggage, whereupon plaintiff brought this bill against defendants Michael Sullivan and others to restrain them from further trespassing on its property and soliciting business. On demurrer to the bill. Case reported to the supreme judicial court for determination.

LATHROP, J.[33] * * * It seems to us clear that the bill in this case may be maintained. If the plaintiff were to sue at law, the amount recoverable could not be large, in comparison with the amount expended in litigation, and every trespass would give a new right of action. Hence there would arise a great multiplicity of suits. At some time the plaintiff would be entitled to the protection of a court of equity, and there is no reason why, on the facts of this case, the remedy by injunction should not be granted at once. * * *

The demurrer should be overruled, and an injunction issued. So ordered.

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## CHAPMAN et al. v. TOY LONG et al.

(Circuit Court of the United States, D. Oregon, 1876. 4 Sawy. 28, Fed. Cas. No. 2,610.)

DEADY, District Judge.[34] The complainants, Matthias Chapman, Aaron B. Klise, James Herd, Lorenzo A. Sturgis, and John M. Chapman, allege in their amended complaint that they are citizens of the United States, and that Toy Long and his four codefendants are "yellow alien Chinamen, who have not declared their intention to become citizens of the United States"; that on February 21, 1875, the miners of Poorman and Jackass creeks district, situate in Jackson county, state of Oregon, duly established rules and regulations for the mines in said district, by which a "claim was declared to be one hundred yards

[33] Parts of the opinion are omitted.
[34] Parts of the opinion are omitted.

square," and every citizen of the United States allowed to hold one creek and one bank claim by location; that said rules and regulations were duly recorded in said county on February 24, 1876; that on February 28, 1876, the complainants, acting under said rules and regulations, and the act of congress of May 10, 1872 [17 Stat. 91], "to promote the development of the mining resources of the United States," duly located and caused to be surveyed by the proper United States surveyor, certain mineral lands particularly described by metes and bounds on said Poorman creek; * * * that the defendants, on said February 28, and divers times between that time and the commencement of this suit—May 1, 1876—trespassed upon said premises by mining thereon and carrying away the gold from the same under a claim of right to do so, to the depreciation of the value of said premises; that the defendants are prohibited, by the act of congress and the mining regulations aforesaid, from mining said lands; that they are insolvent and of "bad reputation for truth and veracity"; that the complainants have no means of proving the amount of gold taken from the premises "by these untruthful defendants" except their own testimony, and that said defendants, unless restrained by the order of this court, will do irreparable damage to the premises. The complainants therefore pray for an account, the appointment of a receiver, a decree that the pretended claim of the defendants is illegal and void, and that they be perpetually enjoined from trespassing upon said premises. On June 6 a motion for a provisional injunction was argued and submitted by counsel, upon the complaint. * * *

The complaint describes the premises by metes and bounds, showing them to be in form a parallelogram of about one hundred and ninety-eight yards in width and four hundred and forty yards in length, and lying on the right or west bank of Poorman creek. But it contains no allegation, as it should, concerning the character of the claims inclosed within these limits, as to whether they are all creek or bank claims, or of both kinds, and if so, in what proportion. Neither does it appear that the plaintiffs are in the actual possession of the premises, but rather the contrary. Their rights then are merely such as result from having located the premises as mineral lands, under the mining laws and regulations, and that, too, over the heads of others already in the actual occupation of them. When parties, under such circumstances, seek the aid of a court of equity—even if the alleged trespassers are Chinamen and not expressly authorized to occupy or enter mining lands—they must bring themselves within the law authorizing the location and show a substantial compliance with its terms. * * *

The complainants being each entitled to locate a creek and bank claim, together they might have included a tract on the creek two hundred yards wide and five hundred yards long. As it is, they have only taken about ninety-seven thousand yards, or nine and one-half claims, instead of the one hundred thousand yards, or ten claims, which the law in its wisdom allowed them.

For this act of self-denial "the heathen Chinee," who appear to have no rights on Poorman creek that a miner is bound to respect, and who had probably bought this ground and long worked it as their own, are doubtless duly thankful. * * *

It is also insisted that the complainants must first obtain possession of the premises by an action at law before a court of equity will interfere to restrain the defendants from committing the threatened trespasses. The remedy by injunction was once confined to waste, or cases of trespass between parties who were privies in title, such as landlord and tenant, mortgagor and mortgagee, tenant of the particular estate and remainder man, and in those cases the complainant was of course not in possession. But the distinction between the trespass technically called waste, and the ordinary trespass between parties who are strangers or claiming adversely to one another, has been gradually disregarded by courts of equity, until it cannot now be said to exist. Whereever a trespass is attended with irreparable mischief or a multiplicity of suits or vexatious litigation, the remedy by injunction will be applied the same as if it were technical waste. Story, Eq. Jur. §§ 918, 928; Adams' Eq. 109. An injunction is now allowed in all cases of trespass upon mines, upon the ground that the acts complained of are, or may be, an irreparable damage to this particular species of property. Id. § 918; Livingston v. Livingston, 6 Johns. Ch. (N. Y.) 499, 10 Am. Dec. 353; Mining Co. v. Fremont, 7 Cal. 320, 68 Am. Dec. 262. And this doctrine is particularly applicable to the case of a continued trespass upon a placer gold mine—the value of which consists wholly of auriferous deposits, that may be worked out and removed without leaving any evidence of their quantity or value upon which to base an estimate or account, as in the case of coal, stone, and other minerals not precious. If, then, the complainants, by their location, have acquired a right to possess the premises and appropriate the minerals contained therein, the defendants can have no such right, and the exercise of it by them is an irreparable injury to the interest of the complainants, and the latter are entitled to the injunction asked for. Prior to the passage of the acts aforesaid concerning the mineral lands, strictly speaking, all persons who occupied them for the purpose of mining, were naked trespassers, at least as against the United States. * * *

Assuming that it does not, I am constrained to hold that the complainants, by their location, have, for the time being, become entitled to possession of the premises, and the right to appropriate the minerals therein to their own use; and that, therefore, the defendants, although in the peaceable possession of the claims when located by the complainants, are now in law trespassers upon the legal rights of the latter. Let an injunction issue commanding defendants to desist from working the premises until the further order of this court.

## HALL v. ROOD.

(Supreme Court of Michigan, 1879. 40 Mich. 46, 29 Am. Rep. 528.)

MARSTON, J. Complainants and defendant are the owners in severalty of certain adjoining property in the village of Kalamazoo, upon which buildings have been erected, and in the rear of which there is, and has been since 1848, a private alley twenty feet wide.

More than twenty years previous to the time the bill was filed in this cause, a wooden building was erected between the rear of defendant's building and this private way, which it is conceded encroached upon the alley some six inches.

In 1878 defendant desired to make some improvements upon this wooden building. He tore off the siding, and commenced the erection of a stone foundation thereunder, with the design of veneering the building with brick and building a stairway in the alley to the second story thereof. Complainants objected to the construction of the stairway which would have extended into the alley some four feet, and also objected to any encroachment whatever. The defendant desisted from building the stairway, but proceeded to veneer the wooden building with a four-inch wall, which would be an encroachment of three inches into the alley farther than the wooden building was before the siding thereon was taken off.

Complainants thereupon filed their bill and obtained an injunction restraining defendant from completing the brick wall, then nearly finished. An answer was filed, proofs taken, and on the hearing a decree was granted, making the injunction perpetual, and commanding defendant to "remove the brick wall, foundation and roof covering the same, and every part and parcel thereof, which is situate and being on the private alley aforesaid." After the injunction was served, work upon the brick wall was discontinued, and between it and the roof the building was boarded up for protection against storms, and the roof put on, but which did not progress farther than sufficient to cover the brick wall when completed.

It might admit of some question whether the decree was not broader than really intended. It would seem to require the removal of not alone the three-inch projection but the entire wall, a portion of which had stood and encroached upon the alley for over twenty years, and had ripened into a right by adverse use. Under the recitals in the decree, perhaps no serious question would arise as to the extent thereof, but under our view of the case, this becomes a matter of no consequence. This building it appears stood within the fire limits, but whether the defendant was thereby prohibited from repairing it in any other way than by brick or stone does not appear.

Admitting that defendant is encroaching some three inches upon this private way, yet it would seem to have been commenced by him in entire good faith, in repairing a building which had long been standing.

It is not claimed that such repairs were not necessary and in all other respects right, proper, and indeed beneficial to the property of defendant, and also the adjoining property of complainants. The injury to complainants was not that it was taking a portion of their private property, but that it was interfering with a right of way to which they were entitled of right. Nor is it claimed, nor could it well be, that this proposed encroachment seriously interfered with their right of way, or that it materially injured them in any way.

Their claim is that they are of right entitled to the full width of the alley, and that it cannot be taken from them by piece-meal this way.

It may admit of some doubt whether a party is ever entitled as matter of right to a remedy by injunction to restrain the commission of a threatened injury. If the injury is likely to be irreparable the court will interfere; so it will for other reasons, but it will examine into all the circumstances of the case, and if it is apparent that the relief sought is disproportioned to the nature and extent of the injury sustained, or likely to be, the court will not interfere but will leave the parties to seek some other remedy. Fox v. Holcomb, 32 Mich. 495; Briggs v. Withey, 24 Mich. 136; Norris v. Hill, 1 Mich. 210; White v. Forbes, Walk. Ch. 114.

Within this rule complainants clearly are not entitled to the relief sought as the case now stands, and they need not anticipate farther trouble in the same direction.

The decree must be reversed and the bill dismissed with costs. The other Justices concurred.

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## WOODHOUSE v. NEWRY NAVIGATION CO.

**(Court of Appeal in Ireland, [1898]. 1 Ir. R. 161.)**

In the statement of claim, the plaintiff stated that he was the owner of certain oyster beds in Carlingford Lough, situate at Omeath, in the county of Louth. He had not any estate or interest in the fore-shore, but his father, John Obins Woodhouse, had obtained a license for the oyster beds, and the plaintiff stated that he was entitled to his father's rights as licensee.

The defendants were a Company incorporated by statute 10 Geo. IV, c. cxxvi., and they obtained in 1884 a further Act, 47 & 48 Vict. c. cxxxviii. By this latter Act the defendants were authorized to make and maintain the works mentioned in the Act for improving the navigation of Carlingford Lough and the Newry River in the line, and according to the levels, shown on the deposited plans. The works authorised were the excavation of a navigable channel in the Newry River and in Carlingford Lough.

Section 7 of the Act stated that Curran Obins Woodhouse (the plaintiff), of Omeath Park, is, or claims to be, the owner of certain oyster

beds in Carlingford Lough, the limits of which were defined by a certain license, dated the 4th of June, 1866, granted to John Obins Woodhouse, deceased. Subsect. 5 of sect. 7 was as follows:

"In addition to the foregoing provisions for compensation the Company shall, during the construction of the said works, make and maintain all such works, matters, and things as may be necessary or proper for effectually protecting from injury, hurt, or damage, all and every part of the Omeath oyster beds not comprised within the limits aforesaid" (i. e. within the limits of deviation).

The defendants employed steam dredges for several months in carrying out their works, and in May, 1890, and for some months after, deposited large quantities of ballast, stones, and rubbish, upon the plaintiff's oyster beds outside the limits of deviation. The last act of trespass was in January, 1891. The plaintiff had let a portion of the oyster beds to one Mussen, for fifteen years, from the 1st January, 1888, at £50 a year. In or about the months of November and December, 1890, the plaintiff and Mussen wrote letters to the defendants calling attention to these acts of trespass. The entire area of the oyster beds comprised in the license amounted to about 60 acres, and the portion upon which the defendants had cast the ballast extended to about ten acres.

In June, 1895, the plaintiff brought an action against the defendants for an injunction to remove and clear away from the oyster beds the ballast and rubbish so deposited, and to restore them to the condition and levels they were in previously.

The defendants filed a defence, traversing the averments in the statement of claim.

On the 17th June, 1896, the Vice-Chancellor pronounced judgment, and gave the plaintiff a mandatory injunction against the defendants, directing them to raise and remove all stones, ballast, and other rubbish from the oyster beds. The defendants appealed to the Court of Appeal, and on the hearing of the appeal, produced further evidence, from Mr. Barton, C. E., and other witnesses, in addition to that used at the hearing, for the purpose of showing that damages would be a sufficient compensation to the plaintiff, and that it would be practically impossible to remove the ballast. On the hearing of the appeal, by consent of both parties, it was referred to FitzGibbon, L. J., to ascertain the amount of the damage. The case was heard before FitzGibbon, L. J., with viva voce evidence, and on the 1st March, 1897, his Lordship gave judgment awarding £600 to the plaintiff.

It transpired subsequently that the property in the license was not vested absolutely in the plaintiff, but in the trustees under his father's will. The trustees then applied for leave to appear and be heard in the case. The order of FitzGibbon, L. J., awarding damages was set aside, and the case was re-heard by the Court of Appeal, on the 30th November, and 1st December, 1897. The trustees refused to accept damages, and insisted on a mandatory injunction.

LORD ASHBOURNE, C.[85] * * * It appears that the plaintiff at an early point served notice on the defendants drawing their attention to the necessity of observing everything necessary for the protection of the oyster beds, and the Commissioners thinking they were within their rights, or that they might run the risk, thought proper to ignore that section altogether. These facts are stated in the 10th paragraph of the statement of claim, which states that:

"The defendants recently employed steam dredges for several months and deposited enormous quantities of ballast upon the oyster beds outside the limits of deviation, burying acres of the beds lying outside the said limits under mud and stones, in some places to the depth of four or five feet."

That being the state of facts the plaintiff brought an action for a mandatory injunction asking for an order—

"that the defendants should forthwith raise, remove, and clear away from the aforesaid oyster beds outside the said limits of deviation all such mud, stones, ballast, and other rubbish as have been at any time deposited by the defendants, their agents, or servants upon the Omeath oyster beds, and restore the said oyster beds to the condition and levels they were in previous to the deposit of the said ballast, mud, stones, and rubbish."

* * * It appears that the 10th paragraph of the statement of claim is substantially borne out, and that the defendants did for four months deposit, by working steam dredges, rubbish and stones on the oyster beds to the depth of 4 or 5 feet. Those may be taken to be the facts. The Vice-Chancellor made an order for a mandatory injunction, that being the remedy asked for and which he thought he could not withhold.

The whole case must be taken with reference to the Act of Parliament which the defendants were bound to observe, and to which I have already referred:

"In addition to the foregoing provisions the Company shall during the construction of the said works make and maintain all such works, matters and things as may be necessary or proper for effectually protecting from injury, hurt, or damage, all and every part of the Omeath oyster beds not comprised within the limits aforesaid."

That is a statutory obligation binding on them, and if they departed from it they are liable to a mandatory injunction to compel them to undo the acts they had done. I think the order of the Vice-Chancellor is right, and should be affirmed. * * *

FITZGIBBON, L. J. * * * The only question now is whether we can withhold the remedy of a mandatory injunction from the plaintiff? The cause of action is trespass, both wilful and reckless. The acts were committed upon a portion of the foreshore which, though not the plaintiff's private property, is a place over which he has certain rights of occupation, with which the trespass directly interferes. His rights were known to the defendants; the statute obtained by themselves recites those rights, and binds the defendants to respect and protect them; it specifically identifies the oyster beds. * * *

[85] Parts of the opinions of Lord Ashbourne, C., and of FitzGibbon and Holmes, L. JJ., and the concurring opinion of Walker, L. J., are omitted.

Yet the engineer of the defendants, in the construction of the works, did the acts complained of, and seriously and extensively damaged the defined oyster beds, without inquiring or knowing whether he was trespassing or not. The law, which protects rights as well as property, describes such conduct as wilful and reckless trespass. It is the same as if a man blindfold drove a horse and cart headlong through his neighbor's shop windows, with the additional element of lawlessness that he was forbidden by special Act of Parliament to go there at all! * * *

In this state of facts, the defendants must find some equitable ground for withholding from the plaintiff a mandatory injunction to compel them to desist from their illegal and injurious conduct. Two grounds have been suggested. The first is acquiescence. I cannot answer that in better words than were used by Mr. Meredith, when he said—"Quiescence is not acquiescence." * * *

The next ground alleged is the impossibility of complying with the order. On legal principle, this defence is almost impossible, where the wrong complained of is a continuing illegality causing damage, sometimes damages are given in place of an injunction, if they will afford complete relief. In this case I go further, for I doubt that a mandatory injunction can give relief as complete as damages, for many reasons. Owing to the nature of the foreshore, to the extent of the spoilbanks thrown upon it, to the action of time and tide, and to the nature of the oysters, I think it more than doubtful whether the oyster beds can ever be restored to the same condition in which they were before the trespass. But physical impossibility is not pleaded, and the case presented before the Vice-Chancellor made out no great difficulty, nor any very inordinate expense. When the defendants came here, and asked to substitute damages for the injunction, their allegation of impossibility was rested on a paragraph of Mr. Barton's affidavit, in which he estimated the quantity of stuff deposited by the defendants, and now remaining on the plaintiff's oyster beds, at about 15,000 cubic yards, and the cost of removing it at £1200 or thereabouts. This is not proof of impossibility; the expense and trouble are only in direct ratio to the extent of the trespass, and those who wrongfully put the stuff there can and must take it away.

The Vice-Chancellor's judgment is to restore the oyster beds to the same condition and levels as before the deposit of stones and ballast by the defendants. It may be impossible to make them as good as they were before, but the defendants must do their best, and if the plaintiff seeks to attach them, they can show that they have done their best to obey the order. We cannot deprive the plaintiff of the right, to which he is entitled, of making the defendants undo their own wrongful act, so far as it is reasonably possible to do so. At the former hearing the Court pressed on the plaintiff, and he recognised, the expediency of taking compensation in preference to requiring the defendants to expend more money in unprofitable dredging. My colleagues took advantage of my absence to make me an

arbitrator. By action on the part of the reversioners, which the Court could neither anticipate nor control, it has become impossible to settle the action on the basis of compensation. I am sorry for this result. I believe it to be injurious to all parties; but the Court is not responsible for it.

The Court went out of its way to substitute compensation for a mandatory injunction. We cannot do so again, and we cannot deprive the owners of the injured oyster beds of their right to compel the defendants to cease from violating both the general rights of the plaintiffs, and the special provisions of the defendants' own Act of Parliament. * * *

HOLMES, L. J. * * * The plea of acquiescence having failed, the defendants urge that the injunction will be of little advantage to the plaintiffs, and that the cost and trouble which it will impose on the defendants will be out of all proportion to any benefit that will follow from it. In this I am disposed to agree; but it is no legal ground for refusing the relief asked. If it were, persons in the position of the defendants would be able to acquire rights of property by wrongdoing, and to carry out a compulsory purchase not only without, but in opposition to, statutory authority. There remains the allegation that it would be impossible to obey the injunction. This I think would be a reason for substituting damages for the other remedy, as a Court of Justice ought not to order an impossibility. But there is no evidence that the terms of the judgment cannot be complied with. Of course in one point of view the foreshore cannot be restored to the precise state in which it was before the acts complained of. The surface will necessarily be a different surface; and if the parties are not reasonable there may ensue much unprofitable discussion and perhaps litigation. But the evidence shows that substantial compliance with the order involves nothing more than a certain amount of expenditure. * * *

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## RILEYS v. MAYOR, ALDERMEN, AND BURGESSES OF HALIFAX.

**(Chancery Division, 1907. 97 Law T. 278.)**

Action.

In this action the plaintiffs, who were tenant for life and trustees of certain hereditaments known as Alcomdean Holmes, situate at Alcomdean, near Hebden Bridge, in the county of York, claimed (1) an order to the defendants forthwith to remove so much of an embankment and works of or in connection with a reservoir or waterworks situate at Alcomdean as had been constructed upon the land of the plaintiffs without their consent; (2) an order that the defendants should restore the said land of the plaintiffs and make good the same

as it was before the commencement of the defendants' works in and upon the same; (3) a declaration (if and so far as might be necessary) establishing the title of the plaintiffs to the said land; (4) costs.

The plaintiffs alleged that, in connection with certain recently constructed waterworks, including the reservoirs known as the Walshaw Dean reservoirs at Alcomdean, the defendants had for the purpose of constructing the southern embankment and puddle trench of the lowest of the said reservoirs entered upon land of the plaintiffs (part of the said hereditaments at Alcomdean) without the permission of the plaintiffs, and laid and constructed in and upon the same land a portion of the said embankment and puddle trench, extending the said works in and upon the plaintiffs' said land for a distance of 42 ft. 6 in. or thereabouts from the boundary of the defendants' own land. Further, that the plaintiffs had requested the defendants to remove such part of the said embankment and works as had been constructed in and upon the plaintiffs' said land, and to make good the plaintiffs' said land, but the defendant, although so requested, had neglected and refused, and still neglected and refused, to remove the said embankment or works or to restore the plaintiffs' said land to its original condition.

The defendants admitted the plaintiffs' title, but alleged that in the construction of the said reservoirs the defendants while engaged in underground workings by inadvertence carried into the land of the plaintiffs, but at a depth of 123 ft. below the surface of the land, a heading 18 ft. in height and 6 ft. in width to the extent of 42 ft. 6 in. beyond their boundary; that the defendants in no way disturbed or affected the surface of the plaintiffs' land, and had wholly filled up the said heading with solid concrete and brickwork, and there was no possibility of any subsidence or movement of the said land taking place at any time hereafter in consequence of the said heading; that they had long since and before the issue of the writ in this action, and long before they were aware that the heading extended under the plaintiffs' land, filled up the said heading and so far as it was physically possible restored the plaintiffs' said land to its original condition. They further alleged that the land under which the said heading was driven was open moorland of little value; that the fee simple of the said piece of land in which the heading was placed did not exceed in value the sum of 10s.; that the said land had not been injuriously affected, nor had its value been reduced by the aforesaid acts; that directly their attention was called to the fact that they had trespassed upon the plaintiffs' said land they acknowledged the trespass, and, although they knew that their acts aforesaid had caused no substantial damage to the plaintiffs, offered them the sum of £100 as compensation therefor; that the plaintiffs refused such offer and demanded the sum of £1000 as compensation, and the defendants refusing to accede to such a demand the plaintiffs commenced this action.

Evidence was given to the effect that the removal of the heading would cost about £1000.

JOYCE, J. The Halifax Corporation in the course of constructing their reservoir for the purposes of which they had under their statutory powers purchased certain land found it necessary to execute certain work in concrete to prevent the escape of water. This work, which was described as a heading was through carelessness, but also by inadvertence, carried into the plaintiffs' property. The plaintiffs therefore are entitled to damages, or the defendants may be ordered to restore the land to its former state. But in order to do the latter the sum of £1000 will have to be expended, and when that is done no benefit will accrue to anyone. In these circumstances I hold that there is ample authority for saying that I have a discretion to award a sum by way of damages, not the amount of what it will cost to remove the works, but a sum which will compensate the plaintiffs. In Shelfer v. City of London Electric Lighting Company, 72 L. T. Rep. 34, [1895] 1 Ch. 322, the late Smith, L. J., laid down the rule that:

"(1) If the injury to the plaintiff's legal rights is small; (2) and is one which is capable of being estimated in money; (3) and is one which can be adequately compensated by a small money payment; (4) and the case is one in which it would be oppressive to the defendant to grant an injunction; then damages in substitution for an injunction may be given."

In the present case the defendants have offered £100, and having regard to the dictum of A. L. Smith, L. J. (sup.), I am of opinion that judgment for that amount will meet the case. I therefore give judgment for the plaintiffs for £100, but without costs.

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## SECTION 4.—NUISANCE

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### SOLTAU v. DE HELD.

**(In Chancery before Sir R. T. Kindersley, 1851. 2 Sim. [N. S.] 133, 61 E. R. 291.)**

Previously to 1817, a mansion-house in Park Road, Clapham, was divided into two messuages, but without there being any party-wall between them; and, on the 25th of March, 1817, the plaintiff took a lease of one of the messuages for sixty-nine years: and, with the exception of two intervals, he had ever since resided in it with his family. * * *

In May, 1851, a Roman Catholic church with a steeple, was erected on the ground adjoining the chapel, and was opened on the 14th of that

month, and, on that occasion, six bells, which had been placed in the belfry of the steeple, were rung nearly the whole day. The chapel bell was rung at five o'clock and a quarter before seven every morning; the steeple bell, at a quarter to nine every morning, and a quarter before and a quarter past seven every evening. On the 13th May, 1851, a peal of six bells was rung several times; on the 14th, the peal continued at intervals during the whole day; on Sunday, the 18th, the chapel bell rang at five o'clock, the steeple bell at a quarter to seven, and again at a quarter to nine. The chapel bell again rang at half past ten. A peal of chimes was rung at eleven, and again at a quarter before one; again at a quarter before six, and again at a quarter before eight. On Saturday, the 24th May, the chapel bell rang, as usual, the three times above mentioned, and the steeple bell twice, and, in addition, a peal of the six bells was rung from half past eight till a quarter to ten at night. On Sunday, the 25th May, the chapel bell was rung at two different times, and the steeple bell seven different times. On Monday evening, the 2d of June, a peal of the bells was rung; and, on Saturday the 7th, a peal was rung from a quarter to eight to a quarter to nine. On Saturday, the 8th of June, in addition to the ordinary bells, the chimes were rung several times up to nearly nine in the evening. The chapel bell and church bells were, subsequently to 20th of May, rung, daily, upon an average, as great a number of times as they had been rung upon the several occasions before mentioned, down to the time when the plaintiff obtained a verdict in the action after mentioned.

The bill was filed on the 20th of November, 1851, and, after stating as above, it alleged that, when a peal of the church bells was rung, the noise was so great that it was impossible for the plaintiff, or the members of his family, to read, write or converse in his house; that the ringing of the chapel bell and church bells was an intolerable nuisance to the plaintiff, and if the said bell or bells was or were permitted to be rung in the manner in which the same were so rung as aforesaid, it would be impossible for the plaintiff to reside any longer in his house. * * *

The bill prayed that the defendant and all persons acting under his directions, or by his authority, might be restrained from tolling or ringing the chapel bell and the church bells, or any of such bells, and from permitting the said bell and bells, or any of them, to be tolled or rung; or that the defendant and such persons as aforesaid, might, in like manner, be restrained from tolling or ringing the said bell or bells, or permitting the same or any of them to be tolled or rung, so as to cause or occasion any nuisance or annoyance to the plaintiff or any of the members of his family residing at his residence in Park Road, Clapham.

On the day after the bill was filed, the plaintiff served the defendant with notice of a motion that the defendant and all persons acting under his directions or by his authority, might be restrained from tolling or

ringing the chapel bell, and the church bells or any of them, or permitting them or any of them, to be tolled or rung.

The defendants put in a general demurrer to the bill, which now came on to be argued.

THE VICE-CHANCELLOR.[36] This case came before me, in the first instance, by way of demurrer, and the demurrer having been overruled, a motion for an injunction was made. I abstained from expressing, at the time, my reasons for overruling the demurrer, from an apprehension that I might intimate some opinion or drop some expression that might prejudice the argument on the motion. I shall now state my reasons for overruling the demurrer, and then I shall give my opinion on the motion.

The demurrer is a general demurrer for want of equity; and, of course, by that demurrer the defendant undertakes to show that, upon the statements contained in the bill, the plaintiff would not be entitled to any relief at the hearing of the cause.

The statements of the bill are as follows, &c., &c., &c.

The first ground of demurrer to this bill is that the nuisance complained of is a public nuisance; and, therefore, the suit should have been instituted by the attorney-general, and that it is not competent to the plaintiff to file a bill respecting it.

With that ground of demurrer, my opinion is that it is extremely questionable (to say the least) whether this is a public nuisance at all. But, in the view which I take of the case, it is scarcely, if at all, necessary to consider whether it be or be not a public nuisance. I entertain, however, very great doubt whether it be a public nuisance. I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequence, is a nuisance—an injury or a damage to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others. * * * And it is rather curious that one of the witnesses who was examined on the trial on the part of the plaintiff, and who deposed strongly to the bells being an intolerable nuisance when he was in Mr. Soltau's house, says:

"But where I live, at Clapham, which is about a furlong from the bells, and with the intervention of trees, so far from their being a nuisance to me, they are a positive gratification; and I confess I should be extremely sorry if they were done away with."

I mention that only by way of illustrating that, in this case, to some persons who live within the sound of these bells, they may be no nuisance at all; and, no doubt, are none; and, therefore, I very much doubt, indeed, my opinion is that the nuisance complained of in this case could not be indicted as a public nuisance. * * *

Under those circumstances, the question that I have to determine is a question which I cannot do better than state in the language of Vice-

[36] The statement of facts is abridged and parts of the opinion are omitted.

Chancellor Knight Bruce, when he decided the case of Walter v. Selfe [15 Jurist 416]. He says:

"The important point next for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered, in fact, as more than fanciful, or as one of mere delicacy or fastidiousness; as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living; but according to plain, sober and simple notions among the English people?"

That, I think, enunciates distinctly the question which is to be tried upon such an occasion as this: and I must add, in the very words of Vice-Chancellor Knight Bruce, that I am of opinion that this point is against the defendant; that this is such an inconvenience, and such invasion of the domestic comfort and enjoyment of a man's home, that he is entitled to come and ask this court to interfere. And, upon that point, I will just refer to the language of Lord Eldon, in the case of The Attorney-General v. Nichol [16 Ves. 338]. He says:

"The foundation of this jurisdiction" (that is, interfering by injunction) "is that head of mischief alluded to by Lord Hardwicke; that sort of material injury to the comfort or the existence of those who dwell in a neighboring house, requiring the application of power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law."

That is the ground for interference by injunction, and that is the ground upon which I conceive that I ought to grant an injunction in this case. * * *

There has been no acquiescence in this case. The plaintiff has diligently asserted his rights; and I think that he is entitled to an injunction, but not quite in the terms in which it is asked by the notice of motion. The bill asks for an injunction to restrain the ringing of these bells altogether; or, in the alternative, to restrain the ringing of them so as to cause or occasion any nuisance or annoyance to the plaintiff or any of the members of his family residing in his house; and it appears to me that the latter is very nearly the form in which the injunction ought to be granted. Therefore I shall order an injunction to issue to restrain the defendant and all persons acting under his direction or by his authority, from tolling or ringing the bells in the plaintiff's bill mentioned, or any of them, so as to occasion any nuisance, disturbance and annoyance to the plaintiff and his family residing in his dwelling-house in the bill mentioned. In thus wording the injunction, I am following what was done, by Vice-Chancellor Knight Bruce, in Walter v. Selfe.

I cannot say that it is absolutely impossible that any one of these bells may not be rung so as not to occasion any nuisance or annoyance to the plaintiff. It is possible: and, therefore, I do not think it right to say that none of the bells shall be rung again.

## GARDNER v. TRUSTEES OF VILLAGE OF NEWBURGH et al.

(Court of Chancery of New York, 1816. 2 Johns. Ch. 162, 7 Am. Dec. 526.)

The bill, which was for an injunction, stated, that the plaintiff is owner of a farm, in the village of Newburgh, through which a stream of water has, from time immemorial, run, having its source from a spring in the adjoining farm of the defendant, Hasbrouck, and after entering the plaintiff's land, continues its whole course through his farm until it empties into the Hudson river. That this stream greatly fertilizes his fields, and, running near his house, serves for watering his cattle, and for various domestic and economical purposes. That it supplies water to a brick-yard on the farm of the plaintiff, where most of the bricks used in Newburgh are made; it also supplies a large distillery erected by him at great expense, and a churning mill, and water for a mill-seat, where the plaintiff is about to erect a mill for grinding plaster of paris. That the trustees of the village of Newburgh, the defendants, by false representations, obtained an act of the legislature, passed the 27th of March, 1809, to enable the said trustees to supply the inhabitants of the village with pure and wholesome water. That the trustees applied to the plaintiff for leave to divert the stream, offering him a trifling and very inadequate compensation, which he refused. That the said trustees having obtained leave from the defendant, Hasbrouck, the owner of the spring, to use and divert the water, or a part thereof, that is, a stream one inch and a quarter in diameter, taken from a great elevation, have commenced a conduit, and threaten to divert the stream, or a great part thereof, from the plaintiff's farm. That the plaintiff is apprehensive that if this is done, there will not, in a dry season, be water sufficient even for his cattle, &c. The plaintiff, therefore, prayed an injunction to prevent the defendants from diverting the water, &c. The bill was sworn to, and the plaintiff produced several affidavits, which stated that the stream was not more than sufficient for the distillery, brick-yard, &c., of the plaintiff, and if diverted through a pipe, or tube, of the proposed diameter, would greatly injure, if not render the works useless. One of the affidavits stated, that the whole stream would pass through a tube of one inch diameter, with a head of five feet.

THE CHANCELLOR [JAMES KENT].[37] The statute under which the trustees of the village of Newburgh are proceeding (Sess. 32, ch. 119) makes adequate provision for the party injured by the laying of the conduits through his land, and also affords security to the owner of the spring, or springs, from whence the water is to be taken. But there is no provision for making compensation to the plaintiff, through whose land the water issuing from the spring has been accustomed to flow. The bill charges, that the trustees are preparing to divert from

[37] Part of the opinion is omitted.

the plaintiff's land, the whole, or the most part of the stream, for the purpose of supplying the village. The plaintiff's right to the use of the water is as valid in law, and as useful to him as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it, and we cannot suppose it was intended he should be deprived of it, without his consent, or without making him a just compensation. The act is, unintentionally, defective, in not providing for his case, and it ought not to be enforced, and it was not intended to be enforced, until such provision should be made.

It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a water course is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy. F. N. B. 184; Moore v. Browne, Dyer, 319, b; Lutterel's Case, 4 Co. 86; Glynne v. Nichols, Comb. 43, 2 Show. 507; Prickman v. Trip, Comb. 231.

The court of chancery has also a concurrent jurisdiction, by injunction, equally clear and well established in these cases of private nuisance. Without noticing nuisances arising from other causes, we have many cases of the application of equity powers on this very subject of diverting streams. In Finch v. Resbridger, 2 Vern. 390, the Lord Keeper held, that after a long enjoyment of a water course running to a house and garden, through the ground of another, a right was to be presumed, unless disproved by the other side, and the plaintiff was quieted in his enjoyment, by injunction. So, again, in Bush v. Western, Prec. in Ch. 530, a plaintiff who had been in possession, for a long time, of a water course, was quieted by injunction, against the interruption of the defendant, who had diverted it, though the plaintiff had not established his right at law, and the court said such bills were usual. These cases show the ancient and established jurisdiction of this court; and the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief, or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, upon just and equitable grounds, ought to be prevented. * * *

I shall, accordingly, upon the facts charged in the bill, and supported by affidavits, as a measure immediately necessary to prevent impending injury, allow the injunction, and wait for the answer, to see whether the merits of the case will be varied.

Injunction granted.

## ROBINSON et al. v. BAUGH.

(Supreme Court of Michigan, 1875. 31 Mich. 290.)

GRAVES, C. J.[38] The complainants, nineteen in number, being separate owners and occupants of valuable residences in a small specified district in Detroit, substantially used for dwellings, have united in a complaint against the defendant, in which they maintain that he uses certain premises he occupies, not far off on Woodbridge street, in such manner as to be a nuisance, and specially and greatly injurious to them in property, comfort and health.

His business is that of forging, which he conducts in low, wood buildings, and on a large scale. He employs steam and consumes a large amount of bituminous coal. He works four steam hammers, one of which weighs thirty-five hundred pounds. The smoke and soot from his works are often borne by the wind in large amounts to the premises of complainants, and sometimes enter their dwellings by the chimneys and the slight cracks by the doors and windows, in such measure as to be extremely offensive and harmful, and the noise from his steam hammers is frequently so great at complainants' places as to be disagreeable and personally hurtful, whilst the jar produced by the largest greatly annoys complainants and their families, and seriously disturbs the sick, and in some cases causes substantial damage to dwellings.

The complainants pray that defendant may be enjoined from carrying on his works in a way thus wrongful and injurious.

Upon answer and proofs, the court below made a decree in accordance with the prayer of the bill, and the defendant appealed.

He objects first, that the case is not rightly constituted, on the ground that complainants are separate owners with distinct property interests, and the attorney general is not a party.

Upon the circumstances of this case, we think the objection not maintainable. The rights asserted by complainants, and for which they ask protection, are alike, and the grievance stated in the bill and charged against defendant has one source, and operates in the same general manner against the agreeing and equivalent rights of all the complainants. If his works as conducted are a nuisance to complainants, they are a nuisance to all in the same way. The case presents no diversity to cause embarrassment in dealing with it, and we should only sacrifice substance to useless form by giving any sanction to the point, if there was no authority to favor its rejection. But without going far we are able to cite such authority. Scofield v. Lansing, 17 Mich. 437; Middleton v. Flat River Booming Co., 27 Mich. 533; Peck v. Elder, 3 Sandf. (N. Y.) 126, and opinion of the chancellor in a note; Reid v. Gifford, Hopk. Ch. (N. Y.) 416. * * *

A further objection is, that a trial at law was needful before seeking the aid of equity.

[38] Parts of the opinion are omitted.

This position is, not maintainable. The legislature have expressly declared that equity shall have jurisdiction "in all matters concerning nuisances where there is not a plain, adequate and complete remedy at law, and may grant injunctions to stay or prevent nuisances." Comp. L. 1871, § 6377. And this language implies that the jurisdiction may not be merely assistant, but is independent and ample in those cases where a remedy at law would not be plain, adequate and complete. That the law could afford no such remedy here, is manifest. Even before this declaratory provision the chancellor asserted the jurisdiction fully. White v. Forbes, Walk. Ch. 112. See, also, Soltau v. De Held, 9 E. L. & E. 104.

When the cause is thus within the jurisdiction, the authority of the court is plenary, and is not dependent upon steps at common law. If, on a view of the circumstances, the court feels that there ought to be a finding, it may in its discretion require one, but is not bound to do so. * * *

It is not appropriate to say that the injurious work is fitly and rightly located, and that the business is lawful in itself, when the ground of complaint is, that it causes a real and serious direct injury to the property of another. However lawful the business may be in itself, and however suitable in the abstract the location may be, they cannot avail to authorize the conductor of the business to continue it in a way which directly, palpably and substantially damages the property of others; unless, indeed, the operator is able to plant himself on some peculiar ground of grant, covenant, license or privilege, which ought to avail against complainants, or on some prescriptive right, and which in this country can rarely happen. There is nothing of the kind here.

In the present case the proof is clear that the defendant's works are so situated and conducted as to cause wrong and injury in regard to both person and property, and to an extent which justifies the complainants in objecting as they do. The grievances shown are not such in their cause, nature and objective effects, as to warrant the court in saying they must be borne in deference to practical exigencies. * * *

The defendant's works have been going but a short time, are not very very expensive, and not of a permanent character. They are placed on leased ground, under a short term, and are practicably removable without very great inconvenience or cost. Other sites reasonably eligible in respect to the profitable prosecution of the business may be had, and where surrounding proprietors would not be wronged.

On the other hand, the complainants' dwellings are in a part of the city appropriated almost wholly to residences, and the place is among the most suitable and desirable for the purpose. The buildings are generally costly and substantial, and some of them have grounds expensively improved. The total value is very large, and in comparison with it the value of defendant's establishment proper is a mere trifle. The case of Gilbert v. Showerman [23 Mich. 448] cannot apply.

On the whole, as already stated, we think the complainants have

clearly made out their rights to the relief prayed, and that the decree below must be affirmed, with costs.

COOLEY and CAMPBELL, JJ., concurred. CHRISTIANCY, J., did not sit in this case.

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## GROTHLICH v. KLEIN & COHN.

(Circuit Court of Ohio, First Circuit, 1909. 32 Ohio Cir. Ct. Rep. 665, 22 O. C. D. 665.)

Petition of plaintiff to enjoin the operation of hammers and heavy machinery in defendant's factory adjoining her residence was allowed in the court below.

GIFFEN, P. J. It appears from the testimony and a view of the premises including the power-shears in operation that the chief noise arises from the cog-wheels forming a part of the gearing, and that there is no substantial vibration affecting the plaintiff's property. The business itself is lawful and conducted in an ordinarily prudent manner. Such annoyance as the plaintiff suffers is no greater than is endured in any populous neighborhood devoted, as this is, in part to manufactures, and to grant relief by injunction would practically suspend manufacturing within the city limits.

The first proposition of the syllabus in the case of Goodall v. Crofton, 33 Ohio St. 271 [31 Am. Rep. 535], is as follows:

"On the petition of a landowner, complaining that certain steam power and machinery operated by another on adjoining land is a nuisance, an injunction should not be granted unless a clear case of nuisance and irreparable injury be made out."

There is and can be no real injury to the property itself, and while the annoyance to the plaintiff and her tenants is substantial, it does not amount to a nuisance for which an injunction should be granted.

We did not see the derrick and weight for crushing iron in operation but from the testimony we find no warrant for restraining its operation by injunction.

The petition will be dismissed and each party ordered to pay his own costs.

SMITH and SWING, JJ., concur.

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## CAMPBELL v. SEAMAN.

(Court of Appeals of New York, 1876. 63 N. Y. 568, 20 Am. Rep. 567.)

EARL, J.[89] The plaintiffs owned about forty acres of land, situate in the village of Castleton, on the east bank of the Hudson river, and had owned it since about 1849. During the years 1857, 1858 and 1859 they built upon it an expensive dwelling-house, and during those years, and before and since, they improved the land by grading and terracing,

[89] Parts of the opinion are omitted.

building roads and walks through the same, and planting trees and shrubs, both ornamental and useful.

The defendant had for some years owned adjoining lands, which he had used as a brick-yard. The brick-yard is southerly of plaintiffs' dwelling-house about one thousand three hundred and twenty feet, and southerly of their woods about five hundred and sixty-seven feet. In burning bricks defendant had made use of anthracite coal. During the burning of a kiln sulphuric acid gas is generated, which is destructive to some kinds of trees and vines. The evidence shows, and the referee found, that gas coming from defendant's kilns had, during the years 1869 and 1870, killed the foliage on plaintiffs' white and yellow pines and Norway spruce, and had, after repeated attacks, killed and destroyed from one hundred to one hundred and fifty valuable pine and spruce trees, and had injured their grape-vines and plum trees, and he estimated plaintiffs' damages from the gas during those years at $500.

This gas did not continually escape during the burning of a kiln, but only during the last two days, and was carried into and over plaintiffs' land only when the wind was from the south.

It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally no other person can say how he shall use or what he shall do with his property. * * *

A use of property in one locality and under some circumstances may be lawful and reasonable, which under other circumstances would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient.

Within the rules thus referred to, that defendant's brick burning was a nuisance to plaintiffs cannot be doubted. * * *

In this country so far as I can ascertain, the question of nuisance from brick burning has rarely been before the courts. The only case to which our attention has been called is Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669. In that case Agnew, J., says:

"Brick making is a useful and necessary employment and must be pursued near to towns and cities where bricks are chiefly used. Brick burning, an essential part of the business, is not a nuisance per se. Attorney-Gen. v. Cleaver, 18 Ves. 219. It, as many useful employments do, may produce some discomfort and even some injury to those near by, but it does not follow that a chancellor would enjoin therefor."

He then goes on to say that the aid of an injunction is not matter of right but of grace, and concludes that there were so many similar nuisances in the locality that it was not clear that this nuisance increased the discomfort from them, and that it was doubtful whether the plaintiff had suffered any material damage from the acts, and therefore held that an injunction ought not to issue and that the plaintiff should be left to his remedy at law. * * *

But the claim is made that although the brick burning in this case is a nuisance, a court of equity will not and ought not to restrain it, and the plaintiffs should be left to their remedy at law to recover damages, and this claim must now be examined.

Prior to Lord Eldon's time injunctions were rarely issued by courts of equity. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and with the development of equity jurisprudence which has taken place since his time, it is well said that the writ of injunction has become the right arm of the court. It was formerly rarely issued in the case of a nuisance until plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania that this writ is not matter of right but of grace, to a large extent prevailed. But now a suit at law is no longer a necessary preliminary, and the right to an injunction in a proper case in England and most of the States is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case either in granting or refusing it, the error is one to be corrected upon appeal. Corning v. Troy Iron & Nail Factory, 40 N. Y. 191; Reid v. Gifford, Hopk. Ch. 416; Pollitt v. Long, 58 Barb. 20; Mohawk & Hudson R. Co. v. Archer, 6 Paige, 83; Parker v. Winnipiseogee Lake Cotton & Woolen Co., 2 Black, 545, 551, 17 L. Ed. 333; Webber v. Gage, 39 N. H. 182; Dent v. Auction Mart Association, 35 L. J. Ch. 555; Attorney-General v. United Kingdom Tel. Co., 30 Beav. 287; Wood v. Sutcliffe, 2 Sim. (N. S.) 165; Clowes v. Staffordshire Potteries Co., L. R., 8 Ch. App. 125. Here the remedy at law was not adequate. The mischief was substantial, and within the principle laid down in the cases above cited and others to which our attention has been called, irreparable. * * *

It follows from these views that the judgment should be affirmed. All concur.

Judgment affirmed.

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## WILMARTH v. WOODCOCK.

**(Supreme Court of Michigan, 1885. 58 Mich. 482, 25 N. W. 475.)**

Appeal from Kent.

CHAMPLIN, J. This is a general demurrer for want of equity to a bill of complaint filed by the complainant against the defendant to abate a private nuisance. The material allegations of the bill are that the complainant is the owner of lot 15, in block 10 of Bostwick & Co.'s addition to the city of Grand Rapids, except a strip six feet in width,

front and rear, off from north of said lot; that her lot is 44 feet in width, fronting on Sheldon street, and constitutes her homestead; that defendant owns the land next to and adjoining her land on the north; that a line fence marks the boundaries of their respective lands; that defendant commenced the erection of a barn upon his premises so near the line that she feared the cornice would project over upon her premises; that she made inquiries of defendant as to whether he intended to construct a cornice over her premises; could obtain no information from him as to his intention; that she warned him that he must not so construct his barn as to cause any part of it to project over her premises. Nevertheless defendant built his barn near the line, and constructed a cornice which projects over her premises a distance of 16 inches at the west end, and 6 inches at the east end, and covers a distance of 21 feet in length; that the cornice is built upon a gable of the barn, and at the eaves is about 15 feet above the ground, and at the peak is about 28 feet above the ground; that the projection of said cornice over the line of said lot, as herein set forth, materially and permanently injures her said property; that it would prevent the use of a portion of her said land for the purposes of a residence; that it very materially injures the looks of her homestead, and would very much depreciate the market value thereof and render it unsalable; that having but a limited amount of land, such an unjust appropriation is an irreparable injury to her homestead, and the evident intent, as your oratrix verily believes, of the said Robert B. Woodcock, in wrongfully infringing upon her rights in this regard, is to ultimately encroach still further upon her premises, as he has given out and insisted that he owns three feet in width off from the north side of your oratrix's said land, which he intends, as your oratrix has been informed and believes, to recover unjustly from her. And your oratrix further shows, and charges the fact upon her best judgment and belief, that if said projection is permitted to remain, her said homestead will be thereby depreciated in its market value, and in value, considering the injury in its looks and convenience in the use and enjoyment of her said property, at least $500.

The defendant claims that the bill states no case for equitable relief, —First, because it appears by the bill that there is a dispute about the boundary; and, second, complainant has an adequate and complete remedy at law, in an action of trespass or trespass upon the case, and because the injury does not appear to be irreparable, since she states the depreciation in the market value of her homestead will be at least $500, and it is not alleged that defendant is pecuniarily irresponsible and unable to respond in damages at least to that amount.

A general demurrer challenges the equity of the case made by the bill, and must be overruled if a case for equitable relief is set out, however imperfectly. Glidden v. Norvell, 44 Mich. 202, S. C. 6 N. W. 195; Hoffman v. Ross, 25 Mich. 175; Clark v. Davis, Har. 227. The bill states a case for equitable relief. The continued invasion of com-

plainant's rights of property by the maintenance of the projection of the cornice over her north line, constituting a permanent injury to and depreciation of her property, addresses itself to and calls in exercise the equitable jurisdiction of the court. No remedy at law is adequate, owing to the uncertainty of the measure of damages to afford complete compensation. In one sense it is taking from complainant her property without condemnation and without due process of law. No person can be permitted to reach out and appropriate the property of another, and secure to himself the adverse engagement and use thereof, which, in a few years, will ripen into an absolute ownership by adverse possession.

Chapter 273, How. St., provides a remedy, where the plaintiff prevails in an action on the case for a private nuisance, for the abatement of the same. It is quite evident that there may be cases where the present injury would be so inconsiderable to the mind of a jury that, although the nuisance complained of might be of the most annoying kind, they might fail to give the plaintiff a verdict for damages. This statute does not take away the jurisdiction of a court of equity, but affords a concurrent remedy; and we can see no good reason for turning the complainant out of a court having full and complete jurisdiction to seek her remedy in a court having not greater but more limited power to afford complete and adequate relief. Fraedrich v. Flieth, 64 Wis. 184, 25 N. W. 28, Denner v. Chicago, M. & St. P. Ry. Co., 57 Wis. 218, S. C. 15 N. W. 158. The statement that the depreciation of her property will be at least $500 does not deprive the party from relief in a court of equity. The object of the pleader in making the averment was doubtless to show that the injury exceeded $100. We do not feel called upon to say, upon this record, whether an averment of the kind is necessary in cases of nuisance, nor that a suit in equity must fail if the proofs should disclose that the damage was less than $100.

Irreparable injury, in the sense in which it is used in conferring jurisdiction upon courts of equity, does not mean that the injury complained of is incapable of being measured by a pecuniary standard; nor does it appear from the face of the bill that the injury complained of, for which relief is sought, is a question of a disputed boundary between the parties. The bill states with certainty and particularity the boundary line between her and the defendant, and her ownership in fee of the land south of such boundary. Her averment that she believes that defendant intends ultimately to encroach still further upon her premises, and stating as the basis for such belief that defendant has given out and insisted that he owns three feet in width of the north side of her land which he intends unjustly to recover from her, is not such a statement of a dispute about a boundary as would deprive the court of jurisdiction. The defendant urges that he has a right to have his title to the three feet, which he insists he owns, and which is in the possession of the complainant, tried by a jury. This suit does not deprive him of that right. The courts of law are open, and the remedy

by ejectment is ample, and he is the only party who can bring the action.

The decree of the court below is affirmed, with costs. The record will be remanded, with leave for defendant to answer in 20 days on complying with the order of the court below as to payment of costs. The other Justices concurred.

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## CHAMBERS v. CRAMER et al.

**(Supreme Court of Appeals of West Virginia, 1901. 49 W. Va. 395, 38 S. E. 691, 54 L. R. A. 545.)**

Bill by S. T. Chambers against George F. Cramer and J. W. McCready. Decree for plaintiff, and defendants appeal.

McWHORTER, J.[40] S. T. Chambers filed his bill in the circuit court of Mingo county against George F. Cramer and J. W. McCready, alleging:

**That he was the owner of certain valuable real estate in the town of Matewan, in said county, known as "Lot 14," upon which was located a valuable house, which he, with his family, occupied as a residence, and in which he had been keeping a hotel for several years. * * * He also had on said lot a valuable store building, costing and worth at least $1,400. * * * That recently defendants claimed to have purchased a lot in close proximity to plaintiff's property, there being only a small alley of 15 feet width intervening between the two properties. That plaintiff was informed that defendants were going to construct a building on their said lot in which they were going to locate an engine, and conduct what they called a "machine shop and blacksmith shop." That soon afterwards plaintiff served notice in writing upon defendants that they should not construct such a building, nor should they be permitted to keep and maintain any machine shops so close to the property of plaintiff, reciting that such shops and engines would greatly impair the value of plaintiff's property, and endanger it by exposure to fire; that the same would constitute a nuisance, which plaintiff would enjoin. That defendants paid no attention to said notice, and proceeded to the full construction of said building, and openly proclaimed their purpose of locating an engine therein and conducting a blacksmith and machine shop thereon, all of which would greatly reduce the value of plaintiff's property. That its location would constitute a great menace and danger to the property of plaintiff and others. * * * That J. W. McCready was insolvent and Cramer had no property in this state, except the interest mentioned, worth, perhaps, not over $400, and, besides, was a nonresident of the state. And he prayed that defendants be perpetually inhibited and enjoined from conducting or maintaining such blacksmith shop, machine shop, or works upon such premises, and from locating any engine thereon calculated to endanger life or property of plaintiff, and for general relief. * * ***

The answer denied all the material allegations of the bill, averring that there would be no extraordinary danger from fire, that the machinery proposed to be put into the shops was of the most approved kind, and almost wholly noiseless; denied that any smoke, effluvia, or cinders, or anything of the like nature, would constitute any undesirable element against the comfort and enjoyment of the property of any one, or that it would increase the insurance on any building in the town of

[40] Parts of the opinion are omitted.

Matewan, or that the construction and operation of said plant would in any manner constitute a nuisance of any nature whatever, or cause any wrong or mischief to the property of plaintiff or any one else; denied the insolvency of either of the defendants, and the nonresidence of defendant Cramer; * * * and averred that they had purchased and paid for over $2,000 worth of machinery to go in said plant, which machinery had arrived at said town of Matewan before the injunction was granted in this cause, and that the continuance in favor of said injunction was absolutely ruinous to defendants' business and to their property rights. * * *

The cause was heard finally on the 12th day of October, 1898, when the court perpetuated the injunction and rendered judgment against defendants for the costs of the suit, from which decree the defendants appealed to this court, and say the court erred in awarding the injunction on the 15th of March 1898, and in not sustaining defendants' demurrer to the bill, and in refusing to pass upon the said demurrer, either overruling or sustaining the same, in refusing to sustain the motion to dissolve the injunction made on the 1st day of June, 1898, and in continuing the same in full force and effect, and in refusing to dissolve the injunction on the 12th day of October, 1898, when the case was submitted for final decree, and in entering its decree perpetuating said injunction and striking said cause from the docket.

Should this injunction have been granted, upon the case made out in the bill? The defendants were engaging in a proper and legitimate business, in harmony with and in furtherance of the material interests of the town and community,—one of the many useful industries that mark the progress of that rapidly developing section of our state. It would seem that inducements would be offered to encourage the building up of industries of that character. "It is a general rule that when the thing complained of is not a nuisance per se, but may or may not become so, according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere. The presumption is that a person entering into a legitimate business will conduct it in a proper way, so that it will not constitute a nuisance; and so when a building in course of erection, or about to be erected, will not of itself constitute a nuisance, equity will not enjoin it on the ground that it may be used for a purpose which will make it a nuisance. If the building is in fact used in such a manner as to create a nuisance, its use for such purpose will then be enjoined." 14 Enc. Pl. & Prac. 1129, and cases cited. In Hough v. Borough of Doylestown, 4 Brewst. (Pa.) 333, it was held that:

"In order for equity to enjoin a private nuisance, the danger must be impending and imminent, and the effect certain, not resting on hypothesis or conjecture, but established by conclusive evidence. If the injury be doubtful, eventual, or contingent, or if the matter complained of is not per se a nuisance, an injunction will not be granted. In cases of prospective nuisance a court of equity will not interfere unless the damages to be apprehended will be serious, nor when, upon balancing the inconveniences or injuries, greater injury will be inflicted by granting than by refusing an injunction."

The property rights of defendants as well as plaintiff must be considered. The defendants had purchased this ground for the location and conducting of a legitimate business and industry in the line of the progress and growth of the town and community, and, according to the evidence, had expended over $2,000 for the equipment of their business with machinery and appliances of the latest and most improved pattern and make. The testimony taken and filed in the cause of all who pretend to know anything about the machinery proposed to be used by defendants is to the effect that it is almost noiseless and without danger from fire, while the evidence to the contrary is principally by men who know little or nothing about machinery, and base their opinions (and their evidence is almost wholly "opinional evidence") upon their knowledge or observation of the conduct of country blacksmith shops. * * *

The evidence is not in relation to existing facts and transactions had, but is something of a speculative character,—as to whether the shops can be so constructed and conducted as not to become a nuisance. If after the shops are opened and operated they prove to be a nuisance to plaintiff or others in the comfortable enjoyment of their property, they will be entitled to relief therefrom by the abatement of the nuisance, and the defendants will be held liable for damages. For the reasons herein given the decrees of June 1 and October 12, 1898, are set aside and reversed, and the bill dismissed, but without prejudice to another suit or action in case the shops, when completed and operated, should become a nuisance to plaintiff.

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## BERNARD v. WILLAMETTE BOX & LUMBER CO.

(Supreme Court of Oregon, 1913. 64 Or. 223, 129 Pac. 1039.)

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Charles Bernard against the Willamette Box & Lumber Company. Judgment for plaintiff, and defendant appeals.

This is a suit by a private individual to prevent and remove an alleged public nuisance and recover damages asserted to have been caused by the inconvenience. The complaint charges generally that the defendant is a private corporation engaged in manufacturing lumber and boxes at Linnton, Or.; that on June 3, 1893, the plaintiff secured the legal title to and is now the owner of lots 3 and 4, in block 26, as indicated on the recorded plat of that town; that these lots abut upon F street which is a public highway 60 feet wide; that, after the plaintiff obtained the title to such real property, the defendant constructed an elevated railroad along F street in front of and adjacent to these lots, and also piled lumber in that street thereby obstructing travel thereon and preventing ingress to and egress from such premises, greatly reducing

their value to plaintiff's damage in the sum of $1,000. A demurrer to the complaint on the ground inter alia that the plaintiff had an adequate remedy at law was overruled, whereupon the answer was filed denying the material allegations of the complaint, and setting forth others as a defense. A reply put in issue the averments of new matter in the answer, and the cause having been tried resulted in a decree as prayed for in the complaint, except that the plaintiff was awarded only $200 as damages, and the defendant appeals.

MOORE, J.[41] (after stating the facts as above). It is maintained that for the redress of the injuries alleged the plaintiff had an adequate remedy at law, and, such being the case, an error was committed in overruling the demurrer. The statute declares that in all cases where there is not a plain, adequate, and complete remedy at law the protection of a private right or the prevention of or redress for an injury thereto shall be by a suit in equity. * * *

Any act of a party that trenches upon the rights of the public may be redressed by a suit in equity instituted by or in the name of the state as an exercise of its police power to prevent or remove a common nuisance. * * * It will therefore be taken for granted that the proper officers of Linnton were authorized to maintain a suit, and by a mandatory injunction could have caused to be removed an obstruction from a public street in that village, and what the persons charged with the right and duty of exercising certain functions were empowered to perform a private party who sustained a special injury, differing in kind from that suffered by the community at large from a public nuisance, may also do. * * *

The owner of a town lot suffers peculiar and special damages, differing in kind from that to which the public is subjected by the obstruction of a part of a public street immediately in front of his premises, whereby ingress and egress to and from such abutting property is prevented, and such owner may maintain a suit in equity to prevent or remove the common nuisance. * * *

In suits by a private party to enjoin a public nuisance, it is generally held that he must not only suffer an injury differing in kind from that sustained by the community at large, but his detriment must also be irreparable, or, at least, not capable of full and complete compensation in damages. Elliott, Roads & Streets (3d Ed.) § 850. In referring to this legal principle the author there observes:

"This is no doubt a fair statement of the general rule, but the phrase 'irreparable injury' is apt to mislead. It does not necessarily mean as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be great. And the fact that no actual damages can be proved, so that in action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one."

The term "irreparable damages," to prevent which injunction may issue, includes wrongs of a repeated and continuing character, or which

[41] Parts of the opinion are omitted.

occasion damages that are estimable only by conjecture, and not by any accurate standard. Commonwealth v. Pittsburgh, etc., R. R. Co., 24 Pa. 159, 62 Am. Dec. 372. See, also, upon this subject the notes to the case of Dudley v. Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368.

The plaintiff's right to ingress and egress to and from that street to his lots has been clearly established, and as the invasion of that right, by the construction of the elevated roadway, has also been substantiated, he is entitled to the relief demanded in the complaint. This redress cannot be defeated by the defendant's removal of the obstruction after this suit was instituted, for a court of equity, having obtained jurisdiction to grant injunctive relief, will retain the right to hear and determine the cause upon the question of damages. Whaley v. Wilson, 112 Ala. 627, 20 South. 922; Fleischner v. Citizens' Investment Co., 25 Or. 119, 35 Pac. 174.

It follows from these considerations that the decree should be affirmed, and it is so ordered.

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## COMMONWEALTH ex rel. PRATT v. McGOVERN.

(Court of Appeals of Kentucky, 1903. 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280.)

SETTLE, J.[42] This equitable action was instituted in the Jefferson circuit court, common pleas division, by the appellant, the commonwealth of Kentucky, on relation of the Attorney General, against the appellees, Terry McGovern and others, to prevent the holding of a prize-fight advertised to take place on the 22d day of September, 1902, in the Auditorium, a large theater situated in the city of Louisville. Terry McGovern and Young Corbett were to be the combatants, and their managers and the owner of the Auditorium were made parties to the action.

It is averred in the petition, in substance, that the prize-fight was to be given under the auspices of the Southern Athletic Club of which the appellee Robert Gray is the sole stockholder and manager; that the Auditorium has a seating capacity of 4,000, and that the prices of tickets for admission into that building to witness the prize-fight vary from $5 to $20 a seat; that the fight was to take place according to the Marquis of Queensbury rules, and the fighters were to receive $10,000 between them. It is further averred that the prize-fight, if allowed to take place, would bring to the city of Louisville a great number of sporting men, disorderly persons, and criminals, and that the persons so drawn to the city would constitute a lawless, turbulent, and dangerous assembly of many thousands of people, and would produce breaches of the peace and other violations of the law, which would have a demoralizing effect upon the good order and well-

[42] Parts of the opinion are omitted.

being of the community, and produce a public nuisance. It is also averred that a criminal prosecution of the principals and others connected with them would not prevent the great injury that would be done to the people of the state by holding the prize-fight within its bounds, and, finally, that the commonwealth has no adequate remedy at law for the injury which would result to the public welfare, if the prize-fight were allowed to be held. Answer was filed by the appellees, traversing the allegations of the petition.

Thereafter, upon the pleadings and proof, in the form of affidavits and depositions, the judge of the court in which the action was then pending issued a temporary restraining order against appellees, and upon the day following its issual a motion was made by the appellees before one of the judges of this court to dissolve the restraining order, and that judge and five of his associates, members of this court whom he called in consultation, rendered the following opinion:

"This motion was made before the Chief Justice, who by consent of the applicants transferred the hearing of the motion to Judge White, who invited the whole court, except Judge Paynter (absent), to hear the application with him. The majority of the court who heard the application to dissolve the injunction of Judge Field are of the opinion that the contest which has been enjoined is a prize-fight, and that it is not material whether the victor in the contest is to receive more of the reward offered than the vanquished. The court is divided equally upon the question of whether the chancellor has preventive power under the Kentucky Statutes to restrain the holding of such contest; Chief Justice Guffy and Judges White and Burnam holding in the negative, and Judges Du Relle, Hobson, and O'Rear holding the affirmative. The motion to dissolve is therefore denied."

After the foregoing action by this court, the case was submitted upon the pleadings and proof to the judge of the chancery division, No. 2, Jefferson circuit court, for trial, who rendered judgment dismissing the petition. Appellant complains of that judgment, and has brought the case by appeal to this court for review.

No one can doubt that the contest between appellees McGovern and Corbett, if it had taken place as advertised, would have been a fight. Indeed, it is clear from the evidence furnished by the record that the fight between these men was to be one of unusual endurance and extreme brutality, a very feast of blood, to be enjoyed to the full by the thousands who were expected to witness it. * * *

We find * * * that the jurisdiction of courts of equity to prevent and suppress nuisances, especially such as affect the public health, morals, or safety, is of ancient date, though in Kentucky this power has been somewhat restricted in its application. While the writ of injunction may not be employed to prevent the commission of crime, as such, we see no reason why it may not be resorted to to prevent the use of real property for the holding of a prize-fight. Indeed, we think the use of the injunction for this purpose is not only permissible, but required by the statute, supra, enacted to suppress that evil, if the means at the command of the criminal courts are inadequate to its suppression. * * *

The question presented for the consideration of the judge of the Jefferson circuit court, when the injunction was applied for in this case, was whether or not the powers that might be invoked under the criminal jurisdiction of the courts were adequate to the suppression of the prize-fight about to come off, and, if not, what further powers might be exercised by him? As the statute required of him the exercise of all the powers of which he was possessed, and the right to employ the writ of injunction being one of those powers, it was his duty to grant it to the extent of preventing the use of the Auditorium for the holding of the prize-fight, if in the exercise of a sound discretion the facts before him justified such relief, in aid of the jurisdiction of the criminal courts in the matter of the arrest and prosecution of the guilty participants in the prize-fight. In granting the injunction to the extent indicated, the chancellor would only exercise the jurisdiction that was exercised in draining the pond, and in suppressing the distillery, in the Massachusetts and Kansas cases, respectively, above cited.*

In none of the cases, supra, was there any question of property or pecuniary right involved; nor need there be any property right involved, so far as the state is concerned, in the maintenance of the public health, morals, or safety. These are all valuable rights, though not susceptible of a pecuniary estimate, which it is the duty of the state to protect by every means at its command; and, if a court of equity has the power to enjoin the use of private property as a nuisance which is dangerous to the public health, why may it not in like manner enjoin it where it constitutes a nuisance dangerous to the public safety or morals?

Is the use of land or a building for the maintenance of prize-fighting a public nuisance? In Wood on Nuisances (3d Ed.) § 68, the author says:

"A public exhibition of any kind that tends to the corruption of morals, or to a disturbance of the peace or of the general good order or welfare of society, is a public nuisance. Under this head are included all puppet shows, legerdemain, and obscene pictures, and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and dissolute members of society."

That a prize-fight is an exhibition of the character here described, and consequently a public nuisance, there can be no doubt; and, if so, the use of a theater for prize-fighting is such a nuisance. Therefore the Legislatures of many of the states have enacted laws for their suppression, realizing, no doubt, that the remedies afforded by the general laws were not adequate to that end; and the courts have been uniform in upholding the statutes thus enacted. * * * *

We conclude, therefore, that while a court of equity may not grant an injunction against the principals who were expected to engage in the fight in question, nor those connected with them as managers,

*Cited in omitted portions.

trainers, etc., because the processes of the criminal courts and the powers of conservators of the peace in the city of Louisville are, or ought to be, adequate to the prevention of the prize-fight, by the arrest and prosecution of the parties concerned, yet it was proper for the lower court to enjoin the owner, proprietor, and managers of the Auditorium theater from permitting the holding of a prize-fight therein, and from allowing therein any future exhibitions of the same character, upon the ground that such a use of the building would constitute a public nuisance, dangerous to the public morals and safety. * * *

As already suggested, not the least of the evils connected with the holding of the prize-fight would be the presence of the immense crowds of lawless and turbulent men from all quarters. An injunction against the use of the building advertised as the place of the fight would go far toward preventing the assembling of this crowd, and thereby avert incalculable mischief, which could not well be averted by the criminal courts, or their ministerial officers, after the assembling of the audience at the place of the combat, or in the act of assembling; for, although every person who attends a prize-fight by that act violates the law, it would be impossible for the officers of the law to arrest any considerable number of them under such circumstances. * * *

In the case at bar the complainant is the state—the sovereign—which is seeking by a writ of injunction to prevent a great evil, affecting the people of the city of Louisville, and the entire state as well, and which threatens irreparable injury to the public morals because of its cruelty, inhumanity, and debasing associations, and danger to the public safety because of its bringing together the lawless and turbulent elements of society from all quarters. Upon such a state of facts, and with the commands of the statute directing him to employ all his powers to avert the threatened evil, it would, in our opinion, be no stretch of authority for the chancellor to employ the aid of the writ of injunction in such an emergency, to the extent, at least, of preventing the use of real property for the holding of the prize-fight. Nor do we think that the right of the chancellor to so employ the writ of injunction in this case is dependent upon the fact that a property right be involved. It may be justified upon the higher ground that the morals and safety of the public are involved, and that the public good is of the first consideration.

If the element of continuity were needed in this case to authorize the injunction, it is shown by the record to exist; for several witnesses testify to having attended contests similar to this in the Auditorium. * * * We are of the opinion, however, that continuity is not a necessary element in this case.

In order to constitute a public nuisance, in the meaning of the law, it is not always necessary that the acts charged should have been habitual or periodical. Where a single act produces a continuing result,

the offense may be complete, without a recurrence of the act. Thus one act upon the part of an individual in befouling a spring from which the public are accustomed to drink is a public nuisance. So is indecent exposure of one's person in a public place. Wood on Nuisances, §§ 27, 57. To constitute the offense denounced by the statute as a prize-fight, or prize-fighting, it is not necessary that a number of such combats, or that more than one combat, should take place. We think one such offense at a given place would constitute a public nuisance, and it is the province of a court of equity to prevent nuisances that are threatened, and before irreparable mischief ensues, as well as to arrest or abate those in progress, and by perpetual injunction protect the public against them in the future.

Being of the opinion that the chancellor erred in dismissing the petition, and in refusing to perpetuate the injunction, in this case, to the extent of restraining the owners and managers of the Auditorium from permitting the use of that building for the holding of the prize-fight between appellees McGovern and Corbett, the judgment is reversed, and cause remanded, with directions to set aside the order dismissing the petition, and to enter in lieu thereof the necessary decree perpetuating the injunction to the extent herein indicated.

PAYNTER, BARKER, and NUNN, JJ., dissent.

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## POWERS et al. v. FLANSBURG.

(Supreme Court of Nebraska, 1911. 90 Neb. 467, 133 N. W. 844.)

SEDGWICK, J. Three citizens and property owners in the village of Trenton began this action in the district court for Hitchcock county to enjoin the defendant from "conducting or in any manner operating and keeping open" a pool and billiard hall in the village of Trenton. The finding and judgment were for the defendant, and the plaintiffs have appealed.

The petition alleges that the defendant's license has expired, and that he conducts the business complained of without a license, that he keeps and sells intoxicating liquors in his place of business without any license so to do, and allows drinking and swearing in his place of business, and in various ways keeps and maintains a disorderly and disreputable house, which has become and is a public nuisance. A large amount of evidence was taken, many citizens were called as witnesses, and the evidence in regard to the manner of keeping and conducting the business is somewhat conflicting, but there is evidence tending to prove that the defendant is keeping and selling intoxicating liquors contrary to law, and maintaining a disorderly house, and doing other illegal and improper things complained of in the petition.

It is stated in the brief that the village council was enjoined by the district court from repealing the ordinance which provided for licens-

ing billiard halls, and that prosecutions were begun against the defendant for keeping and selling intoxicating liquors without license, and that these actions have been allowed to remain in the courts without determination, and that the courts and the officers of the law are preventing the good people of the village of Trenton from enforcing the law, and from putting a stop to the unlawful actions and conduct of the defendant. The evidence shows that an action was begun by this defendant in the district court to enjoin the village council from enacting an ordinance repealing the ordinance under which he was licensed, and in that action a temporary injunction was allowed as prayed, but the evidence does not show what became of these proceedings, nor whether the action was promptly tried or was unduly delayed. The evidence also shows that a complaint was made against this defendant in the county court of Hitchcock county charging him with unlawfully keeping intoxicating liquors, with intention to sell or dispose of the same, contrary to law, and that a warrant was issued under which a search was made of the premises and certain liquors found and the defendant arrested, and that a hearing was had before the county court, and that the defendant was held to the district court for trial, and a judgment entered by the county court ordering the liquors to be destroyed. The defendant in that action then gave bond for his appearance in the district court, and for an appeal to the district court from the judgment ordering the destruction of liquors. The evidence does not show what was done in this matter in the district court. There is no evidence tending to support the statements of the brief criticising the courts and officers of Hitchcock county.

If we consider only the allegations of plaintiffs' petition and the evidence which they introduce, it appears that the defendant has been guilty of various crimes as charged in the petition, and that he is violating the criminal law in many particulars. There seems to be a great diversity of opinion in regard to these matters as disclosed by the evidence, and we do not find it necessary to determine the preponderance of the evidence under the issues presented. The trial court made no special findings of fact. There is nothing in the petition or evidence to indicate that the criminal laws of the state are in any respect insufficient to punish the defendant and put a stop to the crimes which it is alleged he has committed, if, indeed, the defendant is guilty, as alleged. The petition does not allege any special interest of these plaintiffs in these proceedings as distinguished from the interest of the general public. On the other hand, it is specifically alleged that this action was brought by these plaintiffs in their own behalf and in behalf of all of the citizens of Trenton, who, it is alleged, were similarly situated. Under these circumstances, it is clear that this action cannot be maintained. If the defendant persists in keeping and selling liquors without license at his place of business in Trenton, the criminal law is amply sufficient to punish such offenses. If the proper of-

ficers refuse or neglect to enforce the law a remedy is provided other than by injunction. If a public nuisance is maintained that affects alike all the members of the community, the public authorities may deal with it, but these plaintiffs have not shown such an interest as will enable them to maintain this action. If the village authorities were improperly enjoined by the district court, the remedy is by appeal, and a review of those proceedings cannot be had in another and independent action. The plaintiffs have failed to allege or prove sufficient grounds, or, in fact, any necessity for the extraordinary writ of injunction; nor have they shown any special interest as distinguished from the interest of the general public.

The judgment of the district court is affirmed.

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## STEAD et al. v. FORTNER et al.

(Supreme Court of Illinois, 1912. 255 Ill. 468, 99 N. E. 680.)

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Shelby County; J. C. McBride, Judge.

Proceedings by W. H. Stead, Attorney General, and others, against M. C. Fortner and others. A judgment for plaintiffs was modified and affirmed by the Appellate Court, and defendants appeal.

CARTWRIGHT, J.[48] The town of Shelbyville is a township of the county of Shelby, which is under township organization, and the city of Shelbyville is incorporated under the general laws of the state, situated within the township and covering only a part of its territory. On April 7, 1908, the proposition, "Shall the town of Shelbyville become anti-saloon territory?" was submitted to the legal voters of the township under the act to provide for the creation and abolition of anti-saloon territory, in force July 1, 1907 (Laws of 1907, p. 297), and the proposition was carried by an affirmative vote. On April 21, 1908, the proposition, "Shall the city of Shelbyville become anti-saloon territory?" was submitted to the legal voters of the city, and, a majority having voted in favor of the proposition, the city became anti-saloon territory. On April 7, 1910, the proposition, "Shall the town of Shelbyville continue to be anti-saloon territory?" was submitted and the majority voted against the proposition, so that the township ceased to be anti-saloon territory. No proposition on the question has been submitted to the legal voters of the city or voted upon by them since the election when the city was made anti-saloon territory.

On May 9, 1910, the city council of the city passed an ordinance granting liquor licenses within the city. The ordinance was vetoed by the mayor, but was passed over the veto, and licenses were issued to the appellant M. C. Fortner, and others. On May 1, 1911, licenses

[48] Parts of the opinion are omitted.

were again issued, and one of them was to Fortner, purporting to authorize him to sell intoxicating liquors at retail for one year. Since May 9, 1910, Fortner has openly, continuously, and willfully sold intoxicating liquor at retail in premises owned by the appellant Ross Ward, in pursuance of the ordinance and licenses. The city authorities have not taken any measures to prevent such sales, and on July 8, 1910, informations were filed in the county court charging Fortner and others with selling intoxicating liquors in violation of law and maintaining common nuisances, but the county judge refused to issue warrants on the informations. At the November term, 1910, and the March term, 1911, of the circuit court of Shelby county, lists of witnesses who would testify to sales of intoxicating liquors by Fortner and others were presented to the grand juries with requests that the witnesses be called, and, if the evidence was sufficient, indictments should be returned against persons violating the law, but each grand jury refused to hear the witnesses or consider the evidence or return any indictment.

After these fruitless endeavors to have the question tried and the alleged violators of the law punished by criminal process, the Attorney General and state's attorney of Shelby county filed the bill in equity in this case stating the above facts, alleging that the sales of intoxicating liquors were illegal and in open and flagrant violation of the law and with the connivance and consent of the city and county authorities, and praying the court to declare the premises owned by Ward, where the business was carried on by Fortner, a common nuisance, and that such nuisance be abated by the order and injunction of the court restraining the appellants from using the premises for the illegal sale of intoxicating liquors. The appellants demurred to the bill, and the demurrer being overruled they elected to stand by it, whereupon the court heard the cause and entered a decree finding the facts in accordance with the allegations of the bill and adjudging the premises in question to be a common nuisance, ordering the appellants to abate the same, and perpetually enjoining them from permitting the building to be used as a place where intoxicating liquors could be sold, bartered, or given away. On appeal to the Appellate Court for the Third district that court ordered the decree modified, so that the injunction, instead of being perpetual, should continue until the voters of the city of Shelbyville should, if ever, vote that the territory should not remain anti-saloon territory, and in all other respects the decree was affirmed. A certificate of importance was granted, and an appeal to this court. * * *

It was in the discretion of the General Assembly, in the exercise of the police power, for the protection of the health, morals, and safety of the people and the promotion of their general welfare, to enact the statute, and our only function is to apply the law as made.

Section 38 of the act in question (Hurd's Rev. St. 1911, c. 43) pro-

vides that all places where intoxicating liquor is sold in violation of any provision of the act shall be taken and held and are declared to be common nuisances and may be abated as such, but it is contended by counsel for appellants that the provision cannot be enforced through a court of equity or the public be protected against the nuisance because a court of equity will not restrain the violation of public or penal statutes and will not administer the criminal laws of the state. A court exercising equitable jurisdiction will not restrain, by injunction, the commission of illegal or immoral acts and will not enjoin one engaged in the sale of liquor from making sales which are punishable by the criminal law. But that is not the object of this suit. The law has a double purpose—to punish the person committing an illegal act and to prohibit the use of property for illegal purposes—and these are separate and distinct. Punishment for the act is a fine or imprisonment, or both, but it is not the sale or keeping for sale of liquor that constitutes the nuisance, but it is the keeping of a place which the General Assembly has determined to be dangerous to the health, morals, safety, and welfare of the public.

The jurisdiction of courts of equity to enjoin nuisances is ancient and extends at least back to the reign of Queen Elizabeth, and in cases of public nuisances an indictment not only lies to abate them and punish the offenders, but an information also lies in equity to redress the grievance by way of injunction, on the ground that courts of equity have ability to give a more complete and perfect remedy, operating through future time, than is attainable by law. Story's Eq. Jur. (13th Ed.) §§ 921–924; Andrews on American Law, § 847. It was very early recognized by this court that a court of equity may grant preventive relief where a threatened act would be a public nuisance (People v. City of St. Louis, 5 Gilm. 351, 48 Am. Dec. 339), and that has always been the law in this state. It is a well-recognized branch of equity jurisprudence to restrain, by injunction, public nuisances. Barrett v. Mt. Greenwood Cemetery Ass'n, 159 Ill. 385, 42 N. E. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168. The same rule is stated in 5 Pomeroy's Eq. Jur. § 479, Joyce on the Law of Nuisance, § 81, 21 Am. & Eng. Ency. of Law (2d Ed.) 705, and 29 Cyc. 1218. It is one of the most useful functions of a court of equity that it may give complete and adequate relief against acts which will constitute nuisances, and laws such as the one in question do not deny the equal protection of the laws. Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620. * * *

By this act all places where intoxicating liquors are sold in violation of its provisions are placed in precisely the same category as any other common and public nuisance, and there is no reason why the same rule should not apply to remedies. The law extends no special favor to one nuisance not allowed to all. As to nuisances generally, not only is the existence of the method provided by the statute for their abate-

ment not an obstacle to relief in a court of equity, but this court, in Minke v. Hopeman, 87 Ill. 450, 29 Am. Rep. 63, held that the trial and acquittal of one indicted for nuisance did not deprive a court of equity of its equitable jurisdiction, and it was said that the fact that the statute gave a remedy by indictment did not deprive the court of jurisdiction to enjoin the nuisance. It was considered that a want of jurisdiction to enjoin a nuisance which might breed a pestilence or be dangerous to the welfare of the public would be a reproach to the law, and it was said that on the trial of the indictment the defendant would be entitled to the benefit of a reasonable doubt, and, although the evidence might clearly preponderate against him, yet the jury might acquit him. Whatever the degree of proof that would be required in a court of equity, that court would determine and apply the law, while in a criminal prosecution the jury would be judges of the law as well as of the facts, and a court, upon any degree of proof, might be powerless to enforce the law. This has been repeatedly demonstrated with respect to prosecutions relating to subjects on which there is a division of opinion among people who may serve as jurors. The Supreme Court of the United States held in the Debs Case that the United States could maintain a suit in the federal court to enjoin a public nuisance, notwithstanding the fact that the acts, in themselves, consisted of violations of the criminal law. In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. In Walker v. McNelly, 121 Ga. 114, 48 S. E. 718, it was held that the Solicitor General of the circuit court might maintain a suit for an injunction to abate the nuisance of selling intoxicating liquors illegally, although the persons engaged in the sale could be punished.

Counsel for appellants also say that injury to property is the foundation upon which equity jurisdiction rests, and that the court had no jurisdiction in this case because it does not affect rights of property or the maintenance of property rights. Necessarily that rule applies only when the complainant is an individual having a property right, and no question as to damage to property is involved in proceedings by the public to abate a public nuisance. The question simply is whether there has been an invasion of public rights, irrespective of questions of pecuniary damage. Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393. A court of equity has jurisdiction to abate a public nuisance, although offenders are not only amenable to criminal laws, but also where no property rights are involved in the litigation. State of Missouri v. Canty, 207 Mo. 439, 105 S. W. 1078, 15 L. R. A. (N. S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787. In Commonwealth v. McGovern, 116 Ky. 237, 75 S. W. 261, 66 L. R. A. 280, the right of the chancellor to enjoin the manager of a theater from permitting a prize fight was sustained, and it was said that the right was not dependent upon the fact that property was involved, but was justified on the higher ground that the public safety and morals were con-

cerned, and that the public good was of the first consideration. In State v. Crawford, 28 Kan. 726, 42 Am. Rep. 182, while the court held that an injunction should not be granted in that case because an adequate remedy was provided by statute, it was held that the court would enjoin the public nuisance unless some remedy was given for its complete suppression and extirpation. * * *

In a general way it may be said that the court might properly decline to exercise its equitable jurisdiction where public officials are discharging their duties in the enforcement of the laws and the ordinary methods are effective in compelling obedience to statutes forbidding the creation and maintenance of nuisances, but, if ordinary methods are ineffective or officials disregard their duties and refuse to perform them, the court ought to apply the strong and efficient hand of equity and uproot the evil. The remedy should be confined within legitimate bounds, but, if any case could be conceived of in which equity ought to take jurisdiction it is this one, where the use of the place for illegal sales of liquor has been continued for a long time openly and notoriously and with the connivance and express consent of the city authorities, and where a county judge has refused to issue warrants and grand juries have refused to hear witnesses, so that the laws of the state might be enforced and the nuisance abated by the ordinary means.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

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## COMMONWEALTH OF PENNSYLVANIA ex rel. DIXON v. EAST WASHINGTON.

**(Court of Common Pleas of Washington County, Pennsylvania, 1911. 60 Pittsb. Leg. J. 300.)**

In Equity.

GALBREATH, P. J.[44] (specially presiding). The demurrer filed in this case raises the following questions: First. Is the Commissioner of Health a proper party, under the law, to maintain the pending bill? Second. Has the Commissioner of Health any power or authority, under the law, to proceed by bill in equity to abate the nuisance complained of? Third. If the Commissioner of Health be a proper party, possessed of the proper authority in the premises, does he not have an adequate remedy at law? Fourth. Must it first be established by action at law that the things complained of constitute a public nuisance before equity can take jurisdiction? Fifth. Is the Act of Assembly of April 27, 1905 (P. L. 312), creating the office of Commissioner of Health and delegating to him certain authority a violation of article 3, § 20, of the Constitution of Pennsylvania?

As to the first of these questions it is contended on the part of the

[44] Parts of the opinion are omitted.

defendant that a proceeding of this kind when maintainable must be instituted by the Commonwealth at the relation of the Attorney General.

The Attorney General is a constitutional officer appointed by the Governor with the advice and consent of the Senate. The Constitution, however, does not undertake to define his authority, its character or the scope of its exercise. These, we may therefore assume, remain the same as they existed at the common law or have either been enlarged or limited by legislative enactment. The very fact that these prerogatives are not in any way defined by the Constitution suggests that these may be created, enlarged or limited by statute just as any other merely common law or statutory power or prerogative. From this it would seem to result that the authority of the Attorney General in any given respect is not necessarily exclusive, but may be exercised in whole or in part by other agents of the Commonwealth on whom the law-making power has exclusively or by clear implication conferred it. The authority of the Attorney General to proceed in a proper case in a court of equity to the abatement of a public nuisance, is, we think, undoubted, but, is his power to do so exclusive?

It is undoubted that proceedings in equity for the abatement of public nuisances have frequently been instituted in our Courts by others than the Attorney General and their right to do so has been unchallenged. In the case of City of New Castle v. Raney, 130 Pa. 546, a bill was filed by the city to abate what was alleged to be a public nuisance and although on appeal to the Supreme Court the bill was dismissed, yet it was on the ground that existence of the nuisance must be first established by action at law before a court of equity would take jurisdiction to abate it. So to, in City of Scranton v. Steel Works, 154 Pa. 171, 26 Atl. 1, the proceeding was instituted by the city and not at the relation of the Attorney General. Again, in the case of Commissioners of Moyamensing v. Long, 1 Pars. Eq. Cas. 143, the right of the proper officers of the municipality to maintain a bill in equity for the abatement of a public nuisance was clearly recognized.

Without multiplying citations, these are sufficient, we think, to establish the conclusion that other than the Attorney General may in a proper case maintain a bill in equity to enjoin or abate a public nuisance, from which it follows that his authority in that respect is not exclusive. A perusal of the authorities indicates the rule to be that where a private individual suffers a species of injury, distinct in character from that done to the public generally, he may maintain a bill in his own name. So, too, where a municipality has or is likely to sustain an injury peculiar to itself resulting from an existing or threatened public nuisance, the proper officers of the municipality may by bill proceed to its abatement. Where, however, it is wholly the public wrong that is complained of, "that must be done by the proper functionaries." Mechling v. Kittanning Bridge Company, 1 Grant, Cas. 416.

The plaintiff in the pending bill avers that the defendant borough is discharging sewage from its disposal plant into Catfish Run, a branch

of Chartiers Creek; that the said Catfish Run is about three miles in length, pursuing a meandering course through thickly populated sections of Washington Borough, emptying into said Chartiers Creek near the western boundary of said borough, which creek from said point flows northwardly, passing through thickly populated districts of several towns and villages on its way to the Ohio River; that the sewage so discharged contains large numbers of organisms, which indicate the presence of matter injurious to the health of both man and beast; that during a considerable portion of the year said stream into which it is discharged is nearly dry, which results in stagnant pools, as well as deposits along the banks of said stream. * * * An adequate remedy would therefore seem to call for a complainant competent to represent the whole public involved in the threatened wrong. That the Attorney General would be a proper party in such a case there can be no doubt. If, however, the conclusion already arrived at be correct, his authority is not necessarily exclusive, but is subject to be enlarged or diminished by the law-making power, and if the Legislature in the exercise of its power has expressly or by clear implication clothed the Commissioner of Health with authority to proceed to the abatement of public nuisances threatening or affecting the public health, we think such a delegation of power must prevail. This brings us to the consideration of the question whether the Commissioner of Health has authority under the law to proceed by bill in equity in the name of the Commonwealth to abate the alleged nuisance. * * *

The Commissioner of Health may, in a proper case, proceed by bill in equity in the name of the Commonwealth to have the alleged nuisance removed. * * *

As already stated the defendant's sewage plant constructed and operated as it now is must for the present purposes be deemed a public nuisance affecting or likely to affect a large community. We are dealing with it therefore not as a public improvement but as an existing nuisance and it is in that character alone that the Commissioner of Health is clothed with authority and power to abate it. It will scarcely be contended we think that a municipal corporation may under the form of a municipal improvement create and maintain a public nuisance without interference by or on behalf of those injuriously affected. The municipality being itself the offender, it can scarcely be expected to exercise its municipal functions in order to abate the offense. And, whilst the borough alone acting through its proper officers has the power to make, manage and control its purely municipal improvements, yet all persons affected or likely to be affected by a public nuisance have their remedy against it and in invoking that remedy they are not in any way exercising any purely municipal functions or interfering with a municipal improvement because the offender happens to be the municipality itself and the thing complained of a municipal creation. To hold otherwise would be, we think, to wrest the constitutional provision from its true meaning and intent. The Commissioner of Health,

proceeding in the name of the Commonwealth, is exercising, as their representative, a right already inherent in the people affected or likely to be affected by the public nuisance, and in so doing he is not exercising or interfering with any exclusively municipal functions, but is exercising the powers conferred upon him to protect the community from the threatened effects of a public nuisance. Whether or not the Act of April 27, 1905, is constitutional in all its provisions it is unnecessary to here inquire. In so far as it is involved in the present inquiry we are not persuaded that it offends against the fundamental law. The statute as a whole is remedial in character and well adapted to serve a most beneficent purpose and should not be turned aside unless quite clearly offending against the Constitution.

Thus we conclude that the Commissioner of Health under the Act of Assembly creating his office is made the representative of the people of the state in matters affecting the public health and that as such he may proceed in the name of the Commonwealth to the abatement of public nuisances prejudicial to the public health; that the Act of Assembly aforesaid has clothed him with power to proceed not only in the summary way pointed out in said Act, but has clothed him with discretion to choose and employ such other remedy as the law provides in order to accomplish his purpose and that he may therefore proceed in a proper case by bill in equity; that in the present case there is no adequate remedy at law for the suppression of the nuisance complained of, which must for the present purposes be assumed to be a public nuisance as alleged in the plaintiff's bill, and that the Act of Assembly aforesaid, in so far as it is involved in our present inquiry is not in violation of the Constitution of the Commonwealth.

For the reasons herein given, the demurrer filed by the defendant is overruled and the said defendant is directed to answer plaintiff's bill of complaint within thirty days from the filing of his opinion. Eo die a bill of exceptions is sealed for the defendant to the above order overruling the demurrer filed.

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## Appeal of RICHARDS.

**(Supreme Court of Pennsylvania, 1868. 57 Pa. 105, 98 Am. Dec. 202.)**

The opinion of the court was delivered, February 3, 1868, by

THOMPSON, C. J.[45] The complainant in this case is the owner of a dwelling-house and cotton factory in the village of Phœnixville, Chester county; and the respondents are owners of very extensive iron works in the same village. The former complains that by reason of the kind of fuel used by the latter in their works, his residence is rendered uncomfortable and unwholesome, and his factory materially injured in the discoloration of his fabrics and deterioration of his machin-

[45] The statement of facts is omitted.

ery. Claiming that he had established this, he asked the court below for a perpetual injunction to restrain the respondents from using the fuel, bituminous and semi-bituminous coal complained of as the cause of the injury to his property in these furnaces. The case was heard on bill and answer, and the court decided against him. He was then permitted to file a replication and take testimony, on which there is a report of a master also against him. The court having sustained the report, again refused to enjoin the defendants, and the case is before us on an appeal, and we are asked to do what the court below refused, namely, perpetually to restrain the defendants from using bituminous or semi-bituminous coal in their furnaces.

The defendants' works are very extensive, amongst the most so, it is said, of any of the kind in the Commonwealth, consisting of several blast furnaces, some seventy puddling furnaces, and rolling-mills and other machinery. They began on a small scale some forty-nine or fifty years ago, and up to 1840 used bituminous coal exclusively. The original works were not precisely on the spot of those complained of, but so near it as to entitle the latter to be regarded as an extension of the former. The extensions made in the works in 1837, 1846 and 1853, constitute the present works, the cost of which alone is represented as exceeding half a million of dollars, and which at the time of taking the testimony, and previously, employed, as the master reports, from eight hundred to one thousand hands.

The plaintiff's dwelling, it appears, is situated on a bluff or hill northwardly from the defendants' works, about seventy feet above the nearest furnace floor, which brings its first story about on a level with the top of the puddling-stacks, and when the wind is towards the plaintiff's house and from the furnace, the consequence is, that it is at times enveloped in a coal-smoke thrown out of the chimneys of the puddling furnaces. It cannot be doubted, I think, that this materially operates to injure the dwelling-house as a dwelling, and consequently to deteriorate its value. The alleged injury to the factory is mainly that the smoke and soot of the furnace blackens the stock and renders the fabrics less salable. This I can readily understand and believe. The house was erected in 1829, and the factory in 1834, and both have been generally occupied ever since; the factory not doing full work for some time past, as the master reports.

A careful consideration of the testimony satisfies us that the use of semi-bituminous coal, the fuel complained of, is necessary to the successful manufacture of iron fit for axles, cannon and the like, in the manufacture of which the defendants are largely engaged; that the process of manufacture, and fuel used, are generally employed in similar establishments, and that there was neither a negligent nor wilful infliction of injury upon the plaintiff or his property in the defendants' mode of operating their works. Whatever of injury may have, or shall result to, his property from the defendants' works, by reason of the

nuisance complained of, is such only as is incident to a lawful business conducted in the ordinary way, and by no unusual means. Still there may be injury to the plaintiff; but this of itself may not entitle him to the remedy he seeks. It may not, if ever so clearly established, be a case in which equity ought to enjoin the defendants in the use of a material necessary to the successful production of an article of such prime necessity as good iron; especially if it be very certain that a greater injury would ensue by enjoining than would result from a refusal to enjoin. If we were able with certainty to say that the use of semi-bituminous coal, in the process of making good iron by the puddling process, was unnecessary, and other fuel was equally good and available, or that by a reasonable expenditure of money on the works, all injury might be avoided, a different case might appear to our minds as chancellors, and we might then say that the cause of injury should cease, and that a decree in terms to meet such a contingency should be made so as to prevent the injury.

But we have not such case before us. Bituminous, or at least semi-bituminous coal, we think, from the testimony, is necessary in the manufacture of iron, such as the business of the defendants require, and whose fabrics the public require. Nor are we shown by testimony or reliable tests of any kind, that the smoke produced in the puddling process can be consumed, as it undoubtedly may be in ordinary chimneys, or when produced in furnaces used to propel machinery. I am personally cognisant that this may be done, from observation both in this country and in England; and I have therefore read with satisfaction and entire conviction of the truth, the article from the London Quarterly of 1866, so largely quoted by the learned counsel for the appellants; but I would be very unwilling to act on that conviction or that theory any further than to the extent to which experiment has gone. I would require very clear proof of the practicability of the application of the principle to uses dissimilar, or partially so, as puddling chimneys from common furnace smoke-stacks.

The defendants seem willing to test the applicability of smoke consumers to puddling furnaces, and at the same time express their doubts in a practical shape by offering $50,000 for an invention which will consume the smoke of their puddling stacks without impairing the efficiency of the process of manufacturing iron. However this may be, certain it is, we are not able to say from anything shown, that the evil complained of can be remedied by the application of smoke consumers. We do not know what effect their application might have on the process; nor do we think we should visit the defendants, because they might be unwilling to add to the height of their chimneys without knowing what effect it would have, or because they might not be willing to tear down their establishment and re-erect it on Seiman's plan or patent. What effect these remedies, or either of them, ought to have on the mind of a chancellor, if feasible, and the injury complained of were absolutely irreparable, we are not called upon to say, for such is evi-

dently not the case here if there be any damage at all, as we shall presently show.

The rule on this subject is well stated in Grey v. Ohio & Pennsylvania Railroad Co., 1 Grant, Cas. 412, thus:

"Where damages will compensate either the benefits derived or the loss suffered from a nuisance, equity will not interfere."

See also Hilliard on Injunc. 271; Adams' Eq. 485; Fonblanque's Eq. 51; 2 Story's Eq. § 925 et seq.; Eden on Injunc. 269. In Coe v. Lake, 37 N. H. 254, it was said, where the bill prayed an injunction to suppress a nuisance to the plaintiff's land, it might be dismissed on general demurrer for want of equity, unless it appeared from the subject-matter affected by the alleged nuisance that there was danger of irreparable mischief, or of an injury such as could not be adequately compensated in a suit at law. These, and many other authorities to the same effect, some of which are on the paperbook of the appellees, prove conclusively that, as a general rule, mischief or damage is not irreparable which is susceptible of being compensated in damages. We have no doubt that an action at law will lie for an injury to property for causes similar to those mentioned in this bill, and if so, why will not the remedy be adequate in such case, and thus the injury be repaired in damages? We are not to presume that it will not be. This would be to impugn the justice of our common-law forms without a reason. We think, under the circumstances of the case, that the injunction ought to be refused, and the plaintiff left to his action at law for the recovery of such damages as he may have sustained or may sustain.

An error seems somewhat prevalent in portions, at least, of this Commonwealth, in regard to proceedings in equity to restrain the commission of nuisances. It seems to be supposed that, as at law, whenever a case is made out of wrongful acts on the one side and consequent injury on the other, a decree to restrain the act complained of, must as certainly follow, as a judgment would follow a verdict in a common-law court. This is a mistake. It is elementary law, that in equity a decree is never of right, as a judgment at law is, but of grace. Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience the former should appear he will refuse to enjoin. Hiltio v. Earl of Granville, 1 Craig & Ph. Ch. R. 292; Grey v. Ohio & Penna. Railroad Co., supra. We think this is a safe rule, and that the case we are considering is within it. With these views, and on full consideration of all the testimony in the case, we are of opinion the injunction was properly refused in the court below, and that the decree dismissing the plaintiff's bill with costs must be affirmed.

Appeal dismissed at the cost of the appellant.

## HULBERT v. CALIFORNIA PORTLAND CEMENT CO. GILBERT v. SAME.

(Supreme Court of California, 1911. 161 Cal. 239, 118 Pac. 928, 38 L. R. A. [N. S.] 436.)

MELVIN, J. Petitioner has made an original application to this court to suspend the operation of a certain injunction until the decision of the appeals in two cases, in each of which the California Portland Cement Company, a corporation, is the defendant, on the ground that the property of the corporation would be so greatly damaged by the operation of the injunction pending the appeals that a judgment in defendant's favor would be almost fruitless; while it is contended the damage to plaintiffs is easily susceptible of satisfaction by a payment of money. Petitioner offers to furnish any bond this court may require, if the order which is prayed for shall be granted. As this was the first case in America, so far as this court knew, in which the operation of a cement plant had been enjoined because of the dust produced in the processes of manufacture, and as the showing which was made indicated that petitioner's loss would be very great if the injunction were enforced at once, an order was entered, temporarily staying its operation until both sides to the controversy could be heard. The court was moved somewhat to such action also because the trial court had made an order staying the operation of the injunction for 60 days, so that this court might have the opportunity of passing upon this application. Two principal questions are presented: (1) Has the Supreme Court the authority in aid of its appellate jurisdiction, under section 4 of article 6 of the Constitution, to suspend the operation of an injunction pending appeal? (2) If it have such power, is this a proper case for the exercise thereof? Owing to the conclusion which we have reached, it is unnecessary to answer the first question authoritatively, because, assuming a reply to it in the affirmative, we cannot say that the facts of this case warrant any other response to the second inquiry than a negative one.

The salient facts shown by the petitioner are that the California Portland Cement Company is engaged in the manufacture of cement on property situated nearly two miles from the center of the city of Colton, in the county of San Bernardino, but not within the limits of said city; that said manufactory is located at Slover mountain, where the substances necessary to the production of Portland cement are quarried; that long before the surrounding country had been generally devoted to the production of citrus fruits Slover mountain had been known as a place where limestone was produced; that quarries of marble and limestone had been established there; that lime kilns had been operated upon said mountain for many years; that in 1891 the petitioner obtained title to said premises, and commenced thereon the manufacture of Portland cement; that the said corporation

has expended upon said property more than $800,000; that at the time when petitioner began the erection of the cement plant the land surrounding the plant was vacant and unimproved, except some land lying to the north, which had been planted to young citrus trees; that these trees were first planted about a year before the erection of the cement plant was commenced (but long after the lime kilns and the marble quarries had been operated); that subsequently other orange groves have been planted in the neighborhood; that the petitioner's plant on Slover mountain has a capacity of 3,000 barrels of cement per day; but that by the judgment of the superior court in two certain actions against petitioner, entitled Lillie A. Hulbert, Administratrix, etc., v. California Portland Cement Company, a Corporation, and Spencer E. Gilbert, plaintiff, v. Same Defendant, the corporation aforesaid was enjoined from operating its plant in such manner as to produce an excess of 88,706 barrels of finished cement per annum; that the regular pay roll of the company includes the names of about 500 men, who are paid about $35,000 a month; that the fixed, constant monthly expenses for supplies and materials amount to $35,000; that the California Portland Cement Company employs the best, most modern methods in its processes of manufacture, but that nevertheless there is an unavoidable escape into the air of certain dust and smoke; that petitioner has no other location for the conduct of its business at a profit; that the land of the Hulbert estate is located from 1,500 to 2,500 feet from petitioner's cement works, and that Spencer E. Gilbert's land is all within 1,000 feet therefrom; that petitioner has diligently sought some means of preventing the escape of dust from its factories; that it has consulted the best experts and sought the best information obtainable, and that it is now and has been for a long time conducting experiments along the lines suggested by the most eminent engineering authorities upon this subject, and that, as soon as any process can be evolved for preventing the escape of the dust, the petitioner will adopt such process in its works, and it is believed that a process now constructing with all diligence by petitioner will effectually prevent the escape of dust. Petitioner also alleges that it is easily possible to estimate the damages of the plaintiffs in money, while it is utterly impracticable to estimate the damage in money which will be caused to the petitioner by the closing of the plant, and that stopping the plant pending the appeals will cause financial ruin to the chief stockholders of the petitioner, and that the elements of loss averred are irreparable on account of the disorganization of petitioner's working force, loss of market, and deterioration of machinery.

The learned judge of the superior court, in deciding the cases in which petitioner here was defendant, described the method of manufacturing cement and the injury to the trees. He said, in part:

"The output from these two mills at the present time is about 2,500 barrels of cement every 24 hours, and to produce this there is fed into the various kilns of the defendant, during the time mentioned, about 1,500,000 pounds of raw mix, composed of limestone and clay, ground as fine as flour and thor-

oughly mixed. This raw mix is fed into the tops of kilns, wherein the temperature varies from 1,800 to 3,000 degrees Fahrenheit, and through which kilns the heated air and combustion gases pass at the rate of many thousands of feet per minute. The result of this almost inconceivable draft is to carry out, in addition to the usual products of combustion, particles of the raw mix, to the extent of probably 20 tons per day or more, the greater part of which, without question, is carried up into the air by the rising gases, and thereafter, through the action of the winds and force of gravity, distributed over the surrounding territory."

Speaking of the premises of the plaintiffs, he said that, because of prevailing westerly winds and on account of the proximity of the mills, said lands were almost continually subject to the deposit of dust. In this regard he said:

"It is the fact incontrovertibly established by both the testimony of witnesses and personal inspections made by the court that a well-nigh continuous shower of cement dust, emanating from defendant's cement mills and caused by their operation, is, and for some years past has been, falling upon the properties of the plaintiffs, covering and coating the ground, filtering through their homes, into all parts thereof, forming an opaque semi-cemented incrustation upon the upper sides of all exposed flowers and foliage, particularly leaves of citrus trees, and leaving ineradicable, yet withal plainly discernible, marks and evidence of dust, dusty deposits, and grayish colorings resulting therefrom, upon the citrus fruits. The incrustations above mentioned, unlike the deposits occasionally occurring on leaves because of the presence of undue amounts of road dust or field dust, are not dissipated by the strongest winds, nor washed off through the action of the most protracted rains. Their presence, from repeated observations, seems to be as continuous as their hold upon the leaves seems tenacious."

The court further found that the deposit of dust on the fruit decreased its value; that the constant presence of dust on the limbs and leaves of the trees rendered the cultivation of the ground and the harvesting of the crop more costly than it would have been under ordinary conditions; and that said dust added to the usual and ordinary discomforts of life by its presence in the homes of the plaintiffs. The court also found that the operation of the old mill of the defendant corporation had occurred with the acquiescence of the plaintiffs, and that the defendant had acquired a prescriptive right to manufacture the maximum quantity of cement produced annually by that factory.

In view of such facts solemnly found by the court after trial, we cannot say that there is reason for a suspension by this court of the injunction, even conceding that we have power under proper circumstances thus to prevent a disturbance of existing conditions, pending an appeal. We are not insensible to the fact that petitioner's business is a very important enterprise; that its location is peculiarly adapted for the manufacture of cement; and that great loss may result to the corporation by the enforcement of the injunction. Even if the officers of the corporation are willing to furnish a bond in a sum equal to the value of the properties of Gilbert and of the Hulbert estate here involved, we cannot, under plain principles of equity, compel these plaintiffs to have recourse to their action at law only, and take from them the benefit of the injunctive relief accorded them by the chancellor below. To permit the cement company to continue its operations, even

to the extent of destroying the property of the two plaintiffs and requiring payment of the full value thereof, would be, in effect, allowing the seizure of private property for a use other than a public one—something unheard of and totally unauthorized in the law. Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374; Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712.

Nor may we say, as petitioner urges us to declare, that cement dust is not a nuisance, and therefore that the restraint imposed is illegal, even though this is one of the first cases, if not the very first, of its kind, in which the emission of cement dust from a factory has been enjoined, for we are bound by the findings of the court in this proceeding, and may not consider their sufficiency or lack of it until we take up the appeals on their merits. The court has found that the plaintiffs in the action tried were specially damaged by a nuisance maintained by the cement company. This entitles the plaintiffs, not only to damages, but to such relief as the facts warrant, and the chancellor has determined that limiting the production in the manner selected is a proper form of protection to their rights. It is well settled in California that a nuisance which consists in pouring soot or the like upon the property of a neighbor in such manner as to interfere with the comfortable enjoyment of the premises is a private nuisance, which may be enjoined or abated, and for which, likewise, the persons specially injured may recover pecuniary damages. Code Civ. Proc. § 731; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 328, 94 Pac. 390; Judson v. Los Angeles Sub. Gas Co., 157 Cal. 172, 106 Pac. 583, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247. The last-named case was one in which the operation of a gas factory had been enjoined, and the following language was used:

"A gas factory does not constitute a nuisance per se. The manufacture in or near a great city of gas for illuminating and heating is not only legitimate, but is very necessary to the comfort of the people. But in this, as in any other sort of lawful business, the person conducting it is subject to the rule, 'Sic utere tuo ut alienum non lædas,' even when operating under municipal permission, or under public obligation to furnish a commodity. Terre Haute Gas Co. v. Teel, 20 Ind. 131; Attorney General v. Gaslight & Coke Co., L. R. 7 Chan. Div. 217; Sullivan v. Royer, 72 Cal. 248 [13 Pac. 655, 1 Am. St. Rep. 51]. Nor will the adoption of the most approved appliances and methods of production justify the continuance of that which, in spite of them, remains a nuisance. Evans v. Fertilizing Co., 160 Pa. 223 [28 Atl. 702]; Susquehanna Fer. Co. v. Malone, 73 Md. 276 [20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595]; Susquehanna Fer. Co. v. Spangler, 86 Md. 562 [39 Atl. 270, 63 Am. St. Rep. 533]."

Petitioner contends for the rule that the resulting injuries must be balanced by the court, and that, where the hardship inflicted upon one party by the granting of an injunction would be very much greater than that which would be suffered by the other party if the nuisance were permitted to continue, injunctive relief should be denied. This doctrine of "the balance of hardship" and the associated rule that "an injunction is not of right but of grace" are the bases of peti-

tioner's argument, and many authorities in support of them have been called to our attention. In petitioner's behalf are cited such cases as Richards' Appeal, 57 Pa. 105, 98 Am. Dec. 202, where an injunction which had been sought to restrain defendant from using large quantities of bituminous coal to plaintiff's damage was refused, and the plaintiff was remitted to his action at law; the court saying, among other things:

"Whatever of injury may have or shall result to his (the plaintiff's) property from the defendant's works, by reason of a nuisance complained of, is only such as is incident to a lawful business conducted in the ordinary way, and by no unusual means. Still, there may be injury to the plaintiff, but this of itself may not entitle him to the remedy he seeks. It may not, if ever so clearly established, be a cause in which equity ought to enjoin the defendant in the use of a material necessary to the successful production of an article of such prime necessity as good iron, especially if it be very certain that a greater injury would ensue by enjoining than would result by refusal to enjoin."

The same rule was announced in Dilworth's Appeal, 91 Pa. 248, a case involving the building of a powder house near plaintiff, and in Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669. Petitioner admits that in the later case of Sullivan v. Jones & Laughlin Steel Co., supra, the Supreme Court of Pennsylvania reached a different conclusion, but contends that the opinion in that case merely defines the word "grace" as used in Huckenstine's Appeal; the real meaning of the expression "an injunction is a matter of grace" being that a high degree of discretion is exercised by a chancellor in awarding or denying an injunction. An examination of the case, however, shows that the court went very much further than a mere definition of the phrase "of grace." In that case the defendant had erected a large factory for the manufacture of steel on land purchased from one of the plaintiffs, but after many years defendant had commenced the use of "Mesaba" ore, which caused the emission of great quantities of fine dust upon the property of plaintiffs. The Supreme Court of Pennsylvania, in reversing the decree of the lower court, dismissing the bill, went into the matter of "balancing injuries" and "injunctions of grace" very thoroughly, and we may with propriety, I think, quote and adopt some of its language upon these subjects as follows:

"It is urged that, as an injunction is a matter of grace, and not of right, and more injury would result in awarding than refusing it, it ought not to go out in this case. A chancellor does act as of grace, but that grace sometimes becomes a matter of right to the suitor in its court, and, when it is clear that the law cannot give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them. This is too often overlooked when it is said that in equity a decree is of grace, and not of right, as a judgment at law. In Walters v. McElroy et al. [151 Pa. 549] 25 Atl. 125, the defendants gave as one of the reasons why the plaintiff's bill should be dismissed that his land was worth but little, while they were engaged in a great mining industry, which would be paralyzed if they should be enjoined from a continuance of the acts complained of; and the principle was invoked that, as a decree in equity is of grace, a chancellor will never enjoin an act where, by so doing, greater injury will result than from a refusal to enjoin. To this we said: 'The phrase "of grace," predicated of a decree in equity,

had its origin in an age when kings dispensed their royal favors by the hands of their chancellors; but, although it continues to be repeated occasionally, it has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. It has been somewhere said that equity has its laws, as law has its equity. This is but another form of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace, of the chancellor. Certainly no chancellor in any English-speaking country will at this day admit that he dispenses favors or refuses rightful demands, or deny that, when a suitor has brought his cause clearly within the rules of equity jurisprudence the relief he asks is demandable ex debito justitiæ, and needs not to be implored ex gratia. And as to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him, as compared with the advantages that would accrue to the defendants from its occupation.' There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land. Though it is said a chancellor will consider whether he would not do a greater injury by enjoining than would result from refusal, and leaving the party to his redress at the hands of a court and jury, and if, in conscience, the former should appear, he will refuse to enjoin (Richards' Appeal, supra), that 'it often becomes a grave question whether so great an injury would not be done to the community by enjoining the business that the complaining party should be left to his remedy at law' (Dilworth's Appeal, supra), and similar expressions are to be found in other cases, 'none of them, nor all of them, can be authority for the proposition that equity, a case for its cognizance being otherwise made out, will refuse to protect a man in the possession and enjoyment of his property, because that right is less valuable to him than the power to destroy it may be to his neighbor or to the public' (Evans v. Reading Chem. Fer. Co., 160 Pa. 209 [28 Atl. 702]). The right of a man to use and enjoy his property is as supreme as his neighbor's, and no artificial use of it by either can be permitted to destroy that of the other."

Petitioner lays great stress upon North Fork Water Co. v. Medland (C. C.) 187 Fed. 169, in which, in the opinion by Judge Ross, formerly a member of this court, the following appears:

"Now, in the first place, it is to be remembered that no one is entitled to an injunction as a matter of absolute right. When a contract is broken and any party thereto sustains an injury by reason of such breach, the injured party has an absolute right to maintain an action at law for the recovery of such damages as can be shown to have been sustained by him. But a suit in equity, either to enjoin the continuance of such a breach or to enforce the specific performance of the contract, appeals to the sound discretion of the chancellor—to his conscience—and the relief so sought will be granted or withheld according to the real equity of the case, in view of all its facts and circumstances."

Petitioner also cites Mountain Copper Co. v. U. S., 142 Fed. 625, 73 C. C. A. 621, in which the opinion was also by Judge Ross. In that case the court refused to enjoin the operation of defendant's smelter, relying largely upon the early cases from Pennsylvania, which declare the "balance of hardship" doctrine, and that an injunction is ex gratia, and not ex debito justitiæ, and citing other cases, including

the well-known Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658. While we have the utmost respect for the learned author of these opinions and for the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, we cannot agree with the principles announced in the two cases decided by that court, cited above. In connection with the case of Mountain Copper Co. v. U. S., supra, it is interesting to note that in his dissenting opinion therein Judge Hawley quotes from Fisher v. Zumwalt, supra, and two other California cases (Daubenspeck v. Grear, 18 Cal. 443, 447, and Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544, 551), and after an analysis of them concludes with this brief but excellent statement of the rule which he deduced from them:

"The pith, point, and substance of this whole matter is that, where the acts of a party, whether individuals or corporations, wealthy or poor, destroy the substance of complainant's estate, whether it be of great or of but little value, an injunction should be issued. This is the underlying principle, the essence, and effect of all the decisions upon the subject which distinguish this character of cases from those where the injury is slight and trivial, and the damage not irreparable, and not absolutely destructive of complainant's estate."

The Mountain Copper Company Case has also been criticized by the Supreme Court of Arizona, as well as the later case of McCarthy v. Bunker Hill & Sullivan Mining & Con. Co., 164 Fed. 927, 92 C. C. A. 259. In Arizona Copper Co. v. Gillespie, 12 Ariz. 203, 100 Pac. 470, this language was used:

"Counsel press upon us the proposition that we should consider the comparative damage that will be done by granting or withholding an injunction in this case, alleging that the effect of an injunction will be to stop the operation of extensive works, deprive thousands of persons of employment, and cause loss and distress to other thousands. It is undoubtedly true that a court should exercise great care and caution in acting where such results would follow. It should very clearly appear that the acts of the defendant are wrongful, and that the complainant is suffering substantial and irreparable injury, for which he cannot secure adequate compensation at law. A number of eminent courts support the contention of appellant that the comparative injury to the parties in granting or withholding relief must also be considered. Among the cases so holding is the case of McCarthy v. Bunker Hill & Sullivan Min. & Con. Co., 164 Fed. 927 [92 C. C. A. 259], decided by the Circuit Court of Appeals for this circuit, a court for which we entertain the highest respect (which exercises an appellate jurisdiction over this court in certain cases); and, if this case were reviewable there, we should not feel at liberty to express views in conflict with those of that court. But this case is reviewable only by the Supreme Court of the United States, and we cannot find, as suggested by the Circuit Court of Appeals, that that court has given adherence to the doctrine. It seems to us that to withhold relief where irreparable injury is, and will continue to be, suffered by persons whose financial interests are small in comparison to those who wrong them is inconsistent with the spirit of our jurisprudence. It is in effect saying to the wrongdoer, 'If your financial interests are large enough so that to stop you will cause great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors.' We prefer the doctrine adhered to by Judge Hawley, in his dissenting opinion in Mt. Copper Co. v. U. S., 142 Fed. 625 [73 C. C. A. 621], and by Judge Sawyer in Woodruff v. North Bloomfield Gravel Min. Co. [C. C.] 18 Fed. 753. In the latter case it is said: 'Of course, great interests should not be overthrown on trifling or frivolous grounds, as where the maxim, "De minimis non curat lex," is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital

and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all small and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency.' To the same effect are the remarks of Judge Marshall, in McCleery v. Highland Boy Gold Min. Co. [C. C.] 140 Fed. 951."

Petitioner cites, among others, the following cases, which, although tending for the most part to support the rule for which he contends, are not, we think, in accord with the best modern ideas upon this subject and with the current of Californian authorities: McBryde v. Sayre, 86 Ala. 458, 5 South. 791, 3 L. R. A. 861; Chambers v. Iron Co., 67 Ala. 358; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 South. 192; Riedeman v. Mt. Morris Elec. Co., 56 App. Div. 23, 67 N. Y. Supp. 391; Barnard v. Sherley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568, 41 Am. St. Rep. 454; Gilbert v. Showerman, 23 Mich. 449; Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Amelia Mill Co. v. Tenn. Coal & Iron Co. (C. C.) 123 Fed. 811; Edwards v. Allouez Min. Co., 38 Mich. 46, 31 Am. Rep. 301; Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414; and Stewart Wire Co. v. Lehigh C. & N. Co., 203 Pa. 474, 53 Atl. 352. The last-named case was really decided upon the doctrine of laches, and not that of "balance of detriment." Many of the cases to which our attention is called by petitioner are not strictly in point. For example, in New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, the Supreme Court of the United States recognized the principle that, where the defendant in an injunction suit has "the ultimate right"—that is to say, where it is entitled to continue with its work by eminent domain proceedings—a permanent injunction will be denied, but a temporary injunction may be granted to compel the defendant to make compensation.

In Georgia v. Tenn. Copper Co., 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488, there is a dictum to the effect that if the plaintiff were a private individual the court might consider the balance of hardship, but from this Harlan, J., dissented. One of the most instructive cases upon this subject is American Smelting & Ref. Co. v. Godfrey, 158 Fed. 225, 89 C. C. A. 139, 14 Ann. Cas. 8. In that case Judge Riner says:

"The fact, urged by counsel, that these smelters are located at a place where, by reason of its relation to the railroads and mines, it is most convenient for smelting purposes does not, in our judgment, constitute any defense to a bill to abate a nuisance; neither can a court take into consideration the fact that the business is conducted in a proper and reasonable manner, employing the latest and best devices and instrumentalities, where the evidence shows, as in this case, that when so operated and conducted it still results in very great damage to, if not the total destruction of, complainant's property and is a menace to health. 'The rights of habitation are superior to the rights of trade, and whenever they conflict the rights of trade must yield to the primary or natural right.' 1 Wood on Nuisances, §§ 514–517, and 523. It is also insisted that the injury to the appellants and to the public, if an injunction issues, so greatly exceeds the injury to the appellees, if denied, that an injunction

should not have been granted. We think it may well be doubted whether this statement is supported by the record. The parties to this suit, upon both sides, have important and very valuable interests affected by the decree, and it would indeed be difficult to say upon the facts disclosed by the record which side would suffer the greater injury. However that may be, we do not think the fact that an actual injury resulting from the violation of a right is small, and the interest to be affected by an injunction is large, should weigh against the interposition of preventative power in equity, when it is clear that, on one hand, a right is violated and, on the other, a wrong is committed."

He then discusses the leading cases. This, and the appended opinion of Marshall, District Judge, rendered in the Circuit Court, are very illuminating.

Our attention has been directed to certain Californian cases which, according to petitioner's belief, support the rule with reference to the "balancing of injury." These are Peterson v. City of Santa Rosa, 119 Cal. 387, 51 Pac. 557, and Williams v. Los Angeles Railway Co., 150 Cal. 593, 89 Pac. 330. In the latter case the court was considering the refusal by the superior court of an injunction pendente lite. While it contains some language perhaps susceptible of the meaning for which petitioner contends, the court was really considering the principle announced in Hicks v. Michael, 15 Cal. 116, that an injunction should not be issued before a hearing on the merits, except in cases of urgent necessity. In Peterson v. Santa Rosa, supra, the following language is found:

"In Attorney General v. Council of Birmingham, 4 Kay & J. 528, the court indicated that in such cases only the right of plaintiff to relief, rather than the question of inconvenience to defendants, was to be considered, although the latter represented a large population. We regard the foregoing as an extreme statement, and deem it more proper to adopt the language of Swayne, J., in Parker v. Winnipiseogee, etc., Co., 2 Black, 545 [17 L. Ed. 333]: 'After the right has been established at law, a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case.' In Curtis v. Winslow, 38 Vt. 690, it was said: 'In determining the right of a party to an injunction after a verdict in his favor by a court of law, the court will consider the relative loss to either party, the character of the property for which protection is sought, the character of the locality in which the nuisance exists, and whether the injury is properly compensable in damages.' If the injury is only occasional, and the damages small, accidental, rather than a probable and necessary consequence, an injunction will be denied. Wood v. Sutaliff, 8 Eng. L. & Eq. 217. In short, each case must be governed by the circumstances that surround it and by relative equities. Wood on Nuisances, § 550."

Nevertheless the department sustained the judgment granting an injunction, by which defendant, a large city, was restrained from polluting the waters of Santa Rosa creek, although plaintiff's damages were found by the jury to amount merely to one dollar. The case is really in exact accord with the views which we have expressed above, for this language is used with reference to plaintiff:

"Her right as a riparian owner was, not only to have the water of the stream flow over her land in its usual volume, but to have it flow in its natural purity, and such pollution of the stream by the defendant as substantially impaired its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes, is an actionable nuisance, and the fact that the defendant is a municipal corporation does not enhance its rights or

palliate its wrongs in this respect. Wood on Nuisances, § 427; High on Injunc. (3d Ed.) § 810."

We are convinced that upon reason and upon great weight of authority we should deny petitioner's prayer, considering the subject upon the assumption that we have power under the Constitution, in aid of our appellate jurisdiction in a proper case, to suspend the operation of a prohibitory injunction pending an appeal.

Let the temporary order staying the operation of the injunction be dismissed, and the petition be denied.*

I concur: LORIGAN, J.

HENSHAW, J., deems himself disqualified to participate herein, and therefore declines to act.

SLOSS, J. I concur in the order. It seems to me, however, that the discussion concerning the right of a court of equity to refuse an in-

*In Bliss v. Anaconda Copper Mining Co. (1909) 167 Fed. 342, 365, 366, 371, the Circuit Court refused to enjoin a great copper smelter built at a cost of $9,500,000 and smelting 7,000 tons of ore per day. There was no question of the injury to complainant's farm from the poisonous fumes of the smelter, but the court held he must seek his damages at law, applying the "balance of equities" rule; Hunt, District Judge, saying in his opinion: "I need not dwell on the question of power, for it is too well established that, from an ancient date, with regard to nuisance, courts of equity have jurisdiction, based upon the reasonable certainty of irreparable mischief, that sort of material injury by one to the comfort of another, which requires the application of a power to prevent, as well as to remedy, the evil (Jeremy's Equity Jurisdiction, § 310; Daniell's Chancery Pleading & Practice [6th Ed.] § 1636), but will pass to the point of close bearing upon the original question, that of discretion where injury of the character proved in this case is threatened to be continued. In my opinion, where there is presented a conflict of rights, it is the duty of a court of equity, in protecting those of the complainant, to consider those of the defendant, and in doing so it may consider also the injuries that may result to others by issuing the writ of injunction. Put broadly, then, the proposition is this: The writ of injunction is not ex debito justitiæ for any injury threatened or done to land or rights of a person; but the granting of it must always rest in sound discretion, governed by the nature of the case. To sustain this rule I need refer to but a few cases. In Parker v. Winnipiseogee Lake Cotton & Woolen Company (1862) 67 U. S. 545, 17 L. Ed. 333, the Supreme Court held that, although the right of a complainant has been established at law, a court of chancery will not 'as of course' interpose by injunction, but will consider all the circumstances, the consequences of such action, and the real equity of the case. A comparison of injury with the damage which would result by injunction was made by the court in Atchison v. Peterson (1874) 87 U. S. 507, 22 L. Ed. 414. The Supreme Court there held that injury sustained by accumulation of sand in water used for mining by one of the parties to the litigation was hardly appreciable in comparison with the damage which would result to the other parties from an indefinite suspension of work on their valuable mining claims, and that it was right for the court not to interfere by injunction to restrain their operations, and to leave plaintiffs to their remedy at law. And again, in Osborne v. Missouri Pacific Railway Co. (1893) 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155, the court recognized a distinction between the instance of an actual invasion of private rights which might be assumed to be essentially irremediable, and one where there is no direct physical taking of the estate itself, in whole or in part, but the infliction of damage in respect to the complete enjoyment of the estate, and implied that probably injunctive relief would be awarded ex debito justitiæ in the one case, while the court would decline to interfere in the other. And again, in the Debs Case (1895) 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, the court refers to the frequency of suits where the necessity for the

junction where the injury resulting to the plaintiff from a denial of the relief would be far less than that sustained by the defendant, if the injunction were granted, is applicable to a consideration of appeals on their merits, rather than to the question here involved. If the court may balance the extent of the losses to be suffered by the respective parties, it exercises its discretion in this behalf when it grants or refuses the injunction. In this case the lower court has determined that it was essential, or at least proper, for the protection of the plaintiffs' rights that the defendant should be restrained. We are not now reviewing the correctness of that determination. The petition-

exercise of equity jurisdiction of public nuisance has depended upon the circumstances of the particular case, and, speaking through Justice Brewer, remarks: 'Of course, circumstances may exist in one case, which do not in another, to induce the court to interfere or refuse to interfere by injunction, but the jurisdiction, the power to interfere, exists in all cases of nuisance.' In New York City v. Pine (1902) 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, the Supreme Court held that there was no absolute right to an injunction; and they so held in Kansas v. Colorado (1906) 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, notwithstanding the finding that 'perceptible injury' was done by diminution of streams in Colorado to portions of the lands belonging to the state of Kansas. 'It cannot be denied,' said the court, 'in view of all the testimony, that the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.' * * * Finally, in the last analysis, when, in connection with the attitude of Mr. Bliss, direct and vicarious, we weigh the uncertainty of his proof as to the amount of past damages done to his land, or of future damages to be done to his pastures by the acts of these defendants, together with the fact that he has not resorted to a court of law to recover any damages at all, and balance these matters against the stern fact that, if defendants are enjoined as prayed for, they must either buy the lands of the farmers at their own prices, or sacrifice their property; that, if enjoined as prayed for, their smelter must close; that, if it does close, their business and great property will be practically ruined; that a major part of the sulphide copper ores of Butte cannot be treated elsewhere within this state; that thousands of defendants' employés will have to be discharged; that the cities of Anaconda and Butte will be injured irreparably by the general effect upon internal commerce and business of all kinds; that professional men, banks, business men, working people, hotels, stores, and railroads will be so vitally affected as to cause unprecedented depression in the most populous part of the state; that the county government of one county of the state may not be able to exist; that the farmers of the valleys adjacent to Butte and Anaconda will not have nearly as good markets as they have enjoyed; that the industry of smelting copper sulphide ores will be driven from the state; and that values of many kinds of property will either be practically destroyed or seriously affected—remembering, always, that the courts of law are open to Mr. Bliss, I hold that, under the evidence, as he has submitted his case, discretion, wisely, imperatively guided by the spirit of justice, does not demand that injunction, as prayed for, should issue."

See Cowper v. Laidler, [1903] 2 Ch. Div. 333, 341, where Buckley, J., expresses the English view against the "balance of equities or convenience" rule (even under the statutory authority of Lord Caines' Act to give damages in lieu of an injunction at its discretion), saying: "The Court has affirmed over and over again that the jurisdiction to give damages where it exists is not so to be used as in fact to enable the defendant to purchase from the plaintiff against his will his legal right to the easement."

er cannot, of course, ask us in this proceeding to stay the force of the injunction, on the ground that the trial court abused its discretion, or that it erred otherwise in granting the injunction. What is claimed is that a suspension of the judgment "is necessary or proper to the complete exercise" of our appellate jurisdiction (Const. art. 6, § 4); it is claimed that a refusal to stay the injunction will so affect the subject of the controversy that, if the judgment should ultimately be reversed, the appellant will in large measure be deprived of the fruits of its successful appeal.

But we must consider the rights of the respondents, as well as those of the plaintiffs. If the judgment of the court below is right, the plaintiffs are absolutely entitled to have the wrongful acts stopped, not only after the determination of the appeal, but pending the appeal. Under the findings, the acts complained of are inflicting a continuing injury upon the plaintiffs and their lands, an injury of a kind which has always been regarded by courts of chancery as irremediable, and not capable of adequate redress by damages. If the appellant may ask that it shall not lose the fruits of an appeal which may turn out to be meritorious, the respondents are in at least as good a position to demand that the appellate court shall not irrevocably take away from them the benefit which they have already won, and which will be confirmed to them if the judgment should be sustained. The exercise of the appellate jurisdiction must contemplate the possibility of affirmances, as well as reversals. I do not think a stay of execution can be said to be necessary or proper to the complete exercise of appellate jurisdiction when such stay can be granted only at the risk of destroying rights which will unquestionably belong to the respondent, if the judgment of the lower court shall be confirmed. This will always be the situation in the case of an appeal from a judgment enjoining acts which are found to be destructive of the plaintiff's real property. I think, therefore, that in such cases, at any rate, this court should not undertake to suspend the force of a prohibitory injunction pending appeal. Swift v. Shepard, 64 Cal. 423, 1 Pac. 493. The statutory law gives no stay, and there should be none, unless the trial court, which is in the best position to weigh the respective equities, concludes to exercise its power (Pasadena v. Superior Court, 157 Cal. 781, 109 Pac. 620, 21 Ann. Cas. 1355) to suspend the injunction until the merits are finally determined.

It may be suggested, further, that the effect of an order by this court, suspending the operation of a prohibitory injunction, is to reverse, pro tanto, the judgment granting the injunction, and that in advance of a hearing on the merits. That this is so will appear more clearly if we suppose the case of an appeal from an order of the superior court, granting an injunction pendente lite. In such case, an application for a suspension of the injunction pending the appeal could be urged upon precisely the same grounds as those here presented by petitioner. The thing decided by the trial court, in the case supposed,

was that the defendant should be restrained until a trial on the merits, or until that court should order otherwise. That conclusion is reviewable on appeal; but to suspend the order before a hearing of the appeal would clearly be to set aside the very thing decided below, viz., that the defendant should be enjoined until a trial or a further order. The situation does not differ where the injunction is embraced in a final judgment. There, too, it is a part of the adjudication that the defendant should be enjoined at once, and this adjudication should not be set aside on appeal before a hearing on the merits of the appeal.

We concur: ANGELLOTTI, J.; SHAW, J.

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## HENNESSY v. CARMONY et ux.

**(Court of Chancery of New Jersey, 1892. 50 N. J. Eq. 616, 25 Atl. 374.)**

PITNEY, V. C.[46] The object of the bill is to restrain a private nuisance. The complainant is the owner of a small lot of land, about 18 feet front and rear by about 96 feet deep, in the city of Camden, fronting on the west side of South Eighth street, about midway between Spruce street on the north and Cherry street on the south. Upon this lot is situated a small dwelling house, composed of a main or front part of brick, about 15 feet front by 30 feet deep, two stories high, leaving a passageway of 3 feet on the northerly side, and having a wooden extension or kitchen about 10 by 35 feet, two stories high, in the rear. The rear of this structure is 31½ feet from the rear line of the lot. The ground lying to the north and west of this lot is owned by the defendants, or one of them, and is used for a dye works for coloring cotton and other materials. In the process of dyeing, it, of course, becomes necessary to dry those materials, and in order to hasten this process use is made of two machines, called in the evidence "whizzers," into which the wet material is placed, and which, by being revolved at great speed, drive out the water by centrifugal force. These machines are driven by two small engines attached to them directly, without intermediate gearing, so that the engines must make the same number of revolutions as do the whizzers, and the more rapid the revolution, the more rapid the process of drying.

The principal subject of litigation was as to the effect upon the complainant's premises of these machines. There were other matters complained of, some of which were remedied about the time the bill was filed, and such as were not remedied are capable of being remedied without serious inconvenience to the defendants. I will state them:

First. The defendants, shortly before the bill was filed, had occasion to place a wire stay rope to support an iron smokestack for their steam boiler, and in so doing fastened the lower end of it to an

[46] Parts of the opinion are omitted.

object on their own land, so situate, as to the smokestack, that the wire rope crossed and overhung the rear of the lot of the complainant. This was removed after complaint made, but whether just before or just after the bill was filed was a disputed question.

Second. Some time previous to the filing of the bill—months or years—the defendants placed on their land, a few feet only from the side line of complainant's lot, and near his back or kitchen door, a privyhouse, which was used by their employés. This privy was placed immediately over a small brick sewer which led from defendants' works across their land to the public sewer in the street, and a small hole was made in this sewer under the privy. The defendants, at stated times, blew off their steam boiler into this sewer, with the result that the hot steam there introduced drove out the offensive odors of the privy into complainant's kitchen. Upon complaint being made of this practice, it was also discontinued, and the hole in the sewer closed, but whether before or after bill filed was also a matter of dispute.

Third. The engines and the machines (whizzers) above mentioned stand near each other in a low, one-story building, immediately in the rear of complainant's lot, and the steam is exhausted from the engines upon the roof. The complainant charges that hot water, vapor, and spray from these exhausts, when the wind blows from the dyehouse towards complainant's house, come over onto his lot, laden with cinders from the smokestack, and greasy filth from the engines, and interfere with the use of the yard for drying clothes, etc.

Fourth. Complainant contends that the running of the centrifugal machines before mentioned has the effect of making a disagreeable noise, and also of jarring and shaking the house, so that the windows and doors rattle, the pieces of table crockery rattle, and move upon one another on the shelves, and the walls are more or less cracked.

Upon the two latter branches of the case (especially the last one) more than twenty witnesses were sworn on the one side and the other. With regard to the charge that dirty water, vapor, and spray come onto complainant's premises from the engine exhausts, the proof is that the summer before the bill was filed defendants made certain repairs to and changes in their works, and when, after these repairs, the small engines were started up, shortly before the bill was filed, the steam exhausts led out to a point on the roof quite near the complainant's lot, with the result above stated, and that, upon complaint being made, the exhaust pipes were cut off, and made to lead directly to the roof, and to exhaust only some six inches above it. The point where they now exhaust is about 25 feet from the rear of complainant's lot, and it was contended by the defendants that this change rendered it impossible for anything proceeding from the exhaust to reach the complainant's lot. Notwithstanding this change, however, complainant's witnesses, himself, wife, and children, swear that the

filthy spray continued to come onto their lot whenever the wind was blowing from the factory in that direction. In this they are supported by a Mrs. Cheeseman, a witness called by the defendants, who had been a tenant in complainant's house after bill filed. She swears to the fouling of her washed clothing from the spray from these exhausts. It was proved that oil was constantly fed into these steam cylinders while in motion, and, of course, as is well known, it is taken up by the steam, passes out with it through the exhaust, rendering the water, spray, and vapor resulting from the condensation of the steam greasy, and sometimes slightly discolored by the result of the wear of the piston. I think complainant made out his case in this regard, and is entitled to relief on that part of his bill. There is not the least difficulty in remedying the nuisance by simply extending the exhaust pipes by a bend down to one of the leaders which carry the rain water from the roof of the factory.

With regard to the alleged noise and vibration, and the right of the complainant to relief on that score if the vibrations be established, more troublesome questions arise. The proof is clear that when these machines, called in the evidence "whizzers," were first put in, some years ago, they did produce a serious vibration in the neighboring buildings. The factory is situate in the easterly center of the block, which is oblong, and bounded north by Spruce street, east by Eighth street and south by Cherry street, and the engines are about equidistant—say 110 feet to 120 feet—from each of these streets, and about 30 feet from the rear of complainant's lot. On the west of the factory is a church and a public schoolhouse, and the latter is more than 150 feet distant from the machines. So great was the vibration they produced at the schoolhouse that complaint was made by the school authorities, and the defendants attempted to remedy the nuisance by constructing a solid foundation of masonry, extending some six feet below the surface, and placing the machines upon it. It is also proven by one of the defendants' witnesses, who lived in the complainant's house at and before the construction of this foundation, that complainant's house was seriously shaken by the machines. This solid foundation, put in about three years before bill filed, seems to have remedied the difficulty so far as the schoolhouse was concerned, and, under ordinary circumstances, one would suppose that the result would be general, and include buildings as near as complainant's dwelling.

But the evidence compels me to come to a contrary conclusion. Numerous witnesses living in the neighborhood—most of them much further away from the machines than complainant's house—swear to a sensible vibration when the machines, as now placed, are going at full speed. Capt. Ward, an intelligent, impartial, and, I think, reliable, witness, lived in a house over 300 feet away, and testifies to a distinct vibration felt at his house whenever the machines were in full motion, causing the windows to rattle, and dishes to move on the shelves. He testifies further that, according to his observation, the

vibration is generally greater in the morning and evening, before and after school hours, a circumstance which, if true, is significant, in connection with the complaint of the school authorities, and the fact that the more rapid the revolution the greater the vibration. Capt. Ward also accounts for the vibration being felt so far in a manner satisfactory to me. He has been a contractor for building sewers, and thus had occasion to excavate extensively in different parts of the city, and he says that whenever you excavate in that neighborhood seven or eight feet below the surface you come to a sort of quicksand, wet, of course, as all quicksand is, spread to a depth of from two to four feet above the solid bottom. This quicksand resembles in its character a body of water under pressure, and forms at once a conductor of the vibratory force. It is a well-known fact that the jar of a steam pump may be carried through the water in an iron main and felt at a great distance from its source.

The evidence of the complainant and his family is strong as to the noise and vibration in his house, and its effect, as above stated, in causing the windows to rattle, and the dishes to rattle and move upon their shelves, the doors to swing open, and the walls to crack; and it is corroborated not only by the evidence of the numerous witnesses who have felt it further away, but, in a measure, by that of Mrs. Cheeseman, who, as before stated, occupied the house as a tenant of the complainant after the bill was filed, and was called by the defendants. This evidence is not overcome or seriously shaken by the evidence of the witnesses of defendants who swear that in some of the dwellings in the neighborhood little, if any, vibration is felt. The schoolhouse is a large, heavy building, built of brick, and the same is true of some of the dwellings, and such buildings would not feel the jar as readily as would a light structure like complainant's dwelling and many others in the neighborhood. Then, again, if I am right in my belief that the real secret of the far-reaching effect of these little machines is that they rest upon a layer of wet quicksand, which extends with more or less uniformity throughout that neighborhood, that fact furnishes an explanation of the inequality of the effect of the same cause, viz., a variation in the thickness, and a possible break in places in the continuity, of this layer.

The serious and troublesome question in the case is as to whether the vibration established is of such a degree as to entitle the complainant to the aid of this court. Upon reason and authority I think there is a clear distinction between that class of nuisances which affect air and light merely, by way of noises and disagreeable gases, and obstruction of light, and those which directly affect the land itself, or structures upon it. Light and air are elements which mankind enjoy in common, and no one person can have an exclusive right in any particular portions of either; and, as men are social beings, and by common consent congregate, and need fires to make them comfortable and to cook their food, it follows that we cannot expect to be able to

breathe air entirely free from contamination, or that our ears shall not be invaded by unwelcome sounds. Thus, my neighbor may breathe upon my land from his, and the smoke from his house fire and the vapor from his kitchen may come onto my land, or he may converse in audible tones while standing near the dividing line, and all without giving me any right to complain. So my neighbor and I may build our houses on the line between our properties, or have a party wall in common, so that we are each liable to hear and be more or less disturbed by the noise of each other's family, and cannot complain of it.

In all these matters of the use of the common element air we give and take something of injury and annoyance, and it is not easy to draw the line between reasonable and unreasonable use in such cases, affecting, as they do, mainly the comfort, and, in a small degree only, the health, of mankind. In attempting to draw this line, we must take into consideration the character which has been impressed upon the neighborhood by what may be called the "common consent" of its inhabitants. But when we come to deal with what is individual property, in which the owner has an exclusive right, the case is different. While my neighbor may stand by my fence on his own lot, and breathe across it over my land, and may permit the smoke and smell of his kitchen to pass over it, and may talk, laugh, and sing or cry, so that his conversation and hilarity or grief is heard in my yard, he has no right to shake my fence ever so little, or to throw sand, earth, or water upon my land in ever so small a quantity. To do so is an invasion of property, and a trespass, and to continue to do so constitutes a nuisance; and, if he may not shake my fence or my house by force directed immediately against them, I know of no principle by which he may be entitled to do it by indirect means. I think the distinction between the two classes of injury is clear. At the same time it would seem that it has, in appearance at least, been frequently overlooked by able and careful judges, and the same rules as to the degree of the injury which will justify judicial interference applied to each class. The distinction between the two classes of injuries was pointed out by Lord Westbury in Smelting Co. v. Tipping, 11 H. L. Cas. 642, 11 Jur. (N. S.) 785, 116 E. C. L. 1093. * * *

The familiar ground on which the extraordinary power of the court is invoked in such cases is that it is inequitable and unjust that the injured party should be compelled to resort to repeated actions at law to recover damages for his injury, which, after all, in this class of cases, are incapable of measurement; and I presume to add the further ground that in this country such recovery must result in giving the wrongdoer a power not permitted by our system of constitutional government, viz., to take the injured party's property for his private purposes upon making, from time to time, such compensation as the whims of a jury may give. This ground of equitable action is of itself sufficient in those cases where the injury, though

not irreparable, promises to be repeated for an indefinite period, and so is continuous in the sense that it will be persevered in indefinitely. See Ross v. Butler, 19 N. J. Eq. 302, 97 Am. Dec. 654.

Several matters have at various times and on various occasions been held to stand in the way of granting an injunction in this class of cases. The principal one is what may be called the "de minibus," "balance of injury," and "discretion" doctrine. It has been said and held on some occasions that, where the injury to the complainant by the continuance of the nuisance is small, and the injury to the defendant by its discontinuance is great, the court will consider that circumstance, and, if the balance is greatly against the complainant, will, in the exercise of a sound discretion, refuse the injunction, and leave the complainant to his remedy at law. As instances in which this notion has been advanced in this state may be cited Quackenbush v. Van Riper, 3 N. J. Eq. 350, 29 Am. Dec. 716; Vanwinkle v. Curtis, 3 N. J. Eq. 422; Railroad Co. v. Prudden, 20 N. J. Eq. 530,—in the court of errors and appeals; and in the later case of Demarest v. Hardham, 34 N. J. Eq. 469. * * *

With regard to the insignificancy of the injury to the complainant, it seems to me it cannot be taken into account if it be appreciable, and such as would clearly entitle him to damages at law. That consideration was urged and overruled, and with it, as I think, the "balance of injury and convenience" notion above stated, by the court of errors and appeals in Higgins v. Water Co., 36 N. J. Eq. 538, at 541, which is the latest expression by that court on this subject. * * *

I have taken the trouble to examine many of the cases which seem to hold more or less the contrary of what I understand to be the rule laid down by the court of errors and appeals in Higgins v. Water Co., and find most of them distinguishable. The majority of them are rulings upon preliminary injunctions, where the right was not yet settled, or where the injury was not a continuing one, and the remedy at law ample, or, if on final hearing, there was something inequitable in the complainant's conduct or case which would amount to a defense in equity to an action at law. And of the English cases it is proper further to observe that some of them gave damages instead of an injunction, under the authority of the acts of Parliament for that purpose, called Lord Cairns' and Sir John Rolt's Acts. The giving of damages for continuing nuisances is quite within the omnipotent power of parliament, which is competent to take private property for private purposes. In this country, under our constitutional system, as before remarked, that course is forbidden. I think the language of Lord Cranworth, quoted by the learned chief justice in Higgins v. Water Co., applies with increased force in this country.

While the "balance of injury" notion has found frequent place in many English cases, the later and best-considered of them put the rules governing courts of equity in such cases upon their true ground. Clowes v. Staffordshire Potteries Water Works Co., L. R. 8 Ch. App.

125, at pages 142, 143; Wilts, etc., Co. v. Water Works Co., L. R. 9 Ch. App. 451; Goodson v. Richardson, Id. 221,—are examples. * * *

The result of a careful review of the evidence upon my mind is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this court. The injury, to be actionable, must be sensible and appreciable, as distinguished from one merely fanciful, and in a case like this I assume, for present purposes, that it must have the effect of rendering the premises less desirable, and so less valuable for ordinary use and occupation. Now, it seems to me that a vibration that causes the windows and doors of a house to rattle in their casings, and dishes on the shelves to rattle and move on one another, and the walls to crack, and is distinctly felt by persons in the house, would have such effect, and is therefore actionable; while smoke and noise might have a similar effect in rendering the house less desirable without being actionable, because the degree of discomfort would not be sufficiently great to reach the standard (if, indeed, any standard has been established) applied to that class of injuries. See Walter v. Selfe, 4 De Gex & S. 318, 20 Law J. Ch. 434, 15 Jur. 416; Ross v. Butler, 19 N. J. Eq. 294, 299, 306, 97 Am. Dec. 654.

There is evidence tending to show that complainant made little or no complaint with regard to this vibration until about the time the bill was filed, when the invasion of his property rights by hanging the stay wire over his land, by driving the filthy steam from the sewer into his kitchen, and the sprinkling of spray over his back yard, seemed to combine to exasperate him. This apparent acquiescence can only be used as evidence that the complainant did not consider the vibration as serious, but I think that is not sufficient in that regard to overcome the weight of the evidence that his house is injured. I will advise a decree that the defendant be restrained from so using his machines as to cause the complainant's house to vibrate, and also from allowing the water and spray from the exhaust of his engines to come onto the complainant's lands.

## AMSTERDAM v. CITY OF CHICAGO.

(Appellate Court of Illinois, First District, 1911. 160 Ill. App. 106.)

MR. JUSTICE BROWN [47] delivered the opinion of the court.

The appellee in this case, Philip Amsterdam, complainant and cross defendant below, is the owner of two three story brick flat buildings of ordinary construction, from the flat roofs of which people can overlook the West Side National Ball Park. One of them, at 451 South Wood street, had on the roof when he bought it "a grand stand," as the same is defined in section 656 of the Municipal Code of Chicago; that is tiers of wooden seats rising one above the other. Seats on these stands were presumably rented by the former owners, as they were by appellee in 1905 and 1906 and 1907, to persons desirous of seeing the base ball games in the park without paying therefor as much as was demanded for admission to the park for equally good seats. The other building is at 805 West Taylor street, and was built by the appellee in 1907. On it he built a grand stand similar to that on the building at 451 South Wood street, but larger, and used it for the same purposes.

Permits to Amsterdam "to use roof" of 451 South Wood street as a "grand stand" were issued to him by a deputy commissioner of buildings for the city in the spring of 1905 and of 1906, and one for the "erection of a grand stand on the roof" of said building in April, 1907. The permits were on blank forms used for permits for the erection of buildings, and all contained the clause:

"This permit is granted on the express condition that the said P. Amsterdam in the erection of said building shall conform in all respects to the ordinances of the city of Chicago regulating the construction of buildings in the city limits, and may be revoked at any time upon the violation of any of the provisions of said ordinances."

A permit apparently was issued for the building at 805 West Taylor street, including a grand stand on the roof, on July 19, 1907. At all events the evidence shows that on that date plans for the building, showing the proposed grand stand on the roof, were approved by a deputy building commissioner, and the court below in its decree hereinafter described so found.

It is, however, not disputed that the permits for the erection or use of "grand stands" on both buildings were revoked in the fall of 1907, and notice given to the appellee by the city of Chicago through a deputy commissioner of buildings. This the court below also found in its decree, and counsel for appellee in their argument concede that no question is raised by the record as to the estoppel of the city because of the issuance of said permits.

But after that revocation the police made objection to people going upon these roofs, and the appellee Amsterdam thereupon filed a bill

[47] Parts of the opinion are omitted.

in chancery making the city of Chicago, its chief of police and its commissioner of buildings defendants, setting forth his ownership of the buildings, the construction of the grand stands upon the roofs, and the profitable use by him for four years of the one on South Wood street. He alleged further by his bill that he had complied with all the regulations of the building department of the city and with all suggestions, additions and improvements required by the city for the purpose of rendering the roofs safe, and that they and the stands were safe; that the building department of Chicago, though admitting the fact that the stands and roofs were safe, were threatening to stop the use of the roofs on the ground that "the corporation counsel had ordered no permits to be issued for stands in the future near the base ball park;" that the police were interfering to prevent persons from going up on the roofs and threatening to arrest the complainant; and "that in the construction of said stands on the roofs and each of them" the complainant had strictly followed the laws and city ordinances. He therefore prayed the court to enjoin the defendants from in any manner interfering with his premises or with the use of the roofs of said premises for the purpose of placing and seating persons thereon.

A temporary injunction in accordance with the prayer of the bill was granted. The defendants then answered, denying that the buildings and constructions thereon were safe or that the grand stands were erected in accordance with the ordinances and regulations of the city of Chicago, and denying any admission to the contrary by said city or its officers. They denied also that the reason for the refusal for the permit for the building at 805 Taylor street was that the corporation counsel had ordered that no permit be issued for stands in the future near base ball parks, and alleged that the true reason was that to issue such a permit would be in violation of certain ordinances of the city of Chicago, and especially section 656 of the Revised Municipal Code of Chicago of 1905. * * *

We think the court below erred as well in the ordering part of its decree. It is found by the court below in its decree, and the finding is acquiesced in by appellee, that the grand stands are within less than sixty feet of another building and are within the fire limits of the city, and that the appellee did not obtain the consent in writing of the owners of a majority of the frontage on both sides of the street on each side of the block or square in which said stands are respectively located.

It therefore is plain that if section 656 applies to them both, the grand stands in question are in violation of the ordinance and the appellants should not be enjoined under any condition from enforcing the ordinance. * * *

Our conclusion is, therefore, that this decree should be reversed and the cause remanded with instructions to the court below to dismiss the bill of the complainant, and inasmuch as the complainant chose the equity forum in which to assert his supposed rights and

litigate the entire question, to grant the relief prayed by the appellants in their cross bill. Had their bill been an original one there might have been doubt of the jurisdiction of the court to make such a decree as is therein prayed for. The chancellor, however, in his decree made a finding which is not questioned that the grand stand on the Wood street house was a continuing nuisance as then used, and that the grand stand on the Taylor street house needed changes to make it safe for the purposes for which it was used, which must be considered as tantamount to the same finding in relation to it. As the stands cannot be made legal or in compliance with the ordinances by any changes, we think the court should order their removal as continuing nuisances in accordance with the prayer of the cross bill.

Reversed and remanded with instructions.

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## REINMAN v. CITY OF LITTLE ROCK et al.

**(Supreme Court of United States, 1915. 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. ——.)**

In error to the Supreme Court of the state of Arkansas to review a decree which reversed, with directions to dismiss the complaint for want of equity, a decree of the chancery court of Pulaski county in that state, enjoining the enforcement of a municipal ordinance forbidding the conduct of a livery stable business within a designated area. Affirmed.

See same case below, 107 Ark. 174, 155 S. W. 105.

Statement by Mr. Justice PITNEY:

Plaintiffs in error filed their bill of complaint in the Pulaski county chancery court, a state court of general chancery jurisdiction, praying an injunction against the city of Little Rock, its mayor and other officers, to restrain them from enforcing an ordinance passed by the city council to regulate livery stables. The ordinance recites that "the conducting of a livery stable business within certain parts of the city of Little Rock, Arkansas, is detrimental to the health, interest, and prosperity of the city;" and it is ordained that it shall be unlawful to conduct or carry on that business within the area bounded by Center, Markham, Main, and Fifth streets, under penalties prescribed. Plaintiffs include a firm that conducts a livery and sale stable business, and a corporation that carries on a general livery stable business, within the defined area. It is averred that the businesses are and have been for many years conducted in brick buildings, in a proper and careful manner, and without complaint as to sanitary conditions; that plaintiffs, during the progress of their business, have been compelled to enter into leases for the grounds and improvements, and to construct brick buildings at great cost, useful for no other purpose, and that

these and other large expenditures made for improvements will be lost if they are compelled to cease to do business there; that there is no other available site in the city where such business can be profitably carried on and where plaintiffs have assurance that they may remain without molestation; that these matters are matters of public notoriety, and the establishment of the business in that locality has been encouraged by the city, and upon the strength of such encouragement the buildings were constructed and expenditures made; that the passage of the ordinance was procured by named parties (not made defendants) who desired to purchase the property of plaintiffs; that plaintiffs have tried to obtain another location for their business outside of the prohibited district, but are unable to do so except with extravagant outlay which they are unable to make; and that the action of city council in prohibiting the carrying on of any livery stable business in the locality mentioned is unreasonable, discriminatory, not warranted by law or the charter of the city, and in contravention of those provisions of the 14th Amendment respecting due process of law and the equal protection of the laws. A verifying affidavit and a copy of the ordinance were attached as exhibits.

Defendants demurred, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer and granted a temporary restraining order. Defendants answered, denying the material averments of the bill, and asserting that the ordinance was passed in good faith for the purpose of promoting the health and prosperity of the citizens, and in the belief that said livery stables in said district were conducive to sickness and inconvenience and ill health to the citizens, and were damaging to the property in that vicinity; also:

"That said district composes the greatest shopping district in the entire state of Arkansas; that it contains the largest and best hotels in the state, and the district encompasses the most valuable real estate in the entire state; and said stable business is conducted in a careless manner, and that it is nothing unusual in connection with said sale stables to have from fifty to one hundred head of horses and mules driven through the principal streets to said stables; that there is always an offensive odor coming from said stables, to the great detriment of the tenants in the property adjoining and the shoppers who go within this district, and hotel guests; that said stables being in such densely populated part of the city produce disease, making that section extremely unwholesome," etc.

Plaintiffs excepted and also demurred to the answer as insufficient in law to raise an issue of fact upon the authority assumed by the city to pass the ordinance, and as stating no facts sufficient to constitute a defense. The cause was then heard upon the complaint and exhibits, the answer and the demurrer; the demurrer was sustained, and, defendants declining to plead further, it was decreed that the temporary restraining order be made perpetual.

Defendants appealed to the Supreme Court of Arkansas, which court, on February 24, 1913, made a decree reversing the decree of the lower court, with costs, and remanding the cause with directions to

dismiss the complaint for want of equity. The decree of reversal recited:

"This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski county, and was argued by solicitors, on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: Said court erred in granting the relief prayed for in the complaint, whereas the same is without equity and should have been dismissed."

It was therefore ordered and decreed that the decree of the chancery court be reversed, "and that this cause be remanded to said chancery court with directions to dismiss the complaint of the appellees for want of equity." Upon the same day an opinion was filed in the Supreme Court, expressing the grounds of the decision. 107 Ark. 174, 155 S. W. 105.

Thereafter, a petition for rehearing was filed, and by leave of the court was submitted at a later date with a supporting brief. Among the averments of the petition were the following:

"That the effect of the ruling of this honorable court is to deprive the appellees of the opportunity of presenting evidence to sustain those of the allegations of the complaint as are denied by the said answer, for the said ruling orders the dismissal of the said complaint, and does not remand the cause so that appellees may present evidence to sustain the allegations of their bill of complaint bearing on the question whether said ordinance and permit system does or does not amount to a deprivation of property and a denial of the equal protection of the laws, within the provisions of the fourteenth amendment to the Constitution of the United States, as well as the provisions of the Constitution of the state of Arkansas. That unless the appellees are given an opportunity to introduce evidence as aforesaid, the said answer may be taken as conclusive against them; that upon the finding that said demurrer was improperly sustained the cause should have been remanded to take evidence as to the said constitutional questions, including the use and abuse of the said permit system by said city."

The petition for rehearing was taken under advisement, and at a later date overruled, without opinion. The present writ of error was then sued out.

Mr. Justice PITNEY, after making the foregoing statement, delivered the opinion of the court:

The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the lawmaking power of the state; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the federal Constitution; and any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of Judicial Code, § 237 (36 Stat. 1156, c. 231, Comp. Stat. 1913, § 1214), which confers jurisdiction upon this court. Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 555, 58 L. Ed. 721, 725, 34 Sup. Ct. 364, and cases cited.

Therefore the argument that a livery stable is not a nuisance per se,

which is much insisted upon by plaintiffs in error, is beside the question. Granting that it is not a nuisance per se, it is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the fourteenth amendment. For no question is made, and we think none could reasonably be made, but that the general subject of the regulation of livery stables, with respect to their location and the manner in which they are to be conducted in a thickly populated city, is well within the range of the power of the state to legislate for the health and general welfare of the people. While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the lawmaking power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the fourteenth amendment. Slaughter-House Cases, 16 Wall. 36, 62, 21 L. Ed. 394, 404; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667, 24 L. Ed. 1036, 1038; Barbier v. Connolly, 113 U. S. 27, 30, 28 L. Ed. 923, 924, 5 Sup. Ct. 357; Soon Hing v. Crowley, 113 U. S. 703, 708, 28 L. Ed. 1145, 1146, 5 Sup. Ct. 730; Lawton v. Steele, 152 U. S. 133, 136, 38 L. Ed. 385, 388, 14 Sup. Ct. 499; Gundling v. Chicago, 177 U. S. 183, 188, 44 L. Ed. 725, 728, 20 Sup. Ct. 633; Williams v. Arkansas, 217 U. S. 79, 87, 54 L. Ed. 673, 676, 30 Sup. Ct. 493, 18 Ann. Cas. 865; Cronin v. People, 82 N. Y. 318, 321, 37 Am. Rep. 564; Re Wilson, 32 Minn. 145, 148, 19 N. W. 723; St. Louis v. Russell, 116 Mo. 248, 253, 20 L. R. A. 721, 22 S. W. 470.

The only debatable question arises from the contention that under the particular circumstances alleged in the complaint, viz., that plaintiffs in error have conducted the livery stable business for a long time in the same location, and at large expense for permanent structures, and the removal to another location would be very costly, and since (as the complaint alleges) their stables are in all respects properly conducted, this particular ordinance must be deemed an unreasonable and arbitrary exercise of the power of regulation. But these averments of fact are contradicted by the answer, and so we are confronted with the question: Upon what basis of fact is this matter to be determined? Plaintiffs in error insist that it is to be decided upon the basis of the averments contained in their complaint, because the supreme court ordered the complaint to be dismissed for want of equity. But it seems that in the practice of the courts of Arkansas, as elsewhere, the expression "dismissed for want of equity" is employed to indicate a

decision upon the merits, as distinguished from one based upon a formal defect or default; and that it applies as well where on final hearing it is found that the averments of the complaint are not true in fact, as where those averments do not upon their face show a sufficient basis of fact for the granting of the relief sought. Meux v. Anthony, 11 Ark. 411, 422, 424, 52 Am. Dec. 274; Smith v. Carrigan, 23 Ark. 555; McRae v. Rogers, 30 Ark. 272.

Upon the face of this record it appears that all the material averments of the bill were denied by the answer, and that the latter pleading also showed particular reasons why it was proper for the city council to prohibit the further maintenance of livery stables within the limited district described in the ordinance. It was averred that that district is in a densely populated and busy part of the city of Little Rock, and that the stables are conducted in a careless manner, with offensive odors, and so as to be productive of disease. Plaintiffs did not contradict this, but demurred to the answer as insufficient in law, and the cause was heard in the trial court upon the complaint and exhibits, the answer, and the demurrer. The demurrer being sustained, and defendants declining to plead further, a perpetual restraining order followed in due course. Upon the removal of the cause to the Supreme Court on defendants' appeal, it was heard there, as appears from the decree rendered by that court, "upon the transcript of the record of the chancery court of Pulaski county." That record includes not only the complaint, but the answer and demurrer. The supreme court in its opinion made no statement of the facts upon which it proceeded to judgment, and did not intimate that it ignored the effect of the answer and confined itself to the averments of the bill alone. It is true that broad reasoning was employed; but, upon familiar principles, the opinion is to be interpreted in the light of the issue as framed by the pleadings. Besides, the petition for rehearing especially set up that the effect of the ruling of the supreme court was to deprive plaintiffs of the opportunity of presenting evidence to sustain those allegations of the complaint that were denied by the answer, that unless they were given an opportunity to introduce evidence the answer might be taken as conclusive against them, and that the cause ought to have been remanded to take evidence, etc. The fact that the Supreme Court denied the rehearing without giving reasons is at least consistent with the theory that plaintiffs had properly interpreted the meaning of the decree as entered, and that it correctly expressed the intent and the purpose of the court.

By section 25 of the Judiciary Act of 1789 (1 Stat. 86, c. 20) it was provided:

"No other error shall be assigned or regarded as a ground of reversal * * * than such as appears on the face of the record."

Under this act, it was uniformly held that in reviewing the judgments of state courts (in states other than Louisiana, where the opin-

ion formed a part of the record), this court could not look into the opinion to ascertain what was decided. In the amendatory act of February 5, 1867 (14 Stat. 386, c. 28, § 2), the words above quoted were omitted, and because of this it has since been held that this court is not so closely restricted as before to the face of the record to ascertain what was decided in the state court, and may examine the opinion, when properly authenticated, so far as may be useful in determining that question. This is recognized in paragraph 2 of our eighth rule. "But, after all," said Mr. Justice Miller, speaking for the court in Murdock v. Memphis, 20 Wall. 590, 633, 634, 22 L. Ed. 429, 443, 444, "the record of the case, its pleadings, bills of exceptions, judgment, evidence—in short, its record, whether it be a case in law or equity—must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

If the record, including the opinion, leaves it a matter of doubtful inference upon what basis of fact the state court rested its decision of the federal question, it seems to us very plain, upon general principles, that we ought to assume, so far as the state of the record permits, that it adopted such a basis of fact as would most clearly sustain its judgment. Hence, in the present case, we ought to and do assume that the Arkansas Supreme Court acted upon the basis of the facts set up in the answer of the city, treating them as sufficiently substantiated by the effect of the demurrer in admitting them to be true so far as properly pleaded. This being so there is, as we have already remarked, no reasonable question of the validity of the ordinance, and the judgment of the Supreme Court is affirmed.

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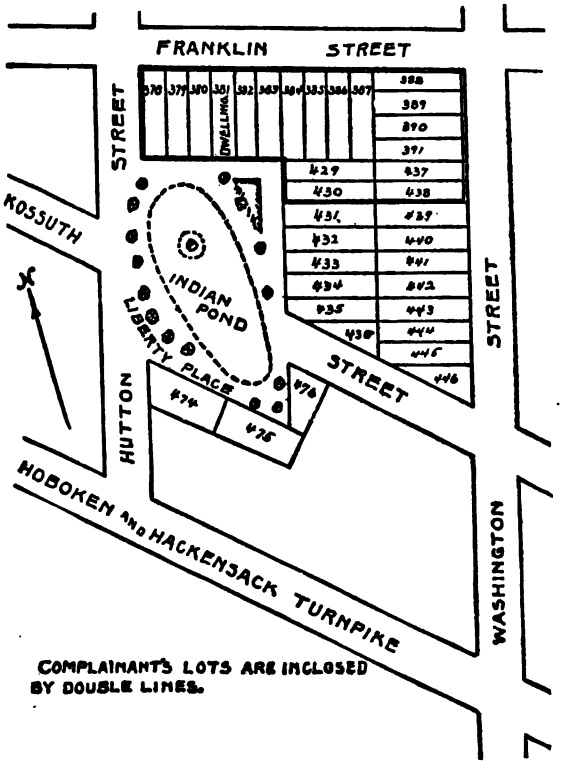
## FESSLER v. TOWN OF UNION.

(Court of Chancery of New Jersey, 1903. 67 N. J. Eq. 14, 56 Atl. 272.)

Bill by Fannie Fessler against the town of Union. Final hearing on bill, answer, and proofs. Decree for complainant.

The object of this bill is to restrain a nuisance in the nature of a purpresture. It is also, in effect, a bill by a cestui que trust to restrain a breach of trust by a trustee. The complainant is the owner of 10 lots, each 25 feet by 100 feet, and each facing on Franklin street, in the town of Union, in the county of Hudson. The rear of six of which lots, and also the rear of two other lots of the same size which do not face on Franklin street, she alleges bound upon a public square which was dedicated to the public by the owners of a tract of land which comprised the complainant's lots, and many others in the neighborhood, by the usual mode of laying the plot out in streets and lots, filing the same in the county clerk's office, and selling and conveying

lots by reference to the map. On that map appears a plot of land not laid out in streets, but so marked as to dedicate it to the public. A copy of so much of that map as comprises the plot in question and complainant's holdings is annexed:




The nuisance of which she complains is the erection of a fire-bell tower on that square, and within about 30 feet of her premises. The structure is composed of iron posts, beams, and braces. The defendant claims no legal title to the premises on which the fire-bell tower is erected, except such as is derived from the same acts of dedication upon which the complainant relies, and a sort of adverse possession or user of some part of the square, which, however, does not include the locus of the tower. * * *

There is no proof that complainant had the least notice that defendant intended to erect this building until her son-in-law saw the material (mainly iron beams ready to be assembled) brought upon the ground. The exact date is not given, but the contract was accepted February 19, 1902. He immediately protested to one or more of defendant's officers, threatened a suit, and called on and attempted to employ Mr. Russ, who was not then town counsel. Failing in this, he applied to and retained Messrs. Crouse and Perkins. They, as soon

as practicable, prepared a bill and affidavits, and applied to this court for an injunction; but, as the building was partly constructed before the application was made, the court declined to impose an interim restraint, and the case was brought to final hearing. * * *

PITNEY, V. C.[48] Upon these facts the following questions arise: * * * Third. Is or was the complainant at any time, as the owner of lands abutting on the square, entitled to relief against the proposed erection? Fourth. If so, has she in any manner lost or waived that right? Upon most of the foregoing questions it seems to me that the law is so well settled in New Jersey as not to admit of doubt. The leading authority is, of course, the case of Methodist Church, etc., v. Mayor, etc., of Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 696, and the numerous cases which have followed it. It is impossible to distinguish that case from the present, so far as the dedication goes. It is laid down as a general rule that the bare legal title remains in the dedicator. In this case it appears that it remains in the three men who bought in the property, including the square, at a sheriff's sale on a common-law execution. They have made no conveyance of the title to the Indian Pond lot. The rule is generally stated to be that, while the bare legal title remains in the original dedicator in trust for the uses expressly or impliedly declared in the dedication, in case of the dedication of a street or public square the right of possession vests in the municipality, which holds a sort of secondary title in trust for the purposes of the dedication; and that is the precise position of the defendant here. * * *

The case of Methodist Church v. Hoboken, 19 N. J. Eq. 355, arose in this wise: After the decision by the Supreme Court of the case of Methodist Church v. Hoboken, above referred to, parties interested procured an act of the Legislature authorizing the city of Hoboken to purchase from the church the premises in question at a price not exceeding $10,000. Not being able to agree, the city sued out a writ of habere facias possessionem, and the church applied for an injunction. Chancellor Zabriskie lays down the precise rights and estate of the original dedicator, the city, and the public as follows:

"The title or fee of the land is in the complainants. That title is subject to an easement which belongs to the public, which is the right to have it kept open and enjoyed as a public square. The defendants have no estate in it. Their only right is the power and duty, as representatives of the public, to see to it that the public are not hindered in the enjoyment of their rights there; and, to effect this, they may maintain ejectment against any one who takes possession of and occupies it to the exclusion of the public. The Legislature may have the right, so far as the public is concerned, to annul the dedication and yield up the right of the public; but they have no power, if the owners of the surrounding lots have the right, as appurtenant to their lots, to have this square kept open as a public square, to permit its occupation, as against them, for a town hall, nor to subject the title or fee which is owned by the complainants to a different easement from that which encumbered it when they acquired title. If the act of 1868 (P. L. p. 838) had unconditionally

[48] The statement of facts is abridged and parts of the opinion are omitted.

**and immediately authorized the occupation of the tract for a city hall, it would have destroyed the easement of the public, and with it the right of the defendants to take the possession for the public."**

I think this statement of the law governing the subject is entirely accurate, and I desire to emphasize the distinction made by Chancellor Zabriskie, and which seems to me clearly to exist, between the right of the public at large, including all persons who do not have land bounding upon the square in question and the owners of lots bounding thereon. I am of the opinion, although, perhaps, it is not necessary to the decision of the present case, that the owners of the lots bounding on the square have a private right, over and above that of the public at large, to have the square kept open. That right is of the same nature as it would be if the original dedicator, in making conveyance to the owners of those lots bounding on the square, had covenanted that the square should be for public use, and that no buildings should be erected thereon. In other words, they occupy the same position that the co-complainant White occupied in the case of Watertown v. Cowen & Bagg, reported in 4 Paige (N. Y.) 510, at page 514, bottom, and page 515, top, 27 Am. Dec. 80.

Upon principle, as well as upon the dicta just cited, I am of the opinion that the dedication in this case was for the purpose of use by the public as an open pleasure ground—a ground with trees and a small lake, if the latter was found desirable and practicable; that the dedication did not include the use of it for a public building; and that the defendant had no right, under the original dedication, to erect any building upon it. * * *

We come then to the question of the complainant's standing in this court. The general rule is that any encroachment on a public highway or public square is an offense against the public, punishable by indictment only, and that one or more of the public cannot maintain an action at law or in equity therefor unless he is so situated as to be injured thereby in a manner and to an extent peculiar to himself as an individual, as distinguished from himself as a member of the public at large. The complainant is the owner of 10 lots comprising a boundary on the square in question of 150 feet in the immediate neighborhood of the tower in question. It is within 30 feet of her house lot, and the existence in that place of the tower, and the ringing of the bell in case of fire, will, in my judgment, produce an effect injurious to the enjoyment of her property, different in a marked degree to that of the inhabitants generally of the town of Union, which is a closely built town of from 15,000 to 20,000 inhabitants. There may be a few other lot owners in the immediate vicinity who are interested in the same degree, or nearly so, as the complainant, and they may have the same standing as the complainant; but the fact that they have not joined in this suit, or brought a suit on their own account, cannot prejudice the rights of the com-

plainant, if those rights are, as I suppose them to be, peculiar to her by reason of her vicinity to the square. But, of course, if I am right in my conclusion that she has, by reason of her owning lands bounding on the square, a right in the nature of a private right, then she has a right in addition to her being a member of the public, which dispenses with the necessity of resorting to the doctrine of peculiar injury. * * *

The prayer is that the materials of the tower may be removed from the ground, and for other relief. It appears that the structure is not an expensive one, and that it may be taken down without serious injury to its parts, and removed and re-erected in another place. I think that the complainant is entitled to a decree against the municipality providing for the removal of the tower and of all its constituent parts, and that she is entitled to recover her costs, besides a reasonable counsel fee, which I shall fix upon hearing parties.

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## PEOPLE ex rel. TESCHEMACHER v. DAVIDSON.

(Supreme Court of California, 1866. 30 Cal. 379.)

By the Court, SHAFTER, J.[49]

This is a bill to restrain the defendants from erecting a wharf from the north line of Chestnut street, in the City of San Francisco, toward and into the deep waters of the bay. It is alleged that the wharf, should it be erected, will greatly interfere with and hinder the trade and commerce of the State at the harbor of said city, and greatly diminish its value; wherefore the plaintiffs pray that the erection of the wharf may be enjoined.

The Court has found, among other things, that the defendants were engaged at the commencement of the action in constructing a wharf at the point mentioned, but has also found:

"That said wharf, so being built and proposed to be built by defendants, was not and would not be a nuisance, and was not injuring and would not injure the harbor of San Francisco, or the shipping or commercial interests thereof, or the people of the State of California."

On the findings the Court below dismissed the action.

First—We cannot go behind the findings, for the testimony is not before us; and the only question for us to consider is, whether, assuming the findings, the judgment is to be regarded as erroneous.

The gist of the action in one aspect of the case is a threatened injury to commerce and navigation resulting or to result from the erection of a wharf in a public harbor. The wharf may be an intrusion or encroachment upon tide waters or the soil thereunder belonging to the State, but the encroachment would not therefore be a public

[49] The statement of facts and parts of the opinion are omitted.

nuisance nor an injury to the harbor by legal conclusion. Lord Hale says (De Jure Maris, 11):

"It is not every building below the high water mark that is ipso facto, in law, a nuisance. For that would destroy all the keys that are in all the ports in England, for they are all built below the high water mark."

All the authorities concur in holding that whether any given encroachment upon a public or private right is a nuisance or not, is a question of fact, and there have been at least two decisions to that effect in this State. Gunter v. Geary, 1 Cal. 466; Middleton v. Franklin, 3 Cal. 241. Where the Court is satisfied that the encroachment or other matter complained of is not a nuisance, an injunction is necessarily refused, or dissolved if one has temporarily been granted. 2 Eden on Inj. 272.

Second—The complaint, in addition to the aspect under which we have thus far considered it, was doubtless intended also as a bill to enjoin or abate a purpresture—that is, an intrusion or encroachment upon tide waters and the soil thereunder—without any reference to the effect of the encroachment upon public interests whether to injure or promote them.

Assuming the complaint to bear the double aspect of a bill to abate a nuisance and, as distinct therefrom, to enjoin or abate a mere purpresture, two questions are presented for consideration: First, does the block in question belong to the appellants; and second, if it belongs to the State, as alleged in the complaint, can the further erection of the wharf be enjoined, and can it be abated in equity in so far as it has been proceeded with. * * *

The result is that the block, in so far as it lies below the line of low water, belongs to the State; and the wharf, in so far as it has been built, is a purpresture. We shall now proceed to the second branch of the inquiry.

The District Courts have no power as Courts of equity to decree the destruction of a naked purpresture, nor to restrain one if threatened. The intrusion, whether perfected or threatened, is not distinguishable, so far as the question of equitable cognizance is concerned, from intrusions upon uplands belonging to the public or to individuals. In all such cases, parties are left to their strictly legal remedies, unless they can make out a case of damage irreparable at law.

Though it is now settled that a Court of equity may take jurisdiction in cases of public nuisance by an information filed by the Attorney-General, the jurisdiction seems to have been acted on with great hesitancy and caution. Thus it is said by Lord Eldon:

"That instances of the interposition of a court of equity in England in such cases are confined and rare; and more information on the subject is to be collected from what has been done in the Court of Exchequer upon discussion of the right of the Attorney-General, by some species of information, to seek on the equitable side of the Court relief as to nuisance, than from any other quarter." Attorney-General v. Cleaver, 18 Ves. R. 216.

Chancellor Kent, in Attorney-General v. Utica Insurance Co., 2 Johns. Ch. (N. Y.) 382, remarks:

"That the equity jurisdiction in cases of public nuisance in the only cases in which it had been exercised—that is, in cases of encroachment on the King's soil—had lain dormant for a century and a half—that is, from Charles I down to 1795. But the jurisdiction has been sustained, upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all that it is one of delicacy, and, accordingly, the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief before the tardiness of the law could reach it." * * *

It is thought that there is no case in the books in which a Court of equity, as such, has ever abated or enjoined a purpresture simply on the ground that it was one. * * *

All that we intend to decide is that the District Courts have no power to decree the destruction or to enjoin the erection of a wharf, unless it is or will be a nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be an appreciable hindrance to the execution of some legislative Act relating to fishery or to commerce or navigation.

The order appealed from is reversed, and the judgment is affirmed.

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## PEOPLE v. MOULD.

(Supreme Court of New York, Appellate Division, Third Department, 1899. 37 App. Div. 35, 55 N. Y. Supp. 453.)

Appeal by the defendant, Horatio D. Mould, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Columbia on the 22d day of September, 1898, upon the decision of the court rendered after a trial before the court without a jury at the Columbia Trial Term.

This action was brought by the plaintiff to compel the defendant to remove a wharf constructed by him on the easterly side of the Hudson river at Germantown in Columbia county, extending between high-water mark and the navigable part of the stream in front of his uplands, on the ground that the same was a purpresture.

PUTNAM, J.[50] The defendant has constructed his wharf in the Hudson river between high-water mark and the navigable part of the stream, without having obtained a grant from the commissioners of the land office of a portion of the land under water on which the structure is placed. It is conceded that the title of lands under the tide water of the Hudson river is vested in the state as trustee of a public trust, and that the defendant's ownership of the uplands adjoining the slip in question gave him no title to the land under water in front of his premises. People v. New York & S. I. F. Co., 68 N. Y. 71, 76, 77;

[50] Parts of the opinion are omitted.

Langdon v. Mayor, etc., 93 N. Y. 129; Sage v. City of New York, 154 N. Y. 61–73, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592. The act of the defendant in erecting a structure on the lands of the plaintiff, and appropriating such land to his own use, has been called a purpresture, which might in a proper case be abated by an action in the name of the people. People v. Vanderbilt, 26 N. Y. 287, 293, 28 N. Y. 396; Ice Co. v. Shultz, 116 N. Y. 382, 387, 22 N. E. 564. The right which the defendant had as a riparian owner in the Hudson river at the place where he erected his wharf is stated in the opinion in Sage v. City of New York, supra, as follows:

"While the title of such owners did not extend beyond the dry land, they were entitled, as against all but the crown as trustee for the people at large, to certain valuable privileges or easements, including the right of access to the navigable part of the river in front for the purpose of loading and unloading boats, drawing nets, and the like. Rumsey v. Railroad Co., 133 N. Y. 79, 30 N. E. 654 [15 L. R. A. 618, 28 Am. St. Rep. 600]; Saunders v. Railroad Co., 144 N. Y. 75, 87, 38 N. E. 992 [26 L. R. A. 378, 43 Am. St. Rep. 729]; Ang. Tide Water, 22, 64. These riparian rights were property belonging to the riparian owner, who could not be deprived of them without his consent, or by due process of law, although he could only use them subject to the rights of the public."

In the same opinion, also, the following language is used:

"Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities."

And in Saunders v. Railroad Co., 144 N. Y. 75, 87, 38 N. E. 995, 26 L. R. A. 378, 43 Am. St. Rep. 729, O'Brien, J., uses the following language:

"What these rights are has been decided in the Rumsey Case, 133 N. Y. 79, 30 N. E. 654 [15 L. R. A. 618, 28 Am. St. Rep. 600], and since that decision reaffirmed in the case of Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110 [36 L. Ed. 1018]. They embrace the right of access to the channel or navigable part of the river for navigation, fishing, and such other uses as commonly belong to riparian ownership, the right to make a landing wharf or pier for his own use or for that of the public, with the right of passage to and from the same with reasonable safety and convenience."

The same doctrine is stated in Rumsey v. Railroad Co., 133 N. Y. 79, 87, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600; Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387–445, 13 Sup. Ct. 110, 36 L. Ed. 1018; City of St. Louis v. Rutz, 138 U. S. 226, 246, 11 Sup. Ct. 337, 34 L. Ed. 941; Black, Pom. Water Rights, § 250. It is said, however, in the authorities referred to, that the right of a riparian owner whose land is bounded by a navigable river, of access to the channel thereof, and to make a landing pier or wharf for his own use or that of the public, is subject to the superior right of the state, as trustee for the people at large. In Sage v. City of New York, supra, the riparian right is spoken of as existing "as against all but the crown [the state], as trustee for the people at large." So, in other authorities, this riparian right is spoken of as a valuable property right, but one that must be held subject to the

superior right of the state. Under the authorities above cited, it will not be denied that had the state required the use of that portion of the Hudson river where the defendant erected his pier for a legitimate public purpose, or, if the pier interfered with navigation, or with any public right or interest, or if shown to be an actual nuisance, that an action to compel its removal could have been maintained. In this case, however, the court found that the pier "extends only to the channel or navigable part of the river, and there is no proof that it is an obstruction to the navigation of the stream"; nor is it shown that it interferes with any right of fishery, or any other public use; hence it was not shown to be an actual nuisance, unless the mere fact of its being a purpresture makes it such. The defendant, in erecting it, under the authorities to which we have referred, was not doing an unlawful act. As riparian owner, although not the owner of the soil under the water, he possessed an easement in the stream opposite to and adjoining his premises, a right of access to the navigable part of it, and, as the water near the shore was shallow, a right to erect a pier in order to reach such navigable portion. As said in Yates v. Milwaukee, supra:

**"This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired."**

But, as the defendant had not obtained a grant from the commissioners of the land office in erecting his landing, he exercised this riparian right subject to the power of the state, in a proper case, to interfere.

Under the facts appearing in this case, can the state by action compel the defendant to remove his landing? As above suggested, the structure does not affect navigation, or any public right or interest. It was not shown to be an actual nuisance. The fact that it prevents the landing of vessels on the south side of the town dock is no ground for its removal. The grant of the commissioners of the land office to the highway commissioner of the town of Germantown of land under water, opposite a certain highway leading down to the shore of the river, only gave the grantee a right in the river opposite the road. The commissioners of the land office could give him no other right. They could not confer upon such grantee a right in the river at the place where the defendant erected his pier, adjoining and in front of his uplands. Ice Co. v. Shultz, 116 N. Y. 382, 388, 22 N. E. 564; Jenks v. Miller, 14 App. Div. 474, 480, 481, 43 N. Y. Supp. 927. The question presented to us, then, is whether, when a riparian proprietor has exercised the right, which the authorities hold he possesses, of building a pier in the shoal waters adjoining and in front of his premises, for the lawful purpose of being able to reach the navigable part of the stream, such pier not obstructing navigation, or interfering with any right of fishery or other public use, and it is not claimed that the place where the pier is erected is required for any public purpose, the state can, without showing a public necessity therefor, interfere, and maintain an action for the removal of the structure. We are not referred to any author-

ity where, under such a state of facts, an action like this has been sustained. * * *

The structure erected by the defendant was not in a harbor or navigable portion of the river; it was built in the shoal water near the shore, to enable the defendant to reach the navigable part of the river. In building it he took the risk of the interference of the state. His right to build the pier was subject to the superior right of the state. If the state required the land for any legitimate public purpose, it was entitled to its possession. But the state was not shown to require the land under the water where the defendant erected his pier. The defendant also took the risk of the interference on the part of the state if his pier in any way should interfere with or endanger the rights or interests of the general public. But no such injury or interference was proved. The state, therefore, in this action arbitrarily asks to have the defendant's pier removed without claiming any injury whatever therefrom. How has the defendant interfered with the rights of the state? He had an easement in the river, a right to reach the navigable part of it over land under the water owned by the state, and he has only done what was necessary to obtain the benefit of that right. The state continues to be the owner of the land subject to defendant's easement. If ever required for any public purpose, it can obtain possession thereof. The state at any time hereafter, if the defendant's pier shall prove an injury to any public right or interest, and hence a nuisance, can cause its removal. The erection of the structure by the defendant has not interfered with any actual right or interest of the state. * * *

It has been held that where the state, as a plaintiff, invokes the aid of a court of equity, it is subject to the rules applicable to ordinary suitors. And the principle has been established that an injunction will not be granted unless injury, actual and material, and not fanciful, shall be shown. People v. Canal Board of State of New York, 55 N. Y. 390; Genet v. Canal Co., 122 N. Y. 505, 529, 25 N. E. 922; Gray v. Railroad Co., 128 N. Y. 499, 509, 28 N. E. 498; 10 Am. & Eng. Enc. Law (1st Ed.) p. 786; Beach, Inj. § 1067; People v. Metropolitan Tel. Co., 31 Hun, 596, 604. In the case last cited, brought by the people to compel the removal of telegraph poles from a public street, claimed to be an unlawful purpresture, the following language was used by Daniels, J.:

"For the damages resulting from the injury were so trifling in their amount as to deprive the action of every serious attribute which could be made the subject of equitable complaint; and 'equity will not interfere * * * to remedy a mere technical or theoretical injury to land.' 2 Story, Eq. Jur. (12th Ed.) § 925. To secure its interposition there must be some gravity to the complaint presented as the subject-matter of the action, for equity will only intervene to prevent irreparable injuries, or to avoid multiplicity of suits. Hil. Inj. 270-272; Attorney General v. Gas Co., 19 Eng. Law & Eq. 639; 3 Wait, Act. & Def. 707."

As we have endeavored to show, in this case no damage or injury to the state, or the public represented by it, was shown on the trial of the complaint, in consequence of the erection of the landing by the

defendant, and hence the plaintiff was not entitled to the relief demanded in the complaint. From the complaint and evidence offered by the plaintiff, it is to be inferred that the action was brought for the benefit of the owners of the town dock, to preserve to them the use of the water of the Hudson river south of said dock and in front of defendant's uplands,—a right which, under the statute, the commissioners of the land office could not transfer to such owners, and which should not be awarded to them by the judgment of this court.

Our conclusion is that the judgment should be reversed, and a new trial granted, costs to abide the event. All concur, except MERWIN, J., dissenting.

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## ATTORNEY-GENERAL ex rel. ROTHSCHILD v. UNITED KINGDOM ELECTRIC TELEGRAPH CO.

**(In Chancery before Sir John Romilly, 1861. 30 Beav. 287, 54 E. R. 899.)**

This was an information and bill by the Attorney-General at the relation of the Baron de Rothschild, and by the baron himself as Plaintiff, against this company, to prevent it interfering with the public highways in the construction of their lines of telegraph.

The company was incorporated in 1860, pursuant to the Joint Stock Companies Act, 1856, by registration in the Joint Stock Companies Registry Office.

The company proposed to establish a system of electric communication, based on the principle of the penny postage, to convey the messages throughout the United Kingdom, at a low and uniform rate (as a shilling for a short message) irrespective of distance. The system it proposed to adopt was to effect an electric communication by means of overground wires suspended from poles along turnpike and other roads, and the banks of the canal; and they expected, by a much smaller expenditure, successfully to compete with the existing telegraph companies.

The company, without any Parliamentary powers (though they professed to have them), had commenced constructing their line of communication along many of the public roads, and amongst them, along the public highway at Acton, opposite to property of which Baron Rothschild was the owner in fee. They effected their purpose, first, by erecting posts from fifteen to forty feet high along the footpath; but they removed them, and had then placed their wires in troughs underneath the surface of the roads. The information also stated that the company had, within the last few days, dug a trench of about a foot and three-quarters in depth, and a foot and a quarter in width, along the whole or greater part of the frontage of the Plaintiff's land, and about five feet from the Plaintiff's boundary fence, in the footpath adjoining the same, along which Plaintiff and Her Majesty's subjects in general were entitled and accustomed to travel and pass, and that they had laid underneath the surface of the footpath, at the bottom of the trench,

a trough of wood, metal or other material, with wires or other apparatus to form part of the electric telegraph which the company were engaged in constructing; and that the company were proceeding to complete such works along the whole frontage of the Plaintiff's land; and the Road Commissioners had, illegally and without authority, given or affected or assumed to give their consent or authority to the execution of such works, and would take no proceedings to stop or prevent the execution thereof. The effect of this was stated to be to produce an obstruction to the highways and to create a public nuisance.

The baron stated that he was the owner of the soil of the footpath opposite his lands, that the company were executing their works contrary to his will and in spite of his remonstrances, and were asserting and attempting to obtain proprietary rights and easements in the soil of the footpath, in derogation of his proprietary right in such soil.

It was also stated that the company were executing similar works for a permanent object along various other highways and roads, and paths and strips of land adjoining thereto, in, through, along and over which the public had a right to pass and travel, and in which other owners had a right of soil, subject to such right-of-way and passage on the part of the public, and so to disturb such right-of-way and passage and thereby to create nuisances to the public, and to obtain and create rights and easements in the soil of such highways and roads, and paths and strips of land, contrary to the wishes and in defiance of the remonstrances of such owners, and to the great prejudice and damage of the public, and the proprietary rights of such owners, and owing to the supineness, connivance or indifference of the Commissioners and their refusal or unwillingness to enforce, as against the company, the powers which by law were vested in them for preventing the occurrence or continuance and repetition of such acts.

The information prayed:

First, an injunction to restrain the company "from breaking, digging up or disturbing the public road or highway, or the footpath abutting upon and adjoining to Plaintiff's land, in the parish of Acton, for the purpose of placing upon, over, in or under the same, any posts, troughs, wires, materials or apparatus to be used for the purposes of an electric telegraph," and from continuing such posts, &c., and from preventing the removal thereof by the Plaintiff.

(2) A similar injunction in regard to all other "public roads or highways, or footpaths or strips of land adjoining thereto."

(3) An injunction against the company to restrain them from making, issuing or circulating any statements or representations that the company had Parliamentary powers for executing their works.

(4) An injunction against the Commissioners. * * *

THE MASTER OF THE ROLLS [51] (without hearing the defence). I cannot grant an injunction in the present state of the cause.

[51] The statement of facts is abridged and parts of the opinion are omitted.

This is an information and bill, by which the Plaintiff complains of an injury done to his own property, and the Attorney-General complains of an injury done to the public. It is necessary to consider these matters of complaint separately.

With respect to the private property of the Plaintiff, the evidence does not shew that it is injuriously affected. Assuming the fact to be as argued, that the soil in the road belongs to the Plaintiff, there is nothing at present which affects him with any injury whatever. There might have been originally some inconvenience produced by the erection of the posts in December, 1860, but these have been taken down, and nothing has been done except that some pipes or mains have been placed in the soil underneath the public highway. I do not, at this moment, intend to express any opinion whether it is an invasion of his private rights or not, but I am clear that there is no irreparable injury to him which requires the interposition of this Court prior to the hearing of the cause. Whether the Court will then do anything is another matter, but this Court only interferes by interlocutory injunction to protect property from injury about to be done to it, and even where the injury is unquestionable, as was laid down in Deere v. Guest, 1 Myl. & Cr. 516, if it has been already completed, as it is in this case, the Court does not interfere by way of interlocutory injunction, but waits until after some proceedings at law have been taken before it will interfere.

In this case there is nothing in the evidence to shew that the property of Baron Rothschild is in danger of any injury whatever from what the company is about to do, and it does not appear that what the company has actually done interferes with the beneficial enjoyment of his property. * * *

As regards the public, the case resolves itself into a question of nuisance, and upon the evidence of the Plaintiff it seems very doubtful whether there is any nuisance or not. There may be to a private person damnum absque injuria, which will support an action and get nominal damages, without entitling the Plaintiff to any injunction: but with respect to nuisance, there must be some injury to the public shewn to exist before any injunction can be granted. Whether it be shewn here, I express no opinion further than this: That the Court does not interfere to abate or to prevent the continuance of a nuisance, unless it is clearly shewn that there is an injury to the public, which is not done here, and in that case the Court leaves the party complaining to establish the fact that the act done is a nuisance at law before it gives its aid by way of injunction.

I cannot, therefore, make any other order than this: That I give the Plaintiff and the informant leave to take such proceedings at law as they may be advised, and I allow the rest to stand over.

The motion was afterward carried by appeal to the Lords Justices, but it was merely arranged that the motion should be converted into a motion for a decree and be remitted back to the Court for hearing.

The cause now came on upon a motion for a decree, supported by photographic pictures shewing the obstructions raised upon the lands, and upon affidavits specifying the obstructions laid in the soil. * * *

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. This case depends upon a legal right, which must be established to the satisfaction of the Court before the equity can be administered; without it, it would be impossible to say that either the acts of the company or the works amounted to a nuisance. The one side insists that the works cause an obstruction, and, on the other side, persons are found to say they do not; but no tribunal is so fit to try this question of fact as a jury, who will have the assistance of a Judge to direct them as to the law.

It is necessary to keep the questions raised by the information and by the bill distinct, the one is whether a public nuisance has been committed, and which may be tried either by indictment or by information, as the Attorney-General may think fit; the other is whether a private wrong has been done, whether in fact there had been a trespass either upon the land or the rights of Baron Rothschild, and that question must be tried by an action. I am, however, not prepared to say that the bill must be at once dismissed, because the acts complained of have been completed. The information and bill must, therefore, stand over, in order that the Attorney-General as the informant may take such proceedings at law as shall be thought fit, and also in order to enable the Plaintiff to bring such action as he may be advised.

I shall, therefore, retain the information and bill for a year, and reserve the costs until the result of the proceedings at law be known.

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## NEW YORK, N. H. & H. R. CO. v. LONG et al.

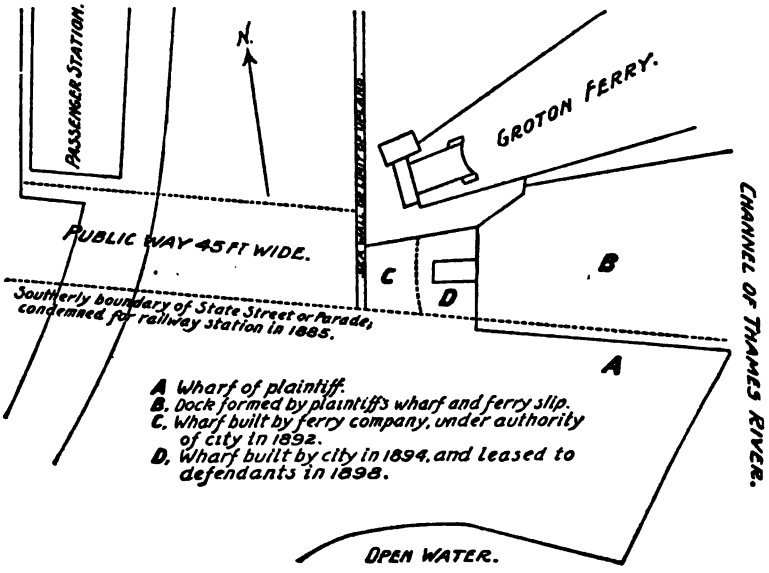
**(Supreme Court of Errors of Connecticut, 1899. 72 Conn. 10, 43 Atl. 559.)**

Appeal from superior court, New London county; Alberto T. Roraback, Judge.

Petition for injunction by the New York, New Haven & Hartford Railroad Company against George M. Long and others to restrain defendants from extending a wharf so as to prevent access to plaintiff's pier. There was a judgment for plaintiff, and defendants appeal.

The plaintiff owns a piece of upland on the Thames river or New London Harbor, with a wharf extending therefrom within the lines of its riparian easement easterly towards the channel. The easterly end or front of the wharf is upon the channel; the southerly side of the wharf is upon the open water; and the northerly side of the wharf is within about a foot of the wharfing easement, and is bounded for about 78 feet from the upland by an adjoining wharf, the fee of which is owned by the city of New London, and bounded beyond that by the waters of a basin or dock. Northerly of the wharf of the city is a ferry slip used for the Groton Ferry, under authority of the city of

New London. The dock bounding the northerly side of the plaintiff's wharf is formed by that wharf and the southerly fence of the ferry slip. * * *


PASSENGER STATION.
N.
GROTON FERRY.
PUBLIC WAY 45 FT. WIDE.
Southerly boundary of State Street or Parade, condemned for railway station in 1885.
C
D
B
A
CHANNEL OF THAMES RIVER.
A Wharf of plaintiff.
B. Dock formed by plaintiff's wharf and ferry slip.
C. Wharf built by ferry company, under authority of city in 1892.
D. Wharf built by city in 1894, and leased to defendants in 1898.
OPEN WATER.

The complaint alleges that the plaintiff uses its wharf for the mooring of vessels belonging to itself and others, and in connection with its business as a common carrier of goods and passengers, and that the northerly side of the wharf bounded on said dock is of great value to the plaintiff in its business. Paragraph 5 of the complaint alleges that the defendants threaten to build and have begun to build, by driving piles and by covering the same with planks and timbers, a permanent structure over and across said basin, in such a manner as to appropriate the same to their own private use, in connection with their private business as dealers in fish, and so as to obstruct the plaintiff in its use of said basin, and such other persons as may have occasion to reach the plaintiff's said pier in vessels, and in such manner as to obstruct and prevent the access of such vessels to the northerly face of said pier, and to deprive the plaintiff of its rights as an abutting owner upon such navigable waters. Paragraph 6 alleges that such use of said basin will interfere with the business of the plaintiff at its said pier, and reduce its value to the plaintiff, as well as its market value. The prayer for relief is:

"An injunction restraining the defendants from placing any piles, planks, or timbers in said basin, and from filling in said basin in whole or in part, and from making any erection or structure therein, and from covering over said basin, and from in any way obstructing the use of the same for the purposes of navigation, or so as to prevent the access of vessels to the northerly part of the land or pier of the plaintiff." * * *

HAMERSLEY, J.[52] * * * The material issues in this action are clearly defined and limited by the complaint and answer. They are: (1) A threat by the defendants to create a public nuisance by erecting in navigable waters a structure which will be an unlawful obstruction to navigation. (2) Injury resulting from the nuisance to the plaintiff of a kind peculiar to him, and different from that suffered in common with the public. The court has found the second issue for the plaintiff, but has not, unless by implication, made a finding in respect to the first issue. The claim of the defendants is that the facts which the court has found as the basis of its judgment justify and legally require a finding of the first issue for the defendants.

The alleged nuisance consists in the extension of an existing wharf within the lines of the wharfing easement. This easement is owned by the city of New London, and the fee of the upland to which the easement is incident is in the city of New London. So far as public rights in navigable waters are affected, it is immaterial whether the city owns this upland solely in its corporate capacity, or as trustee for the inhabitants of New London, or in part as legal custodian of the highways and public places established for the use of those inhabitants, —in any event, the full ownership and control, with all the riparian rights attached to that ownership, are in the city. The city therefore has the right to build the wharf structure. The lease which the court finds the city has given to the defendants confers upon them all the powers of the city in respect to this wharf and its extension for a term of 10 years. The defendants, therefore, in building the threatened wharf, act under authority of the city, the owner of the wharfing easement. We do not understand these conclusions to be seriously questioned, we do not doubt that they result from the facts found by the court, and we think they are inconsistent with the judgment rendered. The conclusions of the court that a public highway has been laid out to navigable waters, that the existing wharf at the foot of this highway and any extension of the same must be a public wharf or landing place, and that the defendants threaten to obstruct the use of such public wharf or landing, so as to create a public nuisance, are without the issues raised by the allegations of the complaint and the denials of the answer, and cannot affect the judgment in this action.

The court has failed to distinguish between a public nuisance consisting in an unlawful structure in navigable waters and a public nuisance consisting in an unlawful use of a lawful structure in such waters. The two are clearly distinct. They depend on different conditions, and affect different interests. Any structure in navigable waters affecting the free passage of vessels is a public nuisance, unless erected in the exercise of rights of private property, or in pursuance of public authority. The owner of land abutting on navigable water has authority, in the exercise of rights of property, to build a wharf to the

[52] The statement of facts is abridged and part of the opinion is omitted.

channel, unless restrained by peculiar conditions of navigation or public regulations (such restraints do not affect the present case). A riparian proprietor whose land is bounded by a navigable steam has certain rights, as such, among which, in the language of Mr. Justice Miller, are:

"Access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use, or for the use of the public, subject to such general rules or regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those rights may be." Yates v. Milwaukee, 10 Wall. 497, 504, 19 L. Ed. 984.

The right is to build a structure in the water for more convenient access to and from the channel. This structure is a wharf, pier, or landing. Its use may be confined to the owner, or shared with the public; but its use, whether public or private, has no relation to the fact of its being a legal structure. That depends on the ownership of the upland, and is in no way affected by the character of its use as a wharf. The status of the wharf as a legal structure is controlled by the ownership of the upland; the right of the owner to exclude the public from its use is controlled by other and different considerations.

"Piers or landing places, and even wharves, may be private, * * * or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use;" the question whether they are so, or are open to public use on payment of reasonable compensation as wharfage, depending in such cases "upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure." Dutton v. Strong, 1 Black, 1, 32, 17 L. Ed. 29.

But, whether the wharf be public or private, the structure is legal if built in pursuance of riparian right. It cannot be abated as a nuisance interfering with free navigation because of conflicting claims as to its use. Being a public wharf, the owner or other person may, by placing upon it buildings, or in other ways, so appropriate it to his exclusive use as to obstruct its use by the public; and these acts may constitute a public nuisance, which may be abated or restrained on application of the state, or of an individual who suffers a special or peculiar injury by this exclusion of the public from the use of the wharf. But such nuisance is not an obstruction to the free use of navigable waters. The wharf structure cannot be abated because of such nuisance, and the actual nuisance cannot be restrained at the suit of an individual whose special injury results wholly from the existence of the wharf structure, and not at all from its misuse.

So, in this case the public who may be entitled to compel these defendants to remove the house now on their wharf, and to have them enjoined from obstructing the public in the use of the existing wharf or any extension thereof, must found the right to such remedy upon the legality of the existing wharf and its extension and its beneficial use to the public; while the public who may be entitled to have the existing wharf abated as a nuisance in navigable water and the defendants enjoined against its extension must found the right to such

remedy on the illegality of the existing wharf, and the injury to the public of its use and extension. It is difficult to fancy two public nuisances more distinct and even antagonistic in their nature than these two, i. e. the one which the plaintiff has alleged in its complaint, and the one which the court has found as the basis of its judgment. The fact that the defendants are guilty of a nuisance as found in the use of their wharf, and intend to use its extension in the same manner, does not authorize the court to abate the existing wharf, nor to enjoin its extension; and the fact that this plaintiff may suffer a special injury from the existence and extension of the present wharf does not entitle it to apply for an injunction against a nuisance consisting in obstructing the public use of the wharf, when he neither alleges nor proves special damage by reason of such nuisance.

These considerations dispose of the case, and render it unnecessary to discuss other questions that have been argued. The defendants claim that the conclusions of the court as to the public highway and landing are not supported by the facts found, and that admitted and undisputed facts have been improperly omitted from the finding as drawn. These claims may or may not be true. Some of the deductions of the court may invite argument; and the law in respect to the controlling principle affecting the riparian rights of the owner of the fee and of the public when a highway adjoins navigable water is neither clearly defined nor well settled. These questions may affect important interests of the public and of the city of New London, which should not be passed upon incidentally. It is sufficient for the determination of this case that, whether the conclusions of the court as to a highway and public landing be right or wrong, the facts found by the court demand a denial of the injunction.

There is error, and the judgment of the superior court is reversed. The other Judges concurred.

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## SECTION 5.—DISTURBANCE OF EASEMENT

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### DURELL v. PRITCHARD.

(In Chancery, 1865. 1 Ch. App. 244.)

The Plaintiffs in this case were the owners, as devisees in trust under the will of John Stables, of two houses, Nos. 32 and 33, on the west side of Rathbone Place, Oxford Street. The back premises of these houses, which were used as workshops, looked down upon a Mews called Glanville Mews, running from north to south between Rathbone Place and Newman Street. The Plaintiffs were also the owners of the premises at the southern extremity of the Mews.

The buildings forming the west side of Glanville Mews, opposite to the backs of Nos. 32 and 33, Rathbone Place, and also the ground and soil of the Mews itself, subject to a right of way for the Plaintiffs through the Mews, belonged to the Defendant, Henry Pritchard, and the buildings were used by him as livery stables.

The whole of these premises formerly belonged to Deborah Robson and John Stables, as tenants in common in fee, but by a deed of partition dated the 24th February, 1853, the part now the property of the Plaintiffs, was conveyed in severalty to John Stables; and the part now the property of the Defendant, was conveyed to Deborah Robson, subject to a right of way for John Stables, his heirs and assigns, with and without horses, carts, and carriages, through and along the Mews.

At the date of the partition deed, and for some years before, the surface of the Mews, which was about twenty feet in width, was partially covered by a lean-to or shed projecting from the stables about halfway across the Mews, opposite to the back of the houses in Rathbone Place, and supported by wooden posts. The roof of this shed sloped downwards from the stables, and was of the height of about 18 feet at the back nearest the stables, and about 13 feet 6 inches at the front, or lowest part. The shed did not extend along the whole length of the Mews, but between its southern end and the southern extremity of the Mews was an open space, part of which was occupied by a dung-pit, about ten feet square.

In July, 1863, the Defendant commenced building on the premises belonging to him, and on the site of the shed, and on the ground a foot or two in advance of it, he erected a new brick building of greater height and length than the old shed. The height of the front of the new building, facing the back of Plaintiffs' houses, was about 20 feet, and the height of the middle of the roof about 25 feet, and it extended southwards so as to cover over the space formerly left open. The new building was begun on the 18th July, 1863, but no complaint was made of it until the 5th September, when Mr. Loaden, the solicitor of the Plaintiffs, wrote to the Defendant, complaining of the new building as obstructing the light coming to the rear of the houses, Nos. 32 and 33, Rathbone Place, and requesting that the building might be stopped. At that time the walls had been carried to their full height, but the building was not completed.

Some further applications to the same effect were afterwards made by Mr. Loaden, but nothing was done upon them; and on the 11th October, 1863, Mr. Loaden died.

On the 30th October, Messrs. Parker, the Plaintiffs' solicitors, who had succeeded Mr. Loaden, called on the Defendant's solicitor and renewed the complaints on the subject of the building, and a further correspondence took place, which continued till the end of November, but without inducing the Defendant to desist from his building, which was completed before the 26th of that month. The Plaintiffs accordingly filed their bill on the 8th January, 1864.

The complaint of the Plaintiffs was not confined to the loss by the tenants of light and air, but they also alleged that the Plaintiffs' right of way along the Mews had been injured by the new building, which prevented carts and waggons from turning round in the Mews; and that it had been further obstructed by the Defendant having allowed vans and carriages to stand in the Mews. The bill (as amended) prayed that the Defendant might be restrained from permitting the new building to continue or remain in its present state, and that he might be ordered to pull down and remove or alter the same, and to restore the Mews and buildings to the state they were in prior to the erection of the new building. It also prayed that the Defendant might be restrained from erecting any building in such a manner as to obstruct or interfere with the right of way of the Plaintiffs, or the free access and circulation of light and air to any of the Plaintiffs' houses; and that the Defendant might be restrained from blocking up or obstructing the right of way by keeping or placing in the Mews any flys, horses, or carriages, or by any other means. The bill also prayed that damages might be awarded to the Plaintiffs for the injury and expense they had sustained.

The Defendant by his answer admitted the main facts stated in the bill, but he denied that he had caused any material obstruction either to the free access of air and light or to the Plaintiffs' right of way. Both parties entered into evidence, the effect of which is stated in the judgment of Lord Justice Turner.

The Master of the Rolls, before whom the cause was heard, was of opinion that, admitting that the Plaintiffs had proved that they had received material injury from the Defendant's building, they were not entitled to an injunction, by reason of the works having been entirely completed before the bill was filed: and that, as they were entitled to no substantial relief in equity, their claim for damages failed also.

The case is reported in 13 W. R. 981.

From this decree the Plaintiffs appealed.

Dec. 22. SIR G. J. TURNER, L. J., after stating the facts of the case, and referring to the pleadings in the cause, continued:

There is evidence in the cause, both on the part of the Plaintiffs and of the Defendant. The witnesses on the part of the Plaintiffs speak generally to obstruction arising from the Defendant placing vans and carriages in the Mews, or allowing them to stand there, and to inconvenience arising from waggons and carts being unable to turn in the Mews in consequence of the Defendant's buildings; but it is evident from the testimony of these witnesses that there has always been difficulty in turning carts and carriages in the Mews. Some of the Plaintiffs' witnesses also speak to the diminution of light and air coming to the back of the Plaintiffs' houses; but most of the witnesses speak of this in general terms, that the light and air is considerably, or materially, or seriously, diminished. It is said, however, in the affidavit of one

or two of them, that in the winter months there is a loss of an hour's daylight in the afternoon. On the other hand, R. Wheeler, one of the witnesses on the part of the Defendant, states:

"I say that there is not now more difficulty or inconvenience of turning round carts and carriages in the said Mews than there was before the erection by the Defendant of the said new buildings."

And again:

"During the progress of the said new buildings, or at any time since, I never heard of any complaint on the part of any of the tenants or occupiers of the houses at the back of Rathbone Place, that the erection of the said new buildings would obstruct the light or air at any of the back windows of these houses, or any other complaint of the said new buildings; but on the contrary, some of the tenants of the houses in Rathbone Place, abutting on the Mews, have expressed themselves as pleased with the alterations of the Defendant's premises, observing that the new erection looked much nicer than the old shed, or to that effect."

And another of them, Louis Boura, who is the occupier of No. 31, says:

"The wall of the said Henry Pritchard's new buildings was raised at the time of the alteration about five or six feet. There is not any material or perceptible diminution of light or air to my back premises arising from the aforesaid alteration."

The Master of the Rolls, upon the hearing of the cause, dismissed the bill with costs, upon the grounds, as appearing in the report, that as to ancient lights—and from another part of the report it is to be collected that his Honour meant as to other easements also—the Court could not entertain the matter, as the damage had been actually completed before the bill was filed; in support of which view his Honour referred to the case of Deere v. Guest. The Plaintiffs have appealed from this decree. Three points have been insisted on upon their behalf in support of this appeal. First, that notwithstanding the damage was completed before the bill was filed, it was competent to this Court to grant the relief by way of injunction prayed for by the bill; secondly, that under the circumstances of the case, that relief ought to have been granted; and, thirdly, that assuming that relief by way of injunction was properly refused, damages ought to have been awarded to the Plaintiffs.

As to the first of these points, the course of the Court in granting mandatory injunctions, such as are prayed for by this bill, was gone into much at large on the part of the Plaintiffs, and a great number of cases upon the subject were cited. I have looked into these cases with as much attention as I have been able, and I do not find that any distinction has been taken in them as to the granting of such injunctions in cases of easements, and in other cases, and certainly they do not seem to me to warrant any such general rule as the Master of the Rolls has laid down being adopted in all cases. The case of Deere v. Guest, on which his Honour seems mainly to have relied in support of the rule laid down by him, does not seem to me to support it. It certainly does not in terms lay down any such general rule as his Honour has pronounced, and it does not seem to me to prove anything

more than that the facts alleged in that particular case were not considered by the Court to be such as to warrant the granting of the mandatory injunction which was asked by the bill. It would certainly not be consistent with the authorities to lay down any such general rule as applicable to all cases; and I can see no principle which can warrant its being laid down as applicable to cases of easements and not to other cases, for in many cases the damage occasioned by interfering with an easement is as great, if not greater, than would be occasioned by interfering with other rights.

I cannot, therefore, venture to go so far as the Master of the Rolls appears to have gone in this case, or to say that relief by way of injunction ought to have been refused in this case upon the mere ground that the damage had been completed before the bill was filed. The authorities upon this subject lead, I think, to these conclusions—that every case of this nature must depend upon its own circumstances, and that this Court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld.

Such, then, being the principles by which we ought to be guided in determining this case, I proceed to consider the second question, whether, under the circumstances of this case the relief by way of injunction prayed by this bill ought to have been granted, and I am of opinion that it ought not. There are three matters in respect of which the relief is asked. The obstruction to the right of way occasioned by the extension of the new buildings beyond the limits of the shed; the obstruction to the right of way by carriages being allowed to stand in the roadway; and the impediment to the access of light and air occasioned by the new buildings. As to none of these grounds does it seem to me that there is any such extreme or serious damage as could justify the mandatory injunction which is asked.

As to the first ground, the right of way is not wholly stopped. The question is one merely of the comparative convenience of the right of way as it formerly existed, and as it now exists. As to the second ground, the case is one merely of temporary and occasional inconvenience; and as to the third ground, I think that the diminution of light and air to the Plaintiffs' houses is not such as would warrant us in granting the relief which is asked. I fully agree in the observations of the Lord Chancellor in the late case of Clarke v. Clark (1865) 1 Ch. App. 16, which seem to me to go far towards disposing of this part of the case.

The remaining question is as to the damages. This question depends upon Mr. Rolt's Act (25 & 26 Vict. c. 42); and Sir H. Cairns's Act (21 & 22 Vict. c. 27). As to Mr. Rolt's Act, independently of the doubt which I suggested in Johnson v. Wyatt, 12 W. R. 234, 33 L. J. Ch. 394; and which I continue to feel, I am of opinion that there is nothing in that Act which renders it necessary for us to give this relief; for I

think that the question of damages is—within the meaning of the Act—a question as to which a Court of common law has concurrent jurisdiction; and I think that the Plaintiffs had not at the time of the filing of this bill any case entitling them to relief in equity, and that the matter therefore has been improperly brought into equity, and ought to have been left to the sole determination of a Court of law. It is obvious, that if we were to entertain the question of damages when the case in other respects fails in equity, the consequence would be to put an end to all actions in cases of this nature, and bring all such cases under the jurisdiction of this Court.

Then, as to Sir H. Cairns's Act, independently of the question whether it empowers the Court to give damages in cases in which there is no sufficient ground for an injunction, I think it clear that the Act leaves it in the discretion of the Court whether it will award damages or not; and I am of opinion that in this case the question of damages will be much more satisfactorily tried at law than in this Court. In the result, therefore, although I differ from the reasons given by the Master of the Rolls, I agree in the conclusion at which he arrived, and am of opinion that this bill was properly dismissed with costs. The appeal, therefore, must be dismissed; but, under the circumstances, I think there should be no costs beyond the deposit, which must be paid to the Respondent.

Sir J. L. Knight Bruce, L. J. I assent to each of my learned Brother's conclusions, and for the reasons which he has stated.

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## CALCRAFT v. THOMPSON.

(In Chancery, 1867. 15 Wkly. Rep. 387.)

The bill prayed a mandatory injunction against the defendants, who had raised the height of their house, thereby, as the plaintiffs charged, obstructing the access of light and air to the plaintiffs' house, No. 2, Dunstercourt, Mincing-lane, in which they carried on the business of colonial brokers. The plaintiffs produced evidence to show the amount of light required for this business as well as affidavits respecting actual light-interruption. The bill was not filed until after the defendants had completed their work (viz., in August, 1863), and it was proved that during the progress of the work the plaintiffs had refused to allow the defendants' surveyors to enter their house.

The cause did not come on for hearing until July, 1865, when the Master of the Rolls, remarking that the bill was not filed until the alleged obstruction had been completed, ordered the cause to stand over until the Lords Justices should have given judgment in the case of Durell v. Pritchard, 14 W. R. 212, a similar case. The Lords Justices in that case were of opinion that the Court might interfere by mandatory injunction, but not unless "extreme" or "very serious" damage would otherwise ensue. The present cause subsequently be-

ing again brought before the Master of the Rolls, he dismissed the bill with costs.

The plaintiffs appealed.

LORD CHELMSFORD, C., after referring to the previous proceedings in the case, said that Durell v. Pritchard had decided that the plaintiff might have a mandatory injunction, notwithstanding the completion of the building; and this right not having been lost through laches or acquiescence; the remaining question was whether the plaintiffs proved sufficient diminution of light to entitle them to the special interposition of the court. Many attempts had been made (not very successfully) to define the quantum of diminution generally necessary in light-and-air cases. He agreed with Lord Westbury's criticism, in Jackson v. Duke of Newcastle, 12 W. R. at p. 1066. Back v. Stacey, had been approved by eminent judges, and so lifted out of the sphere of a mere Nisi Prius decision. But what was the meaning of the words "uncomfortable" and "preventing the occupant from carrying on his business as beneficially" as he had done—in that case? If the emendation proposed by Wood, V. C., in Dent v. The Auction Mart Company were correct, the language of Best, C. J., in Back v. Stacey, was greatly wanting in precision.

[His Lordship then proceeded:] Lord Justice Turner, in the case of Durell v. Pritchard (as we have seen), thought that, in order to justify the Court in issuing a mandatory injunction, proof must be given of "extreme, or at least very serious, damage." This appears to me to have gone very much beyond the description given, in previous cases, of the extent of damage necessary to found a claim to the interposition of the Court. Two of these are referred to by Lord Westbury in the case of Jackson v. The Duke of Newcastle, but his Lordship, in dissolving the injunction granted by the Master of the Rolls in that case, seems to have thought that he could only consider the obstruction of light with reference to the requirements of the business which was then carrying on in the plaintiffs' house, and asked for some authority that would warrant him in looking to the possible future use that might be made of the premises. I cannot think that the right of the owner of a house to complain of the interruption of light, which had been accustomed to enter through an ancient window, can be limited to the use which is made of the premises at the time of the obstruction complained of. I agree with what Lord Cranworth held, in Yates v. Jack, that the right conferred by the statute of 2 & 3 Will. IV, c. 71, is an absolute and indefeasible right to the light, without reference to the purpose for which it is used. Vice-Chancellor Wood says that this perhaps is going a step beyond the previous case; but a very short consideration will show that the Lord Chancellor was perfectly correct. The right which is gradually ripening—and which, after twenty years enjoyment, is absolutely acquired—is a right to have the light freely admitted to the house through an aperture of

certain dimensions. The particular use to which the house is applied during the period in which the right is thus growing never enters at all into consideration. When the full statutory time is accomplished, the measure of the right is exactly that (neither more nor less) which has been uniformly enjoyed previously. If, when an invasion of this sort occurs, you are to consider to what use the house is applied at the time, this strange consequence would follow:—Suppose that, during the whole course of the twenty years, a business had been carried on which required all the light that could be obtained, but that, at the end of that time, when the right had become absolute or indefeasible, the house were to be used for a purpose to which the whole of the light was not essential—according to the doctrine that you must judge of the extent of the damage occasioned by an obstruction—with reference to the amount of light actually required at the time, the wrongdoer would be allowed to measure out exactly the quantity wanted for the particular use of the premises, and to deprive the owner of the excess to which he had acquired an absolute right under the Prescription Act.

The cases which I have been considering will show how impossible it is to find any precise standard by which to determine the amount of injury necessary in cases of this description to induce the Court to exercise its protective jurisdiction. Each case must depend upon evidence whether there has been a substantial reduction of the quantity of light which the owners of the house had a right to enjoy, and which must be determined on each occasion by the judge or jury before whom the question is brought.

As the defendants were entitled to build as they pleased upon their own premises, doing thereby no injury to their neighbors, the burden of proof is upon the plaintiffs to show that the raising of the defendants' building had given them a legal ground of complaint.

[His Lordship then remarked that the plaintiffs' "practical" evidence respecting deprivation of light, was very vague, and that the plaintiffs' refusal to allow the defendants' surveyors to enter the house, would have removed any doubt from his mind, had he entertained any doubt of the plaintiffs' not being entitled to the relief they asked.]

The appeal must be dismissed with costs.[53]

[53] This was an issue directed by the Lord Chancellor to try, First, whether the ancient lights of the plaintiff in his dwelling-house in the city of Norwich had been illegally obstructed by a certain building of the defendant. And, Secondly, If the first issue should be found in the affirmative, what damage the plaintiff had sustained in respect of the injury. A great many witnesses, including several surveyors of eminence, were examined on both sides; and it was evident, that the quantity of light previously enjoyed by the plaintiff, had been diminished by the building in question. Under these circumstances, it was contended for the plaintiff, that he was at all events entitled to a verdict on the first issue, any obstruction of ancient lights being wrongful and illegal. Best, C. J., told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation, than from the testimony of any witnesses, however respectable, of the degree of diminution which the

## HOME & COLONIAL STORES, Limited, v. COLLS.

(Court of Appeal. [1902] 1 Ch. Div. 302.)

The plaintiffs were the occupiers of a large corner block of premises situate on the north side of Worship Street and the east side of Paul Street, in the City of London, held by them for a term of years of which about seventeen years were unexpired. The windows in the Worship Street front of the block were all ancient lights. The defendant was the owner of No. 44, Worship Street, on the south side of that street, and immediately opposite that part of the plaintiffs' premises furthest from Paul Street. The defendant had recently pulled down an old building that had stood upon the site of No. 44, that old building having been 36 ft. wide along the front and 19 ft. 6 in. high. The buildings on each side of No. 44, to the east and west, were 33 ft. high, or 13 ft. 6 in. higher than the old building. Worship Street itself was 41 ft. wide. The defendant proposed to erect on No. 44 a building which would, when completed, be 36 ft. wide and 42 ft. high from the street level.

The ground-floor of the plaintiffs' premises consisted of a large room or office about 12 ft. high and extending back from the Worship Street front to a depth of about 50 ft. This room was occupied by some

plaintiff's ancient lights had undergone. It was not sufficient, to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as beneficially as he had formerly done. His Lordship added, that it might be difficult to draw the line, but the Jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises. The Jury found for the defendant on both issues." Back v. Stacey (1826) 2 Car. & P. 465.

In Birmingham, Dudley & District Banking Co. v. Ross (1888) 38 Ch. Div. 295, 312, et seq., Bowen, L. J., said: "Coming to the amount of enjoyment of light that is supposed by the law to accompany in an ordinary case the lease or the grant of a house which is erected with window-lights, where the grantor of the house is also the owner of premises either adjoining or neighboring, then this presumption arises, that the grantor intends the grantee to enjoy so much light unobstructed as must under the circumstances have been assumed by both parties to be reasonably necessary for the fair and comfortable use of the premises which are the subject of the grant. That seems to me to be the real definition and measure of the ordinary implication that arises. Sir Horace Davey asked us to consider that the measure of this right, which in ordinary cases of a grant arose, was the same as the measure of enjoyment of ancient lights. I confess I do not at the present moment assent to that view. The extent of the right in the case of ancient lights is measured, not by what is assumed between the parties to be reasonably necessary, but by what has been in fact enjoyed; and although it is perfectly true that a Court of Equity will not interfere by injunction, and the common law will not interfere by giving damages, by way of relief for a nominal interruption of light which is not attended with a material diminution of convenience, still the measure of the right in the case of ancient lights seems to me to be different from the measure of the right which accompanies, in ordinary cases, a grant by a grantor."

ninety clerks, who sat at desks arranged there for the purposes of the business. The only windows lighting it were in the Worship Street front. There were five of these windows in a row, all of large dimensions, being 10 ft. high and 6 ft. wide, and the sill of each was 3 ft. from the street level. The defendant's proposed new building, though it threatened to affect the whole of the plaintiffs' ancient lights, would, it was said, most seriously affect two of them in particular, namely, the two ground-floor windows numbered 4 and 5 from the corner of Paul Street. The ground-floor room was fitted with electric light, there being five rows of lamps near the ceiling. Through the absence of windows except at the front the back part of the room had always required the electric light except on very bright days.

As the defendant had commenced and was proceeding with his new building the plaintiffs, on August 17, 1900, issued the writ in this action, claiming an injunction to restrain him from erecting on the site of No. 44, Worship Street, any building or erection so as to darken, injure, or obstruct any of the plaintiffs' ancient lights as the same had been enjoyed previously to the taking down of the defendant's old building; and for damages. On August 20, 1900, the plaintiffs served the defendant with notice of motion for an interim injunction in the same terms.

Upon the motion coming on for hearing on October 26, 1900, it being admitted that the case was one to be tried on viva voce evidence, it was ordered that the action should immediately be set down in the list of witness actions for trial, without pleadings. The action was accordingly set down for trial, and was eventually tried before Joyce, J., on December 19 and 20, 1900. The only question seriously argued was as to the amount of obstruction to the plaintiffs' two ground-floor windows, numbered 4 and 5 from Paul Street, these windows being directly opposite No. 44, Worship Street. Several London architects and surveyors were called on both sides. A scale plan of the plaintiffs' premises and of the defendant's proposed new building was put in. From this plan, and also from a model produced, it appeared that the angle of incidence of light over the highest part of the defendant's proposed new building to the sill of each of the two windows in question would be at least 45 degrees from the perpendicular above the point of incidence. The defendant's witnesses admitted that there would be some, though they said not a material, diminution of light, but they expressed the opinion that the angle of 45 degrees would leave the plaintiffs a sufficient amount of light for all practical purposes. One of the defendant's expert witnesses further expressed the opinion that the defendant's new building would not cause any damage to the plaintiffs' property, and would not in the least affect its letting or selling value. On the other hand, the plaintiffs' witnesses stated that the light would be substantially and materially diminished, and that, although the plaintiffs might still have sufficient light for

ordinary business purposes, they would probably have to use artificial light in the ground-floor room to a greater extent than at present.

In giving judgment Joyce, J., said:

"Various expert witnesses were examined, and as the result of their evidence I am of opinion that the proposed new building of the defendant would not affect the selling or letting value of the plaintiffs' premises."

And he concluded his judgment as follows:

"Apart from any question with respect to the back part of the office on the ground-floor of the plaintiffs' premises and to the extraordinary light required, if it be possible to be obtained so far back in the absence of illumination by electric light, the plaintiffs' premises would still in my opinion, after the erection of the defendant's building, be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business. For all ordinary days they have amply sufficient light; at present they have abundance of light and are, in my opinion, unusually well lighted. If, as it is contended on behalf of the plaintiffs, they are entitled to the full amount of light now enjoyed, without appreciable diminution, the plaintiffs would have a good cause of action upon the erection of the defendant's building, though it might perhaps be doubted whether the diminution that would be caused by the defendant's building, if and when erected, is sufficiently serious to entitle the plaintiffs to an injunction. A great number of authorities have been cited before me: in my opinion it is not possible to reconcile them satisfactorily; but the defendant relies upon the most recent decision, that of Wright, J., in Warren v. Brown, [1900] 2 Q. B. 722. After considerable hesitation, I have come to the conclusion that this decision, if it remains unreversed by the Court of Appeal, ought to govern the present case; and I think, sitting as a judge of first instance, I must follow it. Assuming, therefore, that I am right in this, I am of opinion that this action fails and must be dismissed, and with costs."

On December 21, 1900, that is, the day following his Lordship's judgment, the plaintiffs served the defendant with notice of appeal, but the defendant nevertheless proceeded with and completed his building.

On November 13, 1901, the decision in Warren v. Brown, [1900] 2 Q. B. 722, was reversed by the Court of Appeal. [1902] 1 K. B. 15. The appeal in the present case was heard on December 2 and 3, 1901. * * *

COZENS-HARDY, L. J.[54] This appeal raises a question as to the nature and amount of evidence required to entitle a plaintiff to relief by way of injunction for the protection of ancient lights. The action was tried by Joyce, J., in December, 1900. This is important, because at that date it had been laid down by Wright, J., in Warren v. Brown, [1900] 2 Q. B. 722, that the owner or occupier of a house has no legal right of action so long as he has left to him as much light as is ordinarily required for habitation or business, even though he has been deprived of a substantial amount of light and has thereby suffered substantial damage. This view of the law was accepted by the defendant's counsel in the cross-examination of the plaintiffs' witnesses and in the examination of the defendant's witnesses, and, as we read the judgment, was adopted by Joyce, J.

Wright, J.'s, decision has recently been reversed by this Court

[54] Parts of the opinion of Cozens-Hardy, L. J., are omitted.

([1902] 1 K. B. 15, 22), and the true rule of law with reference to the interference with ancient lights has been authoritatively laid down thus:

"If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief."

In this sentence "substantial" does not indicate any particular percentage.

In Back v. Stacey, [1826] 2 C. & P. 465, 466, 31 R. R. 679, an issue was directed by the Lord Chancellor whether the ancient lights of the plaintiff in his dwelling-house had been illegally obstructed by the defendant's building. Evidence having been given that the quantity of light previously enjoyed had been diminished, it was contended that the plaintiff was entitled to a verdict; but Best, C. J., directed the jury, in language which has been often cited with approval, thus:

"It was not sufficient, to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as beneficially as he had formerly done."

And in Parker v. Smith, [1832] 5 C. & P. 438, 439, 38 R. R. 828, Tindal, C. J., directed the jury as follows:

"It is not every possible, every speculative exclusion of light which is the ground of an action; but that which the law recognizes, is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business."

Without substantial interference, there is no right of action; and in addition, in order to obtain an injunction, the plaintiff must establish substantial injury suffered or threatened. There is no standard or fixed amount of light to which alone a plaintiff is entitled. He must not be fanciful or fastidious; he must recognize the necessity of give and take in matters of this nature. But there may be real damage to the owner or occupier of a building used for particular purposes, or reasonably adapted for particular purposes, although there would be no real damage if the building were not used or reasonably adapted for such purposes. The application of these principles is far more easy when the building which is complained of has been erected and damages only are claimed; but they have to be applied when the plaintiff comes for an injunction before the building has been erected. It is the duty of the Court to arrive at the best conclusion it can upon the effect which the proposed building, if erected, would produce; and if the Court is satisfied that in that event the plaintiff would have a good cause of action, the plaintiff is entitled, as a matter of right, to an injunction to prevent the defendant from interfering with his ancient light; or, in other words, to restrain the defendant from committing a wrongful act. * * *

As we read the judgment, it is a finding in favor of the plaintiffs that real damage would result, though light enough would be left for ordinary purposes of occupancy as a place of business, and there is no finding that the interference is not substantial. Now there was, immediately opposite the windows in question, what may be called "a gap," in width 36 ft. and in height 13 ft. 6 in. The direct light which passed through this gap penetrated to a considerable depth into the plaintiffs' room. The interference with this light is "substantial" within the meaning in which the word is used. * * *

In our opinion, on the balance of the evidence, substantial interference and "real damage" will result; and the proper judgment would have been to grant an injunction in the settled form known as the Yates v. Jack, L. R. 1 Ch. 295, 298, form. But immediately after the action was dismissed with costs, the plaintiffs gave notice of their intention to appeal. Notwithstanding this, the defendant has proceeded with and completed the erection of his building. Under these circumstances there is only one course open to us. We must reverse Joyce, J.'s, judgment and give the plaintiffs the judgment to which, according to our view, they were entitled. And we must grant a mandatory injunction requiring the defendant to pull down anything erected in breach of the terms of our injunction. This point was really decided by the Court of Appeal in Parker v. First Avenue Hotel Co., 24 Ch. D. 287. The defendant must pay the costs here and below.

VAUGHAN WILLIAMS, L. J. The judgment which has just been read is the judgment of the Court; but I wish to add for myself that, so far as the rule of 45 degrees is concerned, I doubt very much whether that rule, as the law is now settled, can be regarded even as a rough measure of the right of the owner or occupier of ancient lights.

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## STALLARD v. CUSHING et al.

**(Supreme Court of California, 1888. 76 Cal. 472, 18 Pac. 427.)**

FOOTE, C. This action is to compel the removal of an obstruction, in the shape of a stairway, placed by the defendants in an alley through and over which the plaintiff has the right of way as an appurtenance to the lot upon which stands his dwelling-house. The plaintiff had judgment as prayed for, and from that, and an order denying a new trial, the defendants have appealed. The alley over which the right of way is alleged to exist in favor of the plaintiff is 10 feet wide, and is a cul-de-sac, running easterly 87 feet from Taylor street, near Sutter. The land on which the alley is laid out was originally a 50-vara lot belonging to a single individual. He sold the easterly 50 feet of this lot to a man named Hagerman, and divided the other part of it into six lots in such a way as that they all abutted on this alley. As these six lots were sold to different parties, the right of way over this

alley was reserved to each of the purchasers in the several deeds of conveyance made thereto. Stallard, the plaintiff, by and through mesne conveyances from the original owner of all the lots, became the possessor of one of them so abutting on the alley, and the defendants also of another such lot. The plaintiff's lot is further down in the alley from Taylor street, where the alley debouches, than is that of the defendants, so that the stairway of the defendants very materially obstructs the ingress and egress of the plaintiff to and from his lot and Taylor street.

From the evidence it is very clear to us that the alley was never dedicated to the use of the public as a highway. There is an absence of all appearance of any intention so to dedicate it on the part of the man who first laid it out and opened it, and there does not appear to have been any acceptance of it as a street or public highway for the general public. To the contrary, it seems to have been intended for and used as a means of approach to the lots and houses there situate for the private use only of those few persons who might dwell there, and those who approached them to minister to their wants. Being a private way, to the unobstructed use of which the plaintiff was entitled, and which use was peculiarly his own, and that of the few persons only who dwelt on the lots which had formerly comprised the 50-vara lot, the injury which the plaintiff suffered was not one in any way common to the general public, and he was entitled to have it abated as a nuisance, as its existence violated his legal rights, which could only be maintained by an injunction ordering its discontinuance, or a resort to a multiplicity of suits for damages, which last alternative action, rather than the first, the law does not force him to take. Wood, Nuis. §§ 782, 783. There is no prejudicial error shown by the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## HODGE v. GIESE.

(Court of Chancery of New Jersey, 1887. 43 N. J. Eq. 342, 11 Atl. 484.)

On application by James Hodge for injunction against Albin Giese. Heard on bill and affidavit, order to show cause, and answer and affidavit.

VAN FLEET, V. C.[55] This is an application for an injunction. The complainant and defendant occupy parts of the same building as tenants, under the same landlord. The defendant occupies the basement as a barber shop, and the complainant occupies the two floors immedi-

[55] Part of the opinion is omitted.

ately above. The complainant is a clothier. He uses the first floor as a store for the sale of clothing, and the second for cutting garments. The defendant has occupied the basement continuously for over 25 years, and the complainant has held the two floors now occupied by him since April, 1879. Prior to the commencement of the complainant's tenancy, the owner of the building put a heater in the cellar, in the rear of the basement occupied by the defendant. Pipes were attached to conduct the heat from the heater to the first floor, and subsequently others were attached to conduct it to the second floor. There are registers on both floors by which the volume of heat transmitted to each is regulated. This connection existed in January, 1887, when the last lease to the complainant was made. The heater is an appurtenance or adjunct to the part of the building occupied by the complainant. It transmits heat to no other. Both parties now hold under leases made in 1887. That to the complainant was executed on the fifth of January, 1887, and grants a term of five years from the first day of April, 1887, and that to the defendant was made in March, 1887. The complainant's lease grants him the use of the heater, with right of access to it.

The defendant, by his answer, admits that the complainant has no means of access to the heater except through his shop, and, also, that the complainant has, every fall and winter since 1879, passed through his shop, with his knowledge, and without objection, to give such attention to the heater as it required. Whether there is a door opening from the defendant's shop into the cellar where the heater is, the pleadings do not expressly state; but the defendant's admission that there is no way of approach to the heater except through his shop, makes it certain that there is either a door there, or some other means of access from his shop to the heater. The defendant notified the complainant on the nineteenth of November, 1887, that he would not thereafter be permitted to pass through his shop to the heater. The complainant thereupon filed his bill asking for an injunction restraining the defendant from preventing him from passing through the defendant's shop to give such attention to the heater as may be necessary to enable him to have the use of the heater.

It cannot be denied that, unless the complainant can have access to the heater through the defendant's shop, that clause of his lease which grants him the use of the heater will be rendered nugatory, and that he will be deprived of that part of the demised premises which, just at this season of the year, is absolutely essential to the safe and comfortable enjoyment of the other parts. No complaint is made that the complainant has exercised the right which he claims in an oppressive or improper manner. The dispute is as to his right, not as to the manner in which he has exercised it. * * *

On the admitted facts of the case, and according to well-established legal principles, the legal right on which the complainant rests his claim to an injunction is, in my judgment, free from the least doubt. This

being so, the duty of the court is plain. It is bound to give to the complainant the protection he asks, if the injury against which he seeks protection belongs to the class which this court may rightfully restrain by injunction. A court of equity may protect and enforce legal rights in real estate, where the right, though formally denied, is yet clear on facts which are not denied, and according to legal rules which are well settled, and the injury against which protection is asked is of an irreparable nature. Hart v. Leonard, 42 N. J. Eq. 416, 7 Atl. 865.

It is obvious that no remedy will be adequate in this case which does not prevent a repetition of the injury. The injury consists in depriving the complainant of an essential part of the demised premises. It is continuous in its character, and, so long as it shall be persisted in, will necessarily result in the complete destruction of the safe and comfortable use of the demised premises for the purposes for which they were rented, for nearly one-half of the complainant's whole term. The law gives no adequate remedy for such a wrong. Successive suits at law, in which only pecuniary damages could be awarded, would give the complainant neither the full measure of his rights, nor justice, but would permit the defendant to deprive the complainant of his rights for such compensation as a jury might see fit to award. The complainant's case presents a strong instance of irreparable injury. All that is meant by that phrase is that the injury shall be a material one, and of such a nature as cannot be adequately redressed by pecuniary damages. Mere inconvenience, resulting in but slight damage, may, in consequence of its peculiar character, constitute an injury so irreparable in its nature as to be the proper subject of redress by injunction. Kerr, Inj. 199, 200.

The right involved here is an easement. The complainant, on the undisputed facts of the case, has a right to pass through the defendant's shop to and from the heater. Courts of equity exercise a very liberal jurisdiction in the protection of such rights. Mandatory injunctions may, contrary to the general rule, be issued at the very inception of the suit for the protection of such rights. Locomotive Works v. Railway Co., 20 N. J. Eq. 379. An inspection of the record in Shivers v. Shivers, reported in 32 N. J. Eq. 578, shows that a mandatory injunction was granted on filing the bill, and without hearing the defendant, commanding the defendant forthwith to take down and remove a gate which he had erected across a private way running through his land. Like injunctions have recently been granted in several similar cases. The true rule on this subject, in my judgment, is that declared in Whitecar v. Michenor, 37 N. J. Eq. 14. Chancellor Runyon there said:

"The court is always very reluctant to grant a mandatory injunction on an interlocutory application, but where extreme or very serious damage would ensue from withholding it, as in cases of interference with easements, or other cases demanding immediate relief, it will be granted."

The complainant is entitled to the writ he asks, but it must be so framed as to limit the exercise of his right of passage to such use of it

as may be necessary to give such care and attention to the heater as shall be required to enable him to have the use of the heater for the purpose of heating the two floors covered by his lease.

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## SHIVERS v. SHIVERS et al.

(Court of Chancery of New Jersey, 1880. 32 N. J. Eq. 578.)

THE CHANCELLOR. Isaac Shivers, in 1848, was the owner of a tract of land, a farm, in Delaware township, in Camden county, fronting on the Marlton turnpike. There were two sets of buildings upon it, one near, and the other back, from the turnpike. In that year he sold and conveyed part of the farm (the front), with one set of the buildings, to his son Richard, and the rear, with the other set of buildings, to his son Jehu. The latter occupied his property until 1866, when he sold and conveyed it to his brother Charles, the complainant. From the time of the conveyances by the father to Jehu and Richard (1848), Jehu and Charles, as successive owners of the rear property, used, for a way between those premises and the turnpike, a lane which, before then, was used for that purpose by their father, who, when he sold to Jehu, occupied the rear set of buildings. That lane was, as it still is, the only way between the complainant's property and the turnpike. From the division line between the two properties to the turnpike, it is on Richard's property. At the division line Jehu erected a gate, as he says, somewhere between 1857 and 1860. While the father occupied the property, there was, and ever since has been, a gate at the mouth of the lane at the turnpike, but, until September, 1876, there was no gate or other obstruction in the lane between that gate and the gate at the division line. At that date, Richard L. Shivers (son of Richard), who occupied his father's property, placed a gate across the lane at the barn on that property, and about one-third of the distance between the two gates just mentioned. The reason given for putting the gate there is, that thus the driving of cattle through the lane into Richard Shivers' barn-yard was facilitated. The complainant being unable, without a breach of the peace, to remove that gate, filed his bill for an injunction to protect him in the enjoyment of his easement.

The existence of the easement is not denied, and it is proved by the testimony on the part of the defendants, as well as that adduced by the complainant. The bill states that the lane or road has been, for upwards of twenty years, used by the complainant and the former owners and occupants of his farm and premises, to pass and repass to and from his farm with carriages, horses, cattle, &c., and that he ought now, and at all times, to have the free use of the lane for himself, his tenants, carriages, horses &c. The answer admits the existence of the lane, and that the complainant has been accustomed for many years to pass by it from his property to the turnpike.

It appears, clearly and unquestionably, that, from August, 1848, to September, 1876, a period of over twenty-eight years, the complainant and his grantor enjoyed the free and unobstructed use of the lane between the division line and the gate, at the junction of the lane with the turnpike, as appurtenant to the complainant's farm, and that it was their only way to the turnpike. It also appears that, at the latter date, the defendants, without the complainant's consent, and against his will, erected the gate complained of, and subsequently maintained it by an exhibition of forcible and violent resistance of the complainant when he attempted to remove it. The gate is, manifestly, from the evidence, a nuisance. It is at the top of a hill which descends to the turnpike, and it is especially annoying to be compelled to stop, with a loaded wagon, to open it in going up, and, in such case, it causes a special strain on the horses to start the wagon again. William A. Shivers, a son of the complainant, testifies that, at times, although the gate was open when the complainant's people entered the lane to go up, some one would come out and shut it, so as to compel them to stop and open it.

The complainant's title, by prescription, to the free and unobstructed use of the way (except as to the gate at the turnpike) at the time of the erection of the gate complained of, is established beyond a peradventure. A right of way, acquired by prescription, is commensurate with and measured by the use, and the owner of the land has no right to do anything which will hinder or obstruct such use. The complainant, therefore, is entitled to the aid of this court in the premises, to secure to him lawful enjoyment of the easement, free from the obstruction of any gate between the gate at the division line and that at the turnpike.

The injunction will be made perpetual, with costs.

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## SECTION 6.—INTERFERENCE WITH CONTRACT AND BUSINESS RELATIONS

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### HAILE v. LILLINGSTONE.

**(Chancery Division, 1891. 35 Sol. Jour. 792.)**

This was a motion to continue an interim injunction restraining the defendants from printing, distributing, or exhibiting any bill or bills, or other notice or advertising, appealing to the public, trade unionists, or any persons to refuse their custom to, or boycott the plaintiff, or his shop or shops, or requesting the public, trade unionists, or any person to do any act injurious to the plaintiff in his trade or business. The plaintiff carried on business at No. 288, Harrow-road, and elsewhere in London, as a cheesemonger. The bill complained of was headed "Boy-

cott the Sweater.—An Appeal to the Public and Trade Unionists," and continued:

"Boycott Haile, cheesemonger, 288 Harrow-road, the blackleg tradesman, who has acted the part of Pecksniff right through the agitation, and let every self-respecting man and woman with a sense of duty towards others resent the contemptible part played by Haile, and support the shop assistants in the vigorous measures taken against those who, by their refusal to co-operate with their fellow-tradesmen in shortening the hours of labour, are making our lives one weary long round of toilsome, monotonous labour, working as we are fourteen to sixteen hours a day. The boycott is the only weapon now left for us to use, having tried moral pressure and Acts of Parliament without avail, and all hope in that direction has been crushed out, therefore boycott the above and deal exclusively with those who, by giving a few hours' leisure to their assistants, shew they are worthy of support."

The notice was signed by the defendant, L. W. Lillingstone, the Honorary Secretary of the Paddington and Harrow-road Branch of the Shop Assistants' Union. An argument very similar to that in Peto v. Apperley, 35 Sol. Jour. 792, was now addressed to the court, and it was stated that the plaintiff's business was being very seriously damaged by what was being done.

JEUNE, J., said that after the Plymouth Intimidation Case, 7 Times L. R. 650, it was impossible to say that what was being done amounted to intimidation. The dispute seemed to be a trade dispute merely. Clearly no cause of action had been shewn, and no authority had been produced supporting the plaintiff's contention. The reasons had been more fully stated in Peto v. Apperley, and he did not intend to recapitulate them in the present case. The injunction must be refused. Costs would be reserved.

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## GEORGE JONAS GLASS CO. v. GLASS BOTTLE BLOWERS' ASS'N.

(Court of Errors and Appeals of New Jersey, 1911. 77 N. J. Eq. 219, 79 Atl. 262, 41 L. R. A. [N. S.] 445.)

PITNEY, Ch.[56] The facts of the case are sufficiently outlined in the opinion of the learned Vice Chancellor. His findings are, in our judgment, fully sustained by the evidence.

The defendants comprise three classes of persons: First, the Glass Bottle Blowers' Association of the United States and Canada, a voluntary association, including in its membership nearly all the journeymen green glass bottle blowers of the United States and Canada; secondly, the officers of this association, who, as individuals, are made parties defendant; and, thirdly, 90 or more individuals who were formerly in the employ of the complainant corporation at its glass works in Minotola, in this state, and who on April 9, 1902, went upon strike. It is undisputed that in the year 1901 the Glass Bottle Blow-

[56] Parts of the opinion are omitted.

ers' Association instituted a boycott of the complainant's wares in the effort to coerce complainant to conform its business to regulations prescribed by the association. The evidence renders it clear that this boycott was still in force and was being actively prosecuted by the association down to the time of the strike of 1902 and thereafter, and, indeed, after the filing of the bill of complaint herein. Whether the defendant association or its officers directly instigated this strike possibly admits of doubt; but it is entirely clear that immediately after the strike began the association, through its executive committee and officers, took charge of it, organized, and directed the strikers, and guided them in the subsequent proceedings. There is abundant evidence that at the time the bill of complaint was filed and thereafter the association, its officers, and the strikers who are joined as defendants made common cause in a war of subjugation against the complainant corporation. While there are individual defendants who are not shown by the evidence to have been personally implicated in certain of the specific acts of violence and coercion that ensued, they were all acting in concert in the general plan of campaign, and are equally subject to injunction with respect to the unlawful acts that were done and threatened.

The final decree that is now under review awards an injunction restraining the defendants as follows:

(1) From knowingly and intentionally causing or attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by inducement or persuasion, any employé of the complainant under contract to render service to it to break such contract by quitting such service.

(2) From personal molestation of persons willing to be employed by complainant with intent to coerce such persons to refrain from entering such employment.

(3) From addressing persons willing to be employed by complainant, against their will, and thereby causing them personal annoyance, with a view to persuade them to refrain from such employment.

(4) From loitering or picketing in the streets or on the highways or public places near the premises of complainant with intent to procure the personal molestation and annoyance of persons employed or willing to be employed by complainant, and with a view to cause persons so employed to refrain from such employment.

(5) From entering the premises of the complainant against its will with intent to interfere with its business.

(6) From violence, threats of violence, insults, indecent talk, indecent abusive epithets, annoying language, acts, or conduct practiced upon any person without their consent, with intent to coerce them to refrain from entering the employment of complainant or to leave its employment.

(7) From attempting to cause any persons employed by complainant to leave such employment by intimidating or annoying such employés by annoying language, acts, or conduct.

(8) From causing persons willing to be employed by complainant to refrain from so doing by annoying language, acts, or conduct.

(9) From inducing, persuading, or causing, or attempting to induce, persuade, or cause, the employés of complainant to break their contracts of service with complainant or quit their employment.

(10) From threatening to injure the business of any corporation, customer, or person dealing or transacting business and willing to deal and transact business with the complainant by making threats in writing or by words for the purpose of coercing such corporation, customer, or person against his or its will so as not to deal with or transact business with the complainant.

Each portion of the injunctive relief thus granted is directed to some manifestation of the strife that was carried on by the combined defendants against the complainant. And in each respect the injunction is justified by the evidence in the case. * * *

So much of the decree as awards an injunction to restrain the defendants from using coercive measures to prevent the flow of labor to complainant's works is likewise proper. In Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 765, 53 Atl. 230, Stevenson, V. C., recognized and enforced the right of an employer to an injunction to prevent undue interference with those who wish to come to him for employment. It is principally upon this ground that injunctions against what is known as picketing have been sustained in this and other jurisdictions.

So much of the decree as is directed against the continuance of the boycott is plainly justified by the evidence, and accords with the law. Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465; Temperton v. Russell (1893) 1 Q. B. Div. 715; Quinn v. Leathem (1901) A. C. 495.

The decree under review should be affirmed, with costs.

GARRISON, SWAYZE, MINTURN, and BOGERT, JJ., dissent.

MINTURN, J. (dissenting). I find myself unable to agree with the majority of my Brethren with respect to that portion of the decree of the Court of Chancery which authorizes the issuing of an injunction against these defendants upon the ground stated in the opinion of the learned Chancellor speaking for the majority of this court, viz.:

"Inducing, persuading, or causing, or attempting to induce, persuade, or cause, the employés of complainant to break their contracts of service with complainant or quit their employment."

It may be conceded since the decision of this court in Brennan v. United Hatters, 73 N. J. Law, 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698, that an ordinary wage employé bears towards his employer in this state a relation in modern legal nomenclature denominated as a "service at will," and for the breach of which an action at law can be maintained. Still, with this concession, it is difficult to discern in jurisprudence outside of the sphere of those English cases which bear the distinct impress of feudal law and customs any consensus of legal authority which can support the principle upon which this injunction rests; and of those cases Chief Justice Parker, speaking for the New York Court of Appeals, said:

"They are hostile not only to the statute law of this country, but to the spirit of our institutions." National Protective Association v. Cumming, 170 N. Y. 332, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648.

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Vice Chancellor Stevenson in Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 765, 53 Atl. 233, following the consideration given by Vice Chancellor Pitney to the statute, termed this "service at will a

newly recognized right," and defined it to be "that peculiar element that is an interest which one man has in the freedom of another," which he further defined as "freedom in the market, freedom in the purchase and sale of all things, including both goods and labor"—a right, says the learned Vice Chancellor, "that our modern law is endeavoring to insure to every dealer." Page 766, 63 N. J. Eq., page 233, 53 Atl. Still later in Fletcher Co. v. International Association of Machinists, 55 Atl. 1077, the same learned Vice Chancellor conceded the right to workmen to organize and use peaceable persuasion substantially as Vice Chancellor Pitney had conceded it in the Herold Case. But in both determinations the learned Vice Chancellor makes the right to "the free flow of labor," as he termed it, the ratio decidendi, thus instituting an analogy as an economic proposition between goods and merchandise and labor, a fallacy all the more confounding to any attempt at harmonious decision when the statutory enactment in question is disregarded.

The analogy ignores the constitutional guaranty of freedom of speech and freedom of the press representing labor's demands, because labor, unlike goods, cannot be severed from the human entity and be considered apart from the man. * * *

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## SHERRY v. PERKINS et al.

**(Supreme Judicial Court of Massachusetts, 1888. 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.)**

Reported case from supreme judicial court, Essex county; C. Allen, Judge.

Bill in equity, by Patrick P. Sherry against Charles E. Perkins and Charles H. Leach, for an injunction to restrain the defendants, respectively president and secretary of the Lasters' Protective Union, from causing to be carried in front of the plaintiff's shoe factory a banner on which was the following inscription: "Lasters are requested to keep away from P. P. Sherry's Per order L. P. U.;" and also a banner on which was the following: "Lasters on a strike; all lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U." The court, at the trial, found as facts that members of the Lasters' Protective Union entered into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiff, as lasters, from continuing in such employment, and in like manner to prevent other persons from entering into such employment as lasters; that the defendants participated in the scheme; that the use of the banner was a part of the scheme, and its use an injury to the plaintiff in his business and property. The court, after finding the facts, reported the case to the full court. * * *

W. ALLEN, J.[57] The case finds that the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiff from continuing in such employment, and to prevent others from entering into such employment; that the banners, with their inscriptions, were used by the defendants as part of the scheme, and that the plaintiff was thereby injured in his business and property. The act of displaying banners with devices, as a means of threats and intimidation, to prevent persons from entering into or continuing in the employment of the plaintiff, was injurious to the plaintiff, and illegal at common law and by statute. Pub. St. c. 74, § 2; Walker v. Cronin, 107 Mass. 555. We think that the plaintiff is not restricted to his remedy by action at law, but is entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiff's bill, and continued to be used at the time of the hearing. The injury was to the plaintiff's business, and adequate remedy could not be given by damages in a suit at law. The wrong is not, as argued by the defendants' counsel, a libel upon the plaintiff's business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiff's business. The scheme, in pursuance of which the banners were displayed and maintained, was to injure the plaintiff's business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiff. The banner was a standing menace to all who were or wished to be in the employment of the plaintiff, to deter them from entering the plaintiff's premises. Maintaining it was a continuous, unlawful act, injurious to the plaintiff's business and property, and was a nuisance, such as a court of equity will grant relief against. * * *

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## DAVIES et al. v. CITY OF SEATTLE et al.

(Supreme Court of Washington, 1912. 67 Wash. 532, 121 Pac. 987.)

GOSE, J.[58] Plaintiffs, at the time of the filing of this bill, were employed by the city of Seattle as teamsters, and as such were performing day labor in the street department of the city. The bill alleges that the city was then employing a great many teamsters in the street department as day laborors; that they were so numerous that it was impracticable to unite all of them in the action; that the wrongs for which redress is sought are common to all the men so employed; and that the action was prosecuted for the common benefit of all such employés. The bill further alleges that the defendants, the city of Seattle, its board of public works, and its superintendent of streets,

[57] Part of the opinion is omitted. [58] Part of the opinion is omitted.

for more than 60 days prior to the commencement of the action had required and then required the plaintiffs, and all other teamsters employed by the city as day laborers in street work, to work more than eight hours each day. The prayer is that the city, its officers and agents, be permanently enjoined from requiring the performance of more than eight hours' labor per day by the plaintiffs and all others on whose behalf the action is prosecuted. The defendants answered and denied that the plaintiffs were required to work more than eight hours per day. There was a decree for the plaintiffs. This appeal followed.

The record discloses without controversy that the city maintains five or six barns and owns its teams; that all teamsters performing day labor for the street department of the city (except as hereinafter noticed) are required to go to the barn each morning where their respective teams are kept, grease their wagons when necessary, harness and hitch their teams, collect their tools, and be at the place of work, or, as the witnesses put it, "on the job," at 8 o'clock a. m.; and that after working eight hours "on the job," they are required to return the teams to the barn and unhitch and unharness them. The appellant Walters, the superintendent of the street department of the city, testified that harnessing and hitching the team, driving it to the place where the work was to be done, and returning it to the barn and unhitching it after the teamster had put in eight hours time on the work, would ordinarily consume about one hour each day. It further appears that, where the distance between the barn and the work is so great as to require more time going to and returning from the work, the city bears that burden. * * *

The appellants next contend that the respondents have other remedies, and that they can have no injunctive relief. In this state there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs, and it is called a "civil action." Rem. & Bal. Code, § 153. The rule, however, has been adopted in this state, as in most of the sister states, that injunctive relief will not be granted where there is a plain, complete, speedy, and adequate legal remedy. As was said in Phelan v. Smith, 22 Wash. 397, 61 Pac. 31:

"Incompleteness and inadequacy of the legal remedy are what determine the right to the equitable remedy of injunction."

The same view is announced in Grant v. Cole, 23 Wash. 542, 63 Pac. 263. In Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578, it is said:

"It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

"It is not enough that there is a remedy at law. It must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." 16 Am. & Eng. Ency. Law (2d Ed.) 355.

One of the respondents testified that, when the teamsters protested against the rule requiring them to work more than eight hours a day, the subforeman answered that it was a general order, and that they could comply with it or "quit the job."

The appellants argue that section 12, art. 16, of the city charter, furnishes the respondents an adequate remedy. It suffices to say that it applies only to employés who have been discharged.

It is further argued that mandamus is the proper remedy. The respondents stated the facts upon which they relied in their bill. If they were entitled to the relief obtained, viz., to be relieved from working more than eight hours a day, the city is not prejudiced by the form of the decree.

The appellants have cited authorities to the effect that an employé, whether in the service of a municipal corporation or an individual, cannot maintain an action in equity to restrain his employer from discharging him. That this is the general rule may be granted. But it has no application to the case. The record shows that the respondents were content to remain in the service of the city, and that the city was satisfied with their service. The employment was mutually satisfactory and agreeable. If the appellants' contention should be upheld, the respondents would be required to continue to work more than eight hours a day or "quit the job." The law places no such alternative upon them.

It is finally said that the decree is too broad. When the record is read as an entirety, the decree operates only in favor of teamsters in the employ of the city as day laborers upon street work, driving the city's teams.

The decree is affirmed.

DUNBAR, C. J., and PARKER, CROW, and CHADWICK, JJ., concur.

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## LINDSAY & CO., Limited, v. MONTANA FEDERATION OF LABOR.

**(Supreme Court of Montana, 1908. 37 Mont. 264, 96 Pac. 127, 18 L. R. A. [N. S.] 707, 127 Am. St. Rep. 722.)**

Action by Lindsay & Co., Limited, against the Montana Federation of Labor and others. From an order denying a motion to dissolve an injunction, defendants appeal. Reversed and remanded.

HOLLOWAY, J.[59] This action was commenced by Lindsay & Co., Limited, a domestic corporation, having its principal office or place of business at Helena, with branch offices and places of business at Billings and Great Falls, in this state, and engaged in conducting the business of wholesale fruit and produce merchants at whose places, against the Montana Federation of Labor, the Yellowstone Trades and Labor

[59] Parts of the opinion are omitted.

Assembly, Billings Clerks' Protective Union, certain officers of these associations, and others to secure an injunction restraining the defendants from certain acts alleged to have been committed by them and threatened to be continued. Upon the verified complaint a temporary injunction was issued. The defendants above named appeared by answer, which denies the allegations of the complaint material to this controversy, and upon such answer and oral testimony to be offered moved the court to dissolve the injunction. After a hearing the injunction was dissolved as to defendants Joy and Doody, and modified by striking out a portion of one sentence, and, with the modifications thus made, the motion was denied, and the injunction continued in force against the remaining answering defendants. * * * Stripped of all useless verbiage, these facts appeared:

That some time prior to October, 1907, Lindsay & Co. had been declared unfair by the Miners' Union and Trades Assembly in Helena, and this action had been indorsed by the Montana Federation of Labor, and circulars announcing the fact had been sent to labor organizations throughout the state. On October 25, 1907, the Yellowstone Trades and Labor Assembly, upon information received of the action taken in Helena, passed a resolution which declared Lindsay & Co. unfair, and referred the matter to the grievance committee of that organization to advise the public of the action taken. Acting upon the authority thus given, the grievance committee caused to be published and circulated among the business houses and elsewhere in Billings circulars, of which the following is a copy:

"Unfair.

"All laboring men and those in sympathy with organized labor are requested not to patronize Lindsay & Co. who are engaged in the wholesale fruit business, also distributers for cigars and vegetables of all kinds in Billings and vicinity, as they are unfair. We urge the retail merchants, laboring men, and all who are in sympathy with organized labor to place themselves in position to patronize friendly wholesalers. We further desire to call attention to the fact that Lindsay & Co. are operating peddling wagons throughout this city, and we ask the people to guard against patronizing these wagons. We ask this for your own protection and the protection of organized labor.

"[Signed] Yellowstone Trades and Labor Assembly."

That immediately after the adoption of the resolution and the publication of this circular a large number of retail dealers in Billings, who had theretofore purchased goods from the plaintiff company, ceased to do business with the concern, with the result that the business of the company at Billings was practically paralyzed, and great financial loss resulted. * * * From these facts we are to determine the question: Should the injunction have been dissolved? It is to be observed that only two acts of any consequence are shown to have been committed by the defendants: (1) They declared Lindsay & Co. unfair, or, in the language of respondent, boycotted the company; and (2) they published the circular set forth above, that is, they caused it to be printed and circulated. The injunction, as modified, is very sweeping in its terms, and in that form could not be justified by any possible state of

facts; but assuming that it was continued for the purpose of preventing the continuance in force of the boycott, and for the purpose of preventing a repetition of the publication of the circular or a similar one, although there is not any evidence of any threat or purpose on the part of the defendants or any of them to repeat that act, we may consider the question presented to us by reference to these two principal acts mentioned.

1. Does the continuance in force of the resolution of October 25, 1907, amount to such an invasion of plaintiff's rights as will warrant the interposition of a court of equity by injunction? * * *

We are of the opinion that the evidence shows that these defendants inaugurated a boycott on Lindsay & Co., and that it was still in effect at the date of the hearing. We adopt the language of the Supreme Court of New York in Mills v. United States Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185, in which the court, speaking through Justice Jenks, said:

"I think that the verb 'to boycott' does not necessarily signify that the doers employ violence, intimidation, or other unlawful coercive means; but that it may be correctly used in the sense of the act of a combination, in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the welfare of the members of the combination, or some of them, or grants concessions which are deemed to make for that purpose."

In Ulery v. Chicago Live Stock Exchange, 54 Ill. App. 233, it is said:

"A person, with or without reason, may refuse to trade with another; so may 10 or 50 persons refuse. An individual may advise his neighbor or friend not to trade with another neighbor. He may even command when the command amounts only to earnest advice."

But what is there unlawful in the act of the union workingmen of Billings in withdrawing their patronage from the plaintiff? Certainly it cannot be said that Lindsay & Co. had a property right in the trade of any particular person. In this country patronage depends upon good will, and we do not think that it will be contended by any one that it was wrongful or unlawful, or violated any right of the plaintiff company, for any particular individual in Billings to withdraw his patronage from Lindsay & Co., or from any other concern which might be doing business with that company, and that, too, without regard to his reason for doing so. * * *

If, then, these defendants and their associates did not violate any legal right of the plaintiff in withdrawing their patronage from the company, or in agreeing to withdraw their patronage from any one who might patronize Lindsay & Co., they cannot be enjoined from continuing the boycott in force, so long as the means employed to make the boycott effective are not illegal. The evidence shows that the only means used in this instance was the publication of the circular in question, and this brings us to a consideration of the second proposition involved.

2. (a) May a court of equity enjoin the publication by an individual of a circular of this character; (b) if not, may it enjoin such publication when made by a number of individuals acting collectively?

(a) Article 3 of our Constitution is entitled: "A declaration of rights of the people of the state of Montana," and section 10 of that article, so far as applicable here, reads as follows:

"No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty."

The language here employed seems too clear to admit of doubt or argument. The one fundamental idea conveyed by this section is penalty for a violation of the privilege, not prevention of its abuse. It cannot be said that a citizen of Montana is free to publish whatever he will on any subject, while an injunction preventing him from publishing a particular item upon a particular subject hangs over his head like a sword of Damocles, ready to fall with all the power which can be invoked in contempt proceedings, if he does the very thing the section of the Constitution says he may do. It is impossible to conceive the idea that the individual has an absolute right to publish what he pleases, subject to the restriction mentioned, and at the same time to entertain the idea that a court may prevent him from doing so. The two ideas cannot possibly coexist. The language of the section is not susceptible of any other meaning than this: That the individual citizen of Montana cannot be prevented from speaking, writing, or publishing whatever he will on any subject. If, however, what he writes or publishes constitutes a criminal libel, he may be held responsible for the abuse of the liberty in a criminal prosecution (Pen. Code, c. 8), or, if what he speaks, writes, or publishes wrongfully infringes the rights of others, he may be held responsible for the abuse in a civil action for damages. If this is not the meaning of the section, it is because the framers employed language which is impotent as a vehicle for conveying their idea.

But it is suggested by counsel for respondent company that these defendants are insolvent, and that a judgment for damages would be worthless. Even granting this to be so, still the Constitution does not discriminate among men according to the amount of their possessions. The guaranty of this section extends as fully to the poorest as to the wealthiest citizen of the state; and, though an abuse of the liberty so guaranteed may result in loss for which there cannot be any adequate compensation, the framers of our Constitution in preparing it, and the people in adopting it, doubtless concluded that it was better that such results be reached in isolated cases, than that the liberty of speech be subject to the supervision of a censor. To declare that a court may say that an individual shall not publish a particular item is to say that the court may determine in advance just what the citizen may or may not speak or write upon a given subject—is, in fact, to say that such court is a censor of speech as well as of the press. Under similar con-

stitutional provisions, the Supreme Courts of California and Missouri have reached the same conclusion. Dailey v. Superior Court, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. Rep. 160; Marx & Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440.

(b) What we have said above, in the first paragraph of this opinion, is likewise applicable here. If any one of these individuals could publish this circular, they may with equal security all join in its publication. We think the evidence produced at the hearing was insufficient to justify the continuance in force of the injunction, and it should have been dissolved.

The order of the court is reversed, and the cause is remanded, with direction to vacate the order heretofore made and enter an order dissolving the injunction.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

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## NEW ENGLAND CEMENT GUN CO. v. McGIVERN.

**(Supreme Judicial Court of Massachusetts, 1914. 218 Mass. 198, 105 N. E. 885.)**

Action for an injunction by the New England Cement Gun Company against Edward J. McGivern and others, individually and as officers and members of a voluntary unincorporated branch plasterers' association. Heard on master's report, and reserved on the bill, answer, replication, and report for the full court, for the entry of such decree as justice and equity require. Decree for plaintiff, and case recommitted for assessment of damages.

DE COURCY, J.[60] No exceptions were taken to the report of the master; and among the facts found by him are the following: The plaintiff is the exclusive licensee in New England of certain patented machinery and processes by which sand, cement and water are simultaneously mixed and projected upon the walls of buildings and other structures. * * *

The defendants Cumming, Taylor and Keating are members of and respectively president, business agent and secretary of the Journeymen Plasterers' Benevolent Union of Boston, Mass., No. 10. McGivern is a member of the local union, and also president of the parent body, the Operative Plasterers' International Association of the United States and Canada, by which the local organization was chartered. * * *

In the fall of 1912, the plaintiff was plastering with its process the exterior of an apartment house in Boston, when the defendant McGivern told the plaintiff's superintendent that he would have to employ

[60] Parts of the opinion are omitted.

union plasterers to operate the nozzle, or he (McGivern) would call a strike of the men working on the building; and for a time a union plasterer was so employed. On February 28, 1913, the plaintiff executed a written contract with the Old Colony Real Estate Trust to coat with gunite the exterior walls of a building which the Trust was erecting on Somerset and Howard streets in Boston. * * * About this time Taylor called on one Farley, who was the acting trustee for the Old Colony Real Estate Trust, and said to him:

"I understand you have got a contract with the New England Cement Gun Company. I would advise you not to go ahead and put that gunite on the building; if you do, there is liable to be trouble."

* * * The union plasterers left their work a third time about ten days afterwards, the lathers and metal workers also leaving, and McGivern and Taylor refused to allow the plasterers to return to work until a contract had been made and exhibited to them, by which the builder had arranged for this outside work with Monahan, who had the contract for the inside plastering, and would employ union labor. Shortly before this the plaintiff's letter, later referred to, releasing the owner from its contract, had been sent to Farley, and by him shown to McGivern and Taylor. * * *

It does not appear that there is any dispute or contention between the plaintiff and its own employés, or that these employés are taking any part in the action of the defendants. The plaintiff's officers do not intentionally discriminate between union and nonunion workmen, and were willing that their employés should join the defendant union. But, as the defendant McGivern informed them, this could not be done because the men were not plasterers; and he knew of no union to which they were eligible.

The master made certain specific findings and conclusions, among which are these:

* * * * * * * * * *

"5. That the defendants have conspired together for the purpose of creating and enforcing a boycott against the plaintiff and of hindering and interfering with the prosecution of its business and of injuring the same unless it accedes to their demand.

"6. That the defendants, in pursuance of said conspiracy, are engaged in watching and seeking out work proposed to be given to the plaintiff and in coercing those in control thereof not to make with the plaintiff any contract for such work, and in causing the rescission of such contracts as they discover to have been made with the plaintiff."

"8. That the strikes were strikes against a subcontractor for the purpose of forcing him to coerce the main contractor to coerce the owner of the building to coerce the plaintiff to yield to the demands of the union.

"9. That the defendants have instituted a boycott against the plaintiff and intend to continue enforcing the same, unless prevented from so doing."

Without further recital of the details, it is apparent that the record discloses a combination on the part of the defendants to do acts which the law does not justify, notwithstanding that the ultimate motive by which they were inspired was to advance their own interests. The plaintiff had a written agreement with the owners of the building to ap-

ply the coating of gunite. Under our decisions it was unlawful for the defendants, by means of strikes and otherwise, to intentionally induce the owners to take away from the plaintiff its rights under that agreement. Such conduct is not legally allowable as so-called trade competition or defense of self-interest. * * *

It was not lawful for them to strike to compel Monahan, with whom they had no trade dispute, to compel the general contractor to compel the owner to compel the plaintiff to give to the defendants the work they demanded. In other words, it was an unjustifiable interference with the plaintiff's business to injure others in order to compel them to coerce the plaintiff. Martin, Modern Law of Labor Unions, § 77, and cases cited. The acts of coercion and procuring breaches of contract mentioned in the sixth finding plainly are not justified by the law of this commonwealth. It is unnecessary to consider further the unlawfulness of such a secondary or compound boycott in view of the full discussion of the subject in the recent opinions of this court in Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, and Burnham v. Dowd, 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778, in which cases are collected the authorities in this and other jurisdictions. * * *

The plaintiff is entitled to a decree enjoining the defendants from causing or taking part in any boycott against the plaintiff's business, by coercing others, through intimidation or threats, to withdraw from the plaintiff their beneficial business intercourse, and from causing or inciting any sympathetic strike against the plaintiff or its customers for the purpose of preventing the use by the plaintiff of its machinery or process for applying gunite, or for the purpose of compelling it to discharge any of its nonunion workmen, and to costs of suit. * * *

Ordered accordingly.

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## RHODES BROS. CO. v. MUSICIANS' PROTECTIVE UNION, LOCAL NO. 198, A. F. OF M., OF PROVIDENCE, et al.

**(Supreme Court of Rhode Island, 1915. 92 Atl. 641.)**

Appeal from Superior Court, Providence and Bristol Counties.

Action for injunction by the Rhodes Brothers Company against Musicians' Protective Union, Local No. 198, A. F. of M., of Providence, and others. Decree for preliminary injunction, and respondents appeal.

VINCENT, J.[61] This is an appeal by the respondents from a decree of the superior court granting to the Rhodes Bros. Company a preliminary injunction restraining the respondents from interfering with the members of said union employed by the complainant company and from imposing any fine or penalty upon such members by reason of their continued employment by the complainant.

[61] Parts of the opinion are omitted.

It appears that the complainant, the Rhodes Bros. Company, has for a number of years maintained a place of entertainment in Cranston in the state of Rhode Island, known as "Rhodes on the Pawtuxet"; one of the principal features of such place of entertainment being a dance hall or pavilion where those desiring to dance might indulge in that pastime under agreeable and suitable conditions and surroundings upon the payment of a small entrance or other fee. To carry on this business successfully, it was necessary for the complainant to furnish music of a suitable character and which should be reasonably satisfactory to the patrons of the place. For several years the complainant has exclusively employed members of the respondent union, which is a voluntary unincorporated association, composed of persons in the musical profession residing or located in the city of Providence and in other towns and cities in the state of Rhode Island. In the spring of 1914, the complainant entered into the following contract with Edward M. Fay, a musician engaged in leading and furnishing orchestras and also a member of the respondent union:

Musicians' Protective Union, Providence, R. I.

Local No. 198 A. F. of M.

Contract Blank

March 5, 1914.

The undersigned party of the first part and second part, respectively agree as follows:

The party of the first part hereby agrees to furnish 12 musicians, members of Local No. 198, A. F. of M. as their agent, to party of the second part, for $280.00 to play at Rhodes on the Pawtuxet six evenings per week, from 8 p. m. until 11 p. m. and to play Saturday afternoons from 3 p. m. to 6 p. m. (The party of the first part also hereby agrees to play six afternoons and six evenings, each week, three hours each session for the sum of $329.50 per week.) (This engagement to start on or about April 15, 1914, and to continue until balance of the season of 1914.)

It is further agreed that if there are any bands or orchestras employed for this engagement who are unfair to the American Federation of Musicians, this contract shall be considered null and void, as far as party of the first part is concerned, but does not relieve party of the second part.

As the musicians engaged under the stipulations of this contract are members of the American Federation of Musicians, nothing in this contract shall ever be so construed as to interfere with any obligation which the musicians owe to the American Federation of Musicians by reason of their prior obligations to the American Federation of Musicians as members thereof.

The party of the second part agrees to fulfill provisions of above.

E. M. Fay,
Party of the First Part.
Rhodes Bros. Co.,
A. A. Rhodes, Treas.,
Party of the Second Part.

Under this contract, Mr. Fay selected from the members of the respondent union an orchestra which furnished the music at "Rhodes on the Pawtuxet" from April 11, 1914, to June 6, 1914.

Mr. Fay, with the exception of the opening night, did not lead the orchestra himself, but intrusted the performance of that duty to his brother. The contract does not by its terms secure to the complainant the personal services of Mr. Fay as a leader or otherwise. The complainant claims that the music was so unsatisfactory in character that

it provoked frequent complaints from the patrons of the place and fully justified the complainant's action in canceling the contract. After the cancellation of this contract, the complainant employed another orchestra, also composed of members of the respondent union, whereupon the union through its board of directors passed a vote forbidding its members to enter or to continue in the employment of the complainant as musicians.

In this situation of affairs, the complainant filed its bill of complaint against the Musicians' Protective Union, Local No. 198, A. F. of M., Providence, R. I., and certain individuals composing its board of directors. The complainant sets forth in its bill, as amended, that it had been for years past engaged in carrying on a place of entertainment and amusement in Cranston which had been and was being patronized by a large number of people from Providence, Pawtucket, Cranston, and other places for the purpose of dancing, and that it was necessary for the complainant to employ an orchestra capable of furnishing music suitable for such purpose; that the complainant is informed and believes that the respondent association comprises in its membership all the available musicians in the state of Rhode Island; that the complainant has never employed at its place of amusement any musicians outside of the membership of the respondent association, and that it does not desire so to do; that the quality and character of the music has not been and is not satisfactory to the patrons of the place, but has, on the contrary, provoked repeated complaints making it necessary for the complainant to employ other professional musicians; that it has endeavored to employ other musicians also members of the respondent association who could and would furnish music of a quality and character satisfactory to its patrons, but that the respondents have undertaken to prevent other members of the union from furnishing music at the complainant's place of amusement, and in pursuance thereof its board of directors on June 4, 1914, passed a vote prohibiting professional musicians, members of the respondent association, from entering into any engagement with the Rhodes Bros. Company to play at "Rhodes on the Pawtuxet" during the season of 1914. The complainant's bill prays for a temporary and permanent injunction restraining the respondents from interfering with the complainant in the exercise of its right and privilege of engaging members of the respondent association or in any manner preventing any one now or who may hereafter be employed by the complainant as a musician or may be desirous of such employment from entering into or continuing in any contract relations with the complainant or from depriving the complainant of the services of any such person through the imposition, enforcement, or collection or any threat or attempt to impose, enforce, or collect any fine or penalty or expel or attempt or threaten to expel any member of the respondent union on account of his employment or engagement or any contract with the complainant in relation to musical services growing out of the same, and from contriving by threats or

intimidation or in any way hindering any person from entering into any contract relations as a musician with the complainant, and that the notice to members forbidding them to enter into the employ of the complainant may be declared null and void and of no effect.

The case came on for hearing in the superior court upon the question of the temporary injunction upon bill, answer, affidavits, and oral testimony. The superior court rendered a decision, in the first instance, that the complainant, while having made out a case in other respects, had failed to show that the action of the respondents, if not interfered with, would result in an irreparable injury to the complainant. Later the case was reopened before another justice of the superior court for the purpose of permitting the complainant to offer testimony bearing upon the question of irreparable injury. Upon this hearing the court decided in favor of the complainant, and the following decree enjoining the respondent association was entered:

"That the respondents, the Musicians' Protective Union, Local No. 198, A. F. of M. of Providence, R. I., a voluntary unincorporated association, its officers, directors, agents, and servants are hereby restrained and enjoined from interfering with the business of the complainant by reason of any matter or thing growing out of a certain contract heretofore entered into between the Rhodes Bros. Company and said association, or any member of said association, offered in evidence at the hearing and marked 'Respondents' Exhibit A,' or by reason of any matter or thing growing out of said contract, from imposing, enforcing, or collecting or attempting to impose, enforce, or collect any fine or penalty by reason of any matter or thing growing out of said contract, upon any member of said Musicians' Protective Union, Local No. 198, A. F. of M. of Providence, R. I., on account of the employment or engagement of any such member as musician by said complainant, until further order of the court."

From this decree the respondents have taken an appeal, alleging: (1) That said decree is against the law; (2) that said decree is against the evidence and the weight of the evidence; (3) that the complainant has not shown any probable right to final relief; (4) that the granting of the preliminary injunction is equivalent to final relief; (5) that the complainant has not shown that it would be irreparably injured if the injunction were not granted; and (6) that the finding of fact by Mr. Justice Brown that complainant could engage a competent orchestra outside of the union is conclusive that complainant would not be irreparably injured if the injunction were not granted, and, the question of irreparable injury being the only question opened to Judge Brown for rehearing, his said finding of fact is conclusive that the preliminary injunction should not be granted.

The novelty of the question presented resides in the fact that the complainant, feeling that its interests would be better served through the employment of union men, desires to employ the members of this union, and certain members of the union desire to enter the employment of the complainant, provided they can do so without imperiling their membership in the union or subjecting themselves to any fines or disciplinary measures which the by-laws of the union authorize. The desires of both the complainant and of the men whom it desires to employ are therefore conditional.

The contract between the complainant and Mr. Fay is in the form prescribed by the union and upon one of the blanks provided by the union. The representatives of the complainant, in executing this contract, must have been aware that they were dealing with Mr. Fay as a member and under the rules and regulations of the union. This is further evidenced by the fact that when the difficulty arose between the complainant and the union, and the contract was rescinded by the former, the complainant appealed to the directors of the union for a settlement of the question and appeared, through its representatives, and presented its side of the controversy. Upon this hearing the directors of the union found that the contract was binding upon both parties, and a vote was subsequently passed forbidding members of the union from entering the employment of the complainant without permission of the said directors.

The by-law of the union under which this action was taken is as follows (section 13, art. 7):

"Members shall not play for the proprietor of a hall, concert saloon, theater, or any person, club, company, or organization who has broken a contract with a member or members of this union. In case of doubt as to which party has broken the contract, it must be referred to the board of directors."

The complainant does not claim that the members of the respondent association are deterred from accepting employment at its place of business through any acts of violence or any acts or threats producing a fear of violence, but it does claim that any disciplinary action under this by-law, based upon such employment, would be unlawful and would amount to a combination or conspiracy having for its purpose the exclusion of the complainant from the open labor market and resulting in irreparable injury.

We cannot say that this by-law is in itself unlawful, or that its enforcement upon the members of the union who have voluntarily subjected themselves to its provisions amounts to an intimidation or to a threat which would justify the interference of a court of equity. It left the members of the union free, in one sense, to enter the employment of the complainant, although it practically compelled them to choose between the benefits of such an engagement and membership in the union. * * *

The complainant urges that the vote of the directors of the union forbidding its members to enter the employment of the complainant was in the nature of a threat and operated to intimidate them, and brings the respondents within the rule laid down in the adjudicated cases that all acts of violence, threats of violence, or acts calculated to intimidate, may be restrained by injunction. It seems to us, however, that this vote amounts to nothing more than a notice to the members of the union that the complainant has brought itself within the scope of the by-law, and that if they should enter the employment of the complainant they would be dealt with in accordance therewith. We do

not think that such vote amounts to intimidation as defined by the adjudicated cases, bearing in mind that such vote was passed after a hearing in which the complainant had participated and after the board of directors had found the contract binding upon both parties thereto.

The complainant states that the case presents three questions for the determination of the court upon the motion for a preliminary injunction: (1) Has the complainant shown probable cause for relief? (2) Has the complainant shown that it would suffer irreparable injury unless a preliminary injunction was granted? And (3) has the complainant a constitutional right to a free market and to employ any person willing to enter its employment?

The complainant has also presented in its brief some argument and cited some authority as to the general scope and purpose of a preliminary injunction. As to this there seems to be no contention between the parties, and we see no reason for doubting the general rule laid down in Kerr on Injunction (3d Ed.) pp. 61, 62, cited by complainant in its brief. Under the rule, the complainant, in order to get a preliminary injunction, must sustain the burden of satisfying the court that there is a substantial question to be tried. The question whether or not the complainant would suffer an irreparable injury largely depends for its solution upon the character of the act or acts alleged to be injurious. It is not every injurious act which renders the party committing it subject to injunction. The act must not only be injurious, but it must also be unlawful. If an injury follows from a proper and lawful act, it is damnum absque injuria. We therefore come back to the act of the respondent in passing a vote, by its board of directors, forbidding its members to enter or continue in the employment of the complainant. That the respondent union might lawfully do so we have already concluded.

This is not simply a case where the complainant desires to employ certain musicians who are desirous of entering its employment. The attitude of both the complainant and the musicians is, as we have already seen, conditioned upon the continued membership of the musicians in the union. To say that the musicians after subjecting themselves to the laws and regulations of the union, which provide for a finding as to the validity of a contract between its members and outside parties, and that in case of a broken contract members shall not enter the employment of the party breaking it, were willing to enter such employment, is not correctly expressive of the situation in the present case. While they may signify their desire to enter the employment of the complainant, they only desire to do so upon the condition that they can at the same time retain their membership in the union. It is quite apparent that the interest of these musicians in the union is paramount to that of their employment by the complainant, and that, on the other hand, the desirability of these particular musicians and their value to the complainant over other musicians resides in the fact that they are members of the union. These men are not ready to enter, or continue

in, the employment of the complainant, nor does the complainant care for their services except they be retained as members of the union. This being the situation, it seems to follow that the further dealings between the complainant and these musicians must depend on the willingness of the union to waive its by-law before mentioned and to consent that its members may continue in the employ of the complainant without penalty, discipline, or expulsion, or that the musicians accept such employment in disregard of the union and its regulations, assuming the responsibility of its discipline. * * *

If we eliminate from the consideration of this case the authorities based upon violence, threats of violence, conspiracies, and unlawful combinations, little remains in the way of authority which could be usefully applied to the determination of the particular question before us. All that the respondent union is attempting to do or contemplates doing, so far as appears, is to enforce against its own members the provisions of a by-law under the terms of which they have voluntarily brought themselves and promised to abide. The union is not acting with others either by way of conspiracy or combination. It is, at most, only claiming the right to act for itself in the enforcement of its by-laws governing the conduct of its own members, and this we think it has a right to do. Bohn Mfg. Co. v. Hollis et al., 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Thomas v. Cincinnati, etc., Ry. Co. (C. C.) 62 Fed. 803.

In Bohn Mfg. Co. v. Hollis et al., it was held that an agreement between the members of a retail lumber dealers' association not to deal with any wholesale dealer who sells directly to customers not dealers, at a point where a member of the association is doing business, and containing provisions for notification to all members when the wholesale dealer makes such a sale and for the expulsion of members who dealt with him, is not unlawful, and such wholesale dealers cannot enjoin the sending out of such notices; that the infliction of the penalty of expulsion was not coercion; and that it was wholly a matter of their own free choice whether they preferred to trade with plaintiff or the association.

In the case of Vegelahn v. Guntner, 167 Mass. 97, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, it is held in the majority opinion that:

"A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby."

* * * We do not think that the case which the complainant presents is one for the exercise of the authority of a court of equity by way of injunction.

The decree of the superior court granting to the complainant a preliminary injunction is reversed, and the case is remanded to that court for further proceedings.

## MUTUAL FILM CORPORATION v. INDUSTRIAL COMMISSION OF OHIO et al.

(Supreme Court of United States, 1915. 236 U. S. 230, 35 Sup. Ct. 387, 59 L. Ed. —.)

Appeal from the District Court of the United States for the Northern District of Ohio to review a decree refusing to restrain the enforcement of a state statute for the censorship of motion picture films.

See same case below, 215 Fed. 138.

Statement by MR. JUSTICE MCKENNA:

Appeal from an order denying appellant, herein designated complainant, an interlocutory injunction sought to restrain the enforcement of an act of the general assembly of Ohio, passed April 16, 1913 (103 Ohio Laws, 399), creating under the authority and superintendence of the Industrial Commission of the state a board of censors of motion picture films. The motion was presented to three judges upon the bill, supporting affidavits, and some oral testimony.

The bill is quite voluminous. It makes the following attacks upon the Ohio statute: (1) The statute is in violation of §§ 5, 16, and 19 of article 1 of the Constitution of the state in that it deprives complainant of a remedy by due process of law by placing it in the power of the board of censors to determine from standards fixed by itself what films conform to the statute, and thereby deprives complainant of a judicial determination of a violation of the law. (2) The statute is in violation of articles 1 and 14 of the Amendments to the Constitution of the United States, and of § 11 of article 1 of the Constitution of Ohio, in that it restrains complainant and other persons from freely writing and publishing their sentiments. (3) It attempts to give the board of censors legislative power, which is vested only in the general assembly of the state, subject to a referendum vote of the people, in that it gives to the board the power to determine the application of the statute without fixing any standard by which the board shall be guided in its determination, and places it in the power of the board, acting with similar boards in other states, to reject, upon any whim or caprice, any film which may be presented, and power to determine the legal status of the foreign board or boards, in conjunction with which it is empowered to act.

The business of the complainant and the description, use, object, and effect of motion pictures and other films contained in the bill, stated narratively, are as follows: Complainant is engaged in the business of purchasing, selling, and leasing films, the films being produced in other states than Ohio, and in European and other foreign countries. The film consists of a series of instantaneous photographs or positive prints of action upon the stage or in the open. By being projected upon a screen with great rapidity there appears to the eye an illusion of motion. They depict dramatizations of standard novels,

exhibiting many subjects of scientific interest, the properties of matter, the growth of the various forms of animal and plant life, and explorations and travels; also events of historical and current interest,—the same events which are described in words and by photographs in newspapers, weekly periodicals, magazines, and other publications, of which photographs are promptly secured a few days after the events which they depict happen; thus regularly furnishing and publishing news through the medium of motion pictures under the name of "Mutual Weekly." Nothing is depicted of a harmful or immoral character.

The complainant is selling and has sold during the past year for exhibition in Ohio an average of fifty-six positive prints of films per week to film exchanges doing business in that state, the average value thereof being the sum of $100, aggregating $6,000 per week, or $300,000 per annum.

In addition to selling films in Ohio, complainant has a film exchange in Detroit, Michigan, from which it rents or leases large quantities to exhibitors in the latter state and in Ohio. The business of that exchange and those in Ohio is to purchase films from complainant and other manufacturers of films and rent them to exhibitors for short periods at stated weekly rentals. The amount of rentals depends upon the number of reels rented, the frequency of the changes of subject, and the age or novelty of the reels rented. The frequency of exhibition is described. It is the custom of the business, observed by all manufacturers, that a subject shall be released or published in all theaters on the same day, which is known as release day, and the age or novelty of the film depends upon the proximity of the day of exhibition to such release day. Films so shown have never been shown in public, and the public to whom they appeal is therefore unlimited. Such public becomes more and more limited by each additional exhibition of the reel.

The amount of business in renting or leasing from the Detroit exchange for exhibition in Ohio aggregates the sum of $1,000 per week.

Complainant has on hand at its Detroit exchange at least 2,500 reels of films which it intends to and will exhibit in Ohio, and which it will be impossible to exhibit unless the same shall have been approved by the board of censors. Other exchanges have films, duplicate prints of a large part of complainant's films, for the purpose of selling and leasing to parties residing in Ohio, and the statute of the state will require their examination and the payment of a fee therefor. The amounts of complainant's purchases are stated, and that complainant will be compelled to bear the expense of having them censored because its customers will not purchase or hire uncensored films.

The business of selling and leasing films from its offices outside of the state of Ohio to purchasers and exhibitors within the state is interstate commerce, which will be seriously burdened by the exaction of the fee for censorship, which is not properly an inspection tax, and the proceeds of which will be largely in excess of the cost of enforcing

the statute, and will in no event be paid to the Treasury of the United States.

The board has demanded of complainant that it submit its films to censorship, and threatens, unless complainant complies with the demand, to arrest any and all persons who seek to place on exhibition any film not so censored or approved by the censor congress on and after November 4, 1913, the date to which the act was extended. It is physically impossible to comply with such demand and physically impossible for the board to censor the films with such rapidity as to enable complainant to proceed with its business, and the delay consequent upon such examination would cause great and irreparable injury to such business, and would involve a multiplicity of suits.

There were affidavits filed in support of the bill and some testimony taken orally. One of the affidavits showed the manner of shipping and distributing the films, and was as follows:

"The films are shipped by the manufacturers to the film exchanges inclosed in circular metal boxes, each of which metal boxes is in turn inclosed in a fiber or wooden container. The film is in most cases wrapped around a spool or core in a circle within the metal case. Sometimes the film is received by the film exchange wound on a reel, which consists of a cylindrical core with circular flanges to prevent the film from slipping off the core, and when so wound on the reel is also received in metal boxes, as above described. When the film is not received on a reel, it is, upon receipt, taken from the metal box, wound on a reel, and then replaced in the metal box. So wound and so inclosed in metal boxes, the films are shipped by the film exchanges to their customers. The customers take the film as it is wound on the reel from the metal box, and exhibit the pictures in their projecting machines, which are so arranged as to permit of the unwinding of the film from the reel on which it is shipped. During exhibition, the reel of film is unwound from one reel and rewound in reverse order on a second reel. After exhibition, it must be again unwound from the second reel from its reverse position and replaced on the original reel in its proper position. After the exhibitions for the day are over, the film is replaced in the metal box and returned to the film exchange, and this process is followed from day to day during the life of the film.

"All shipments of films from manufacturers to film exchanges, from film exchanges to exhibitors, and from exhibitors back to film exchanges, are made in accordance with regulations of the Interstate Commerce Commission, one of which provides as follows:

" 'Moving picture films must be placed in metal cases, packed in strong and tight wooden boxes or fiber pails.' "

Another of the affidavits divided the business as follows:

"The motion picture business is conducted in three branches; that is to say, by manufacturers, distributers, and exhibitors, the distributers being known as film exchanges. * * * Film is manufactured and produced in lengths of about 1,000 feet, which are placed on reels, and the market price per reel of film of a thousand feet in length is at the rate of 10 cents per foot, or $100. Manufacturers do not sell their film direct to exhibitors, but sell to film exchanges, and the film exchanges do not resell the film to exhibitors, but rent it out to them."

After stating the popularity of motion pictures, and the demand of the public for new ones, and the great expense their purchase would be to exhibitors, the affidavit proceeds as follows:

"For that reason film exchanges came into existence, and film exchanges such as the Mutual Film Corporation are like clearing houses or circulating

libraries, in that they purchase the film and rent it out to different exhibitors. One reel of film being made to-day serves in many theaters from day to day until it is worn out. The film exchange, in renting out the films, supervises their circulation."

An affidavit was filed, made by the "general secretary of the national board of censorship of motion pictures, whose office is at No. 50 Madison Avenue, New York City." The "national board," it is averred, "is an organization maintained by voluntary contributions, whose object is to improve the moral quality of motion pictures." Attached to the affidavit was a list of subjects submitted to the board which are "classified according to the nature of said subjects into scenic, geographic, historical, classical, and educational and propagandistic."

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court:

Complainant directs its argument to three propositions: (1) The statute in controversy imposes an unlawful burden on interstate commerce; (2) it violates the freedom of speech and publication guaranteed by section 11, article 1, of the Constitution of the state of Ohio;* and (3) it attempts to delegate legislative power to censors and to other boards to determine whether the statute offends in the particulars designated.

It is necessary to consider only sections 3, 4, and 5. Section 3 makes it the duty of the board to examine and censor motion picture films to be publicly exhibited and displayed in the state of Ohio. The films are required to be exhibited to the board before they are delivered to the exhibitor for exhibition, for which a fee is charged.

Section 4:

"Only such films as are, in the judgment and discretion of the board of censors, of a moral, educational, or amusing and harmless character shall be passed and approved by such board."

The films are required to be stamped or designated in a proper manner.

Section 5. The board may work in conjunction with censor boards of other states as a censor congress, and the action of such congress in approving or rejecting films shall be considered as the action of the state board, and all films passed, approved, stamped, and numbered by such congress, when the fees therefor are paid, shall be considered approved by the board.

By section 7 a penalty is imposed for each exhibition of films without the approval of the board, and by section 8 any person dissatisfied

* "Section 11. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted."

with the order of the board is given the same rights and remedies for hearing and reviewing, amendment or vacation of the order "as is provided in the case of persons dissatisfied with the orders of the Industrial Commission."

The censorship, therefore, is only of films intended for exhibition in Ohio, and we can immediately put to one side the contention that it imposes a burden on interstate commerce. It is true that, according to the allegations of the bill, some of the films of complainant are shipped from Detroit, Michigan, but they are distributed to exhibitors, purchasers, renters, and lessors in Ohio, for exhibition in Ohio, and this determines the application of the statute. In other words, it is only films which are "to be publicly exhibited and displayed in the state of Ohio" which are required to be examined and censored. It would be straining the doctrine of original packages to say that the films retain that form and composition even when unrolling and exhibiting to audiences, or, being ready for renting for the purpose of exhibition within the state, could not be disclosed to the state officers. If this be so, whatever the power of the state to prevent the exhibition of films not approved,—and for the purpose of this contention we must assume the power is otherwise plenary,—films brought from another state, and only because so brought, would be exempt from the power, and films made in the state would be subject to it. There must be some time when the films are subject to the law of the state, and necessarily when they are in the hands of the exchanges, ready to be rented to exhibitors, or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the state.

It is true that the statute requires them to be submitted to the board before they are delivered to the exhibitor, but we have seen that the films are shipped to "exchanges" and by them rented to exhibitors, and the "exchanges" are described as "nothing more or less than circulating libraries or clearing houses." And one film "serves in many theaters from day to day until it is worn out."

The next contention is that the statute violates the freedom of speech and publication guaranteed by the Ohio Constitution. In its discussion counsel have gone into a very elaborate description of moving picture exhibitions and their many useful purposes as graphic expressions of opinion and sentiments, as exponents of policies, as teachers of science and history, as useful, interesting, amusing, educational, and moral. And a list of the "campaigns," as counsel call them, which may be carried on, is given. We may concede the praise. It is not questioned by the Ohio statute, and under its comprehensive description, "campaigns" of an infinitive variety may be conducted. Films of a "moral, educational, or amusing and harmless character shall be passed and approved," are the words of the statute. No exhibition, therefore, or "campaign" of complainant will be prevented if its pic-

tures have those qualities. Therefore, however missionary of opinion films are or may become, however educational or entertaining, there is no impediment to their value or effect in the Ohio statute. But they may be used for evil, and against that possibility the statute was enacted. Their power of amusement, and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences. And not only the state of Ohio, but other states, have considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty.

We do not understand that a possibility of an evil employment of films is denied, but a freedom from the censorship of the law and a precedent right of exhibition are asserted, subsequent responsibility only, it is contended, being incurred for abuse. In other words, as we have seen, the Constitution of Ohio is invoked, and an exhibition of films is assimilated to the freedom of speech, writing, and publication assured by that instrument, and for the abuse of which only is there responsibility, and, it is insisted, that as no law may be passed "to restrain the liberty of speech or of the press," no law may be passed to subject moving pictures to censorship before their exhibition.

We need not pause to dilate upon the freedom of opinion and its expression, and whether by speech, writing, or printing. They are too certain to need discussion—of such conceded value as to need no supporting praise. Nor can there be any doubt of their breadth, nor that their underlying safeguard is, to use the words of another, "that opinion is free, and that conduct alone is amenable to the law."

Are moving pictures within the principle, as it is contended they are? They, indeed, may be mediums of thought, but so are many things. So is the theater, the circus, and all other shows and spectacles, and their performances may be thus brought by the like reasoning under the same immunity from repression or supervision as the public press,—made the same agencies of civil liberty.

Counsel have not shrunk from this extension of their contention, and cite a case in this court where the title of drama was accorded to pantomime;† and such and other spectacles are said by counsel to be

† Kalem Co. v. Harper Bros., 222 U. S. 55, 56 L. Ed. 92, 32 Sup. Ct. 20, Ann. Cas. 1913A, 1285.

publications of ideas, satisfying the definition of the dictionaries,—that is, and we quote counsel, a means of making or announcing publicly something that otherwise might have remained private or unknown,—and this being peculiarly the purpose and effect of moving pictures, they come directly, it is contended, under the protection of the Ohio constitution.

The first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the billboards of our cities and towns, and which regards them as emblems of public safety, to use the words of Lord Camden, quoted by counsel, and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.

The judicial sense supporting the common sense of the country is against the contention. As pointed out by the district court, the police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation. The court cited the following cases: Marmet v. State, 45 Ohio St. 63, 72, 73, 12 N. E. 463; Baker v. Cincinnati, 11 Ohio St. 534; Com. v. McGann, 213 Mass. 213, 215, 100 N. E. 355; People v. Steele, 231 Ill. 340, 344, 345, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236.

The exercise of the power upon moving picture exhibitions has been sustained. Greenberg v. Western Turf Ass'n, 148 Cal. 126, 113 Am. St. Rep. 216, 82 Pac. 684, 19 Am. Neg. Rep. 72; Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953; State v. Loden, 117 Md. 373, 40 L. R. A. (N. S.) 193, 83 Atl. 564, Ann. Cas. 1913E, 1300; Block v. Chicago, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011; Higgins v. Lacroix, 119 Minn. 145, 41 L. R. A. (N. S.) 737, 137 N. W. 417. See, also, State v. Morris, 1 Boyce (Del.) 330, 76 Atl. 479; People ex rel. Moses v. Gaynor, 77 Misc. Rep. 576, 137 N. Y. Supp. 196, 199; McKenzie v. McClellan, 62 Misc. Rep. 342, 116 N. Y. Supp. 645, 646.

It seems not to have occurred to anybody in the cited cases that freedom of opinion was repressed in the exertion of the power which was illustrated. The rights of property were only considered as involved. It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the state of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal

Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government.

It does not militate against the strength of these considerations that motion pictures may be used to amuse and instruct in other places than theaters,—in churches, for instance, and in Sunday schools and public schools. Nor are we called upon to say on this record whether such exceptions would be within the provisions of the statute, nor to anticipate that it will be so declared by the state courts, or so enforced by the state officers.

The next contention of complainant is that the Ohio statute is a delegation of legislative power, and void for that if not for the other reasons charged against it, which we have discussed. While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.

The objection to the statute is that it furnishes no standard of what is educational, moral, amusing, or harmless, and hence leaves decision to arbitrary judgment, whim, and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film," while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men, and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. This has many analogies and direct examples in cases, and we may cite Gundling v. Chicago, 177 U. S. 183, 44 L. Ed. 725, 20 Sup. Ct. 633; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. Ed. 240, 32 Sup. Ct. 152; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. Ed. 435, 30 Sup. Ct. 356; Buttfield v. Stranahan, 192 U. S. 470, 48 L. Ed. 525, 24 Sup. Ct. 349. See also Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. Ed. 417, 29 Sup. Ct. 220. If this were not so, the many administrative agencies created by the state and national governments would be denuded of their utility, and government in some of its most important exercises become impossible.

To sustain the attack upon the statute as a delegation of legislative power, complainant cites Harmon v. State, 66 Ohio St. 249, 53 L. R. A.

618, 64 N. E. 117. In that case a statute of the state committing to a certain officer the duty of issuing a license to one desiring to act as an engineer if "found trustworthy and competent" was declared invalid because, as the court said, no standard was furnished by the general assembly as to qualification, and no specification as to wherein the applicant should be trustworthy and competent, but all was "left to the opinion, finding, and caprice of the examiner." The case can be distinguished. Besides, later cases have recognized the difficulty of exact separation of the powers of government, and announced the principle that legislative power is completely exercised where the law "is perfect, final, and decisive in all of its parts, and the discretion given only relates to its execution." Cases are cited in illustration. And the principle finds further illustration in the decisions of the courts of lesser authority, but which exhibit the juridical sense of the state as to the delegation of powers.

Section 5 of the statute, which provides for a censor congress of the censor board and the boards of other states, is referred to in emphasis of complainant's objection that the statute delegates legislative power. But, as complainant says, such congress is "at present nonexistent and nebulous;" and we are, therefore, not called upon to anticipate its action, or pass upon the validity of section 5.

We may close this topic with a quotation of the very apt comment of the district court upon the statute. After remarking that the language of the statute "might have been extended by description and illustrative words," but doubting that it would have been the more intelligible, and that probably by being more restrictive might be more easily thwarted, the court said: "In view of the range of subjects which complainants claim to have already compassed, not to speak of the natural development that will ensue, it would be next to impossible to devise language that would be at once comprehensive and automatic." [215 Fed. 147.]

In conclusion we may observe that the Ohio statute gives a review by the courts of the state of the decision of the board of censors.

Decree affirmed.

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## BOSLEY v. McLAUGHLIN. (Nos. 362, 363.)

**(Supreme Court of United States, 1915. 236 U. S. 385, 35 Sup. Ct. 345, 59 L. Ed. —.)**

Two Appeals from the District Court of the United States for the Northern District of California to review decrees refusing to enjoin the enforcement of a state statute restricting the hours of women employees.

The facts are stated in the opinion.

MR. JUSTICE HUGHES delivered the opinion of the court:

This is a suit to restrain the enforcement of the statute of California prohibiting the employment of women for more than eight hours

in any one day, or more than forty-eight hours in any one week. The act is the same as that which was under consideration in Miller v. Wilson, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. ——, as amended in 1913. By the amendment, the statute was extended to public lodging houses, apartment houses, hospitals, and places of amusement. The proviso was also amended so as to make the statute inapplicable to "graduate nurses in hospitals." Stat. (Cal.) 1913, p. 713.

The complainants are the trustees of "The Samuel Merritt Hospital" in Alameda, California, and one of their employees, Ethel E. Nelson. Their bill set forth that there were employed in this hospital approximately eighty women and eighteen men; that of these women ten were what are known as "graduate nurses," that is to say, those who had "pursued and completed, at some training school for nurses in a hospital, courses of study and training in the profession or occupation of nursing and attending the sick and injured," and had received diplomas or certificates of graduation. By reason of their qualifications, they were paid "a compensation greatly in excess of that paid to female pupils engaged in nursing in hospitals while students of the training school."

It was further averred that, in addition to these ten graduate nurses, certain other women were employed in the hospital, one as bookkeeper, two as office assistants, one as seamstress, one as matron or housekeeper, five who were engaged in ordinary household duties, and one —the complainant Ethel E. Nelson—as pharmacist. It was stated that this complainant was a graduate pharmacist, licensed by the state board; that she also acted as storekeeper, but that her chief duty was to mix and compound drugs for use in the treatment of the hospital patients. The general allegation was made that these last-mentioned eleven employees performed work that was in no manner different from that done by "persons engaged in similar employments or occupations and not employed in hospitals." The apprehended injury to the complainant Nelson by reason of the interference of the statute with her freedom to contract was specially alleged.

It was also set forth that the hospital maintained a school with a three years' course of study wherein women were trained to nurse the sick and injured; that in this school there were enrolled twenty-four in the third-year class, eighteen in the second-year class, and twenty-three in the first-year class; that a part of the "education and training" of these "student nurses" consisted in "aiding, nursing, and attending to the wants of the sick and injured persons" in the hospital, this work being done while the student was pursuing the prescribed course of study; that the student nurses were paid $10 a month during each of the first two years of their course and $12.50 a month in the third year, and were also provided throughout the three years "with free board, lodging, and laundry." It was averred that the cost to the hospital of maintaining the school was $2,500 a month, and that the cost of procuring the work to be performed by graduate nurs-

es that was being done by the student nurses would be not less than $3,600 a month. It was set forth as a reason why the work of the student nurses was done at less expense, that their compensation was paid not only in money, board, etc., but also partially in their education and training, their attendance on patients being in itself an indispensable part of their course of preparation. It was said further that their hours of labor must be determined by the exigencies of the cases they were attending.

The enforcement of the act with respect to these student nurses, it was stated, would require the hospital either to cease the operation of the school, or largely to increase the number in attendance in order that an equal return in service could be obtained; and such increase would involve a greatly enlarged expense.

The complainants attacked the act on the grounds that it interfered with their liberty of contract, and denied to them the equal protection of the laws, contrary to the 14th Amendment. And in support, it was asserted in substance, that labor in hospitals did not afford, in itself, a basis for classification; that there was no difference between such labor and the "same kind of labor" performed elsewhere; that a hospital is not an unhealthful or unsanitary place; and, generally, that the statute and its distinctions were arbitrary.

Upon the bill, an application was made for an injunction pending the suit. It was heard by three judges and was denied. The appeal in No. 362 is from the order thereupon entered.

The defendants, the officers charged with the enforcement of the law, filed an answer. On final hearing, the complainants made an offer to prove that:

"All the allegations of fact set forth in the bill were true; that the fact that a woman was a graduate nurse merely showed that she had completed a course of study for the treatment of the sick, but that the course of study which a woman must take for that purpose was not prescribed by law or fixed by custom, but was such as any hospital or training school might, in the discretion of its governing officers, see fit to prescribe; that the difference between a graduate nurse and an experienced nurse is a difference of technical education only, and that there is no standard by which this difference can be measured; that graduate nurses working in and employed by hospitals do not ordinarily perform therein the work of nursing the sick, but act as overseers to assistants to the medical staff."

The district judge thereupon stated that upon the hearing of the motion for an interlocutory injunction it had been held that the complaint did not state a cause of action, and that it was considered unnecessary to take the evidence. The offer of proof was rejected and the bill of complaint dismissed. No. 363 is an appeal from the final decree.

1. As to liberty of contract.—The gravamen of the bill is with respect to the complainant Nelson, a graduate pharmacist, and the student nurses. As to the former,—it appears that a statute of California limits the hours of labor of pharmacists to ten hours a day and sixty hours a week. Stat. (Cal.) 1905, p. 28. In view of the nature

of their work, and the extreme importance to the public that it should not be performed by those who are suffering from overfatigue, there can be no doubt as to the legislative power reasonably to limit the hours of labor in that occupation. This, the appellants expressly concede. But this being admitted to be obviously within the authority of the legislature, there is no ground for asserting that the right to contractual freedom precludes the legislature from prohibiting women pharmacists from working for more than eight hours a day in hospitals. The mere question whether in such case a practical exigency exists, that is, whether such a requirement is expedient, must be regarded as a matter for legislative, not judicial, consideration.

The appellants, in argument, suggest a doubt whether the statute is applicable to the student nurses, but the bill clearly raises the question of its validity as thus applied, and urges the serious injury which its enforcement would entail upon the hospital. Assuming that these nurses are included, the case presented would seem to be decisive in favor of the law. For it appears that these persons, upon whom rests the burden of immediate attendance upon, and nursing of, the patients in the hospital, are also pupils engaged in a course of study, and the propriety of legislative protection of women undergoing such a discipline is not open to question. Considerations which, it may be assumed, moved the legislature to action, have been the subject of general discussion, as is shown by the bulletin issued by the United States Bureau of Education on the "Educational Status of Nursing" (Bulletin, 1912, No. 7). With respect to the "hours of duty" for student nurses, it is there said (pp. 29–32):

"These long hours have always formed a persistent and at times an apparently immovable obstacle in efforts to improve the education of nurses and to establish a rational adjustment of practice to theory. * * * Ten or more hours a day in addition to class work and study might be endured for a period of two years without obvious or immediate injury to health. The same hours carried on for three years would prove a serious strain upon the student's physical resources, inflicting perhaps irreparable injury. The conclusions reached in this first study of working hours of students (1896) were that they were universally excessive, that their requirement reacted injuriously not only upon the students, but eventually upon the patients and the hospital, that it was a short-sighted and unjustifiable economy in hospital administration which permitted it to exist. Fifteen years later, statistics show that though the course of training has now in the great majority of schools been lengthened to three years, shorter hours of work have not generally accompanied this change, and that progress in that direction has been slow and unsatisfactory."

After quoting statistics the bulletin continues:

"In speaking of hours it must be remembered that these statistics refer only to practical work in ward, clinic, operating room, or other hospital department, and not to any portion of theoretical work; that the ten hours in question are required of the student irrespective of lectures, class, or study. This practical work, also, is in many of its aspects unusually exacting and fatiguing; much of it is done while standing, bending, or lifting; much of it is done under pressure of time and nervous tension, and to a considerable degree the physical effort which the student must make is accompanied by mental anxiety and definite, often grave, responsibility. Viewed from any standpoint whatever, real nursing is difficult, exacting work, done under abnormal conditions, and all the extraordinary, subtile, intangible rewards and

satisfactions which are bound up in it for the worker cannot alter that fact. Ten hours, or even nine hours, of work daily of this nature, cannot satisfactorily be combined with theoretical instruction to form a workable educational scheme. * * * How largely the superintendents of training schools feel the need of improvement in this direction may be gathered from the fact that over two thirds of the replies to the questions on this subject suggested shorter hours as advisable or necessary, that a large proportion of these stated their firm belief in an eight hour day, and that almost every reply which came showed clearly in one way or another the difficulties under which the schools were laboring in trying to carry on the hospital work with the existing number of students."

Whatever contest there may be as to any of the points of view thus suggested, there is plainly no ground for saying that a restriction of the hours of labor of student nurses is palpably arbitrary.

As to certain other women (ten in number) employed in the hospital, such as the matron, seamstress, bookkeeper, two office assistants, and five persons engaged in so-called household work, the bill contains merely this general description, without further specifications; and from any point of view it is clear, that, with respect to the question of freedom of contract, no facts are alleged which are sufficient to take the case out of the rulings in Muller v. Oregon, 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. 324, 13 Ann. Cas. 957; Riley v. Massachusetts, 232 U. S. 671, 58 L. Ed. 788, 34 Sup. Ct. 469; Hawley v. Walker, 232 U. S. 718, 58 L. Ed. 813, 34 Sup. Ct. 479; and Miller v. Wilson, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. ——.

2. As to the equal protection of the laws.—The argument in this aspect of the case is especially addressed to the exception of "graduate nurses." The contention is that:

They are placed "on one side of the line, and doctors, surgeons, pharmacists, experienced nurses and student nurses and all other hospital employés on the other side of the line."

So far as women doctors and surgeons are concerned, the question is merely an abstract one, as no such question is presented by the allegations of the bill with regard to the complainant hospital. Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. Ed. 868, 871, 30 Sup. Ct. 594; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. Ed. 1197, 1201, 32 Sup. Ct. 784. With regard to other nurses, whether so-called "experienced" nurses or student nurses, it sufficiently appears that the graduate nurse is in a separate class. The allegations of the bill itself show this to be the fact. It is averred that the graduate nurses are:

Those who "have pursued and completed, at some training school for nurses in a hospital, courses of study and training in the profession or occupation of nursing and attending the sick and injured, and have received, in recognition thereof, diplomas or certificates of graduation from said courses of study."

And, in the appellants' offer of proof, it is said that:

"Graduate nurses working in and employed by hospitals do not ordinarily perform therein the work of nursing the sick, but act as overseers to assistants to the medical staff."

It may be, as asserted, that the difference in qualifications between a graduate nurse and an "experienced nurse" is a difference of technical education only, but that difference exists and is not to be brushed aside. It is one of which the legislature could take cognizance. Not only so, but as such nurses act as overseers of wards or assistants to surgeons and physicians, it would be manifestly proper for the legislature to recognize an exigency with respect to their employment making it advisable to take them out of the general prohibition. Again, with regard to the complainant Nelson, who is a graduate pharmacist, while she has been graduated from a course of training for her chosen vocation, it is a different vocation. The work is not the same. There is no relation to the supervision of the wards, and, putting mere matters of expediency aside, there is no basis for concluding that the legislature was without power to treat the difference as a ground for classification.

As to the ten other women employees, the validity of the distinction made in the case of graduate nurses is obvious. It should further be said, aside from the propriety of classification of women in hospitals with respect to the general conditions there obtaining (Louisville & N. R. Co. v. Melton, 218 U. S. 36, 53, 54, 54 L. Ed. 921, 928, 929, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. 676), that the bill wholly fails to show as to the employment of any of these persons any such injury—actual or threatened—as would warrant resort to a court of equity to enjoin the enforcement of the law.

And the objection based upon the failure of the legislature to extend the prohibition of the statute to persons employed in other establishments is not to be distinguished in principle from that which was considered in Miller v. Wilson, supra, and cases there cited.

Decrees affirmed.

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## SECTION 7.—INFRINGEMENT OF TRADE RIGHTS; TRADE-NAME, TRADE-MARK, AND TRADE SECRET

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### LEATHER CLOTH CO., Limited, v. AMERICAN LEATHER CLOTH CO., Limited.

(In Chancery before Lord Westbury, 1863. 4 De Gex, J. & S. 137, 46 E. R. 868.)

This was an appeal by the Defendants from a decree made by the Vice-Chancellor Wood upon the hearing of the cause, whereby His Honour granted, with costs, a perpetual injunction, restraining them from selling or exposing for sale or procuring to be sold any leather cloth or any fabric or article similar thereto having affixed thereon

such stamp or trade mark with the name of L. R. & C. P. Crockett, or the name of Crockett & Co., introduced thereon in such manner as by colourable imitation, or otherwise, to represent the fabric or article manufactured or sold by the Appellants as being the same fabric or article as that manufactured and sold by the Respondents, the Plaintiffs in the suit, or as being the fabric or article known as Crockett's leather cloth. * * *

THE LORD CHANCELLOR.[62] Upon a review of the numerous cases which have been decided in this Court on the subject of trade marks, there appears to be some uncertainty and want of precision in the language of different Judges as to the ground on which a Court of Equity interferes to protect the enjoyment of a trade mark, and also on the question whether the right to use a trade mark admits of being sold and transferred by one man to another.

At law, the remedy for the piracy of a trade mark is by an action on the case in the nature of a writ of deceit. This remedy is founded on fraud, and originally it seems that an action was given not only to the trader whose mark had been pirated, but also to the buyer in the market, if he had been induced by the fraud to buy goods of an inferior quality. In equity, the right to give relief to the trader whose trade has been injured by the piracy appears to have been originally assumed by reason of the inadequacy of the remedy at law, and the necessity of protecting property of this description by injunction. But although the jurisdiction is now well settled, there is still current in several recent cases language which seems to me to give an inaccurate statement of the true ground on which it rests. In Croft v. Day, 7 Beav. 88, and Perry v. Truefitt, 6 Beav. 73, the late Lord Langdale is reported to have used words which place the jurisdiction of this Court to grant relief in cases of the piracy of trade marks entirely on the ground of the fraud that is committed when one man sells his own goods as the goods of another. The words of the learned Judge are, "I own it does not seem to me that a man can acquire a property merely in a name or mark," and in like manner the learned Vice-Chancellor, whose decision I am now reviewing, is reported to have said:

"All these cases of trade mark turn not upon a question of property, but upon this, whether the act of the Defendant is such as to hold out his goods as the goods of the Plaintiff." 1 H. & M. 287.

But with great respect this is hardly an accurate statement; for, first, the goods of one man may be sold as the goods of another without giving to that other person a right to complain, unless he sustains, or is likely to sustain, from the wrongful act some pecuniary loss or damage (thus in the case of Clark v. Freeman, 11 Beav. 112, an eminent physician, Sir James Clark, applied for an injunction to restrain a chemist from publishing and selling a quack medicine, under

[62] The statement of facts is abridged and parts of the opinion are omitted.

the name of Sir James Clark's pills; but the Court refused to interfere, because it did not appear that Sir James sustained any pecuniary injury); and, secondly, it is not requisite for the exercise of the jurisdiction that there should be fraud or imposition practised by the Defendant at all. The Court will grant relief, although the Defendant had no intention of selling his own goods as the goods of the Plaintiff, or of practising any fraud either on the Plaintiff or the public.

If the Defendant adopts a mark in ignorance of the Plaintiff's exclusive right to it, and without knowing that the symbols or words so adopted and used are already current as a trade mark in the market, his acts, though innocently done, will be a sufficient ground for the interference of this Court. * * *

If the Plaintiff has an exclusive right so to use any particular mark or symbol, it becomes his property for the purposes of such application, and the act of the Defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of the patent. I cannot therefore assent to the dictum that there is no property in a trade mark.

It is correct to say, that there is no exclusive ownership of the symbols which constitute a trade mark apart from the use or application of them; but the word "trade mark" is the designation of these marks or symbols as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle therefore would seem to be, that the jurisdiction of the Court in the protection given to trade marks rests upon property, and that the Court interferes by injunction, because that is the only mode by which property of this description can be effectually protected.

The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade mark, as in the case of the violation of any other right of property.[63] * * *

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## KIRCHNER & CO. v. GRUBAN.

(Chancery Division. [1909] 1 Ch. 413.)

Adjourned summons and motion.

By an agreement dated June 30, 1905, and made between the plaintiffs Kirchner & Co., of Leipzig, and the defendant Gruban, a German subject, the defendant was engaged as representative of the plaintiff firm for the United Kingdom, with domicile in London, for the sale of the goods manufactured and sold by the plaintiffs at a remuneration consisting of a fixed salary and certain commissions on sales. * * *

[63] The bill was finally dismissed on another ground.

From the date of the agreement the defendant acted as agent for the plaintiff firm, but by the end of 1907, he became desirous of determining his engagement with the plaintiffs, on the ground of certain alleged complaints against them. He gave three months' notice to the plaintiffs of his intention to determine the agreement, and on May 1, 1908, after the expiration of the notice, he left their employment and entered into the employ of a rival English firm with whom in the month of February, 1908, he had entered into a conditional agreement for employment of a similar nature in the event of the determination of his employment with the plaintiffs.

On June 9, 1908, the plaintiffs issued a writ for an injunction to restrain the defendant from engaging in any other business than that of the plaintiffs until after July 1, 1910; an injunction to restrain him from divulging to any one any matters relating to the plaintiffs' business; an account of commissions; damages, incidental relief, and costs. * * *

The plaintiffs filed evidence alleging that the defendant had divulged certain matters relating to their business and had solicited their customers. * * *

EVE, J.[64] * * * With regard to the second part of the motion different and somewhat wider considerations arise. That part of the motion is directed to an injunction to restrain Mr. Gruban, the defendant, from divulging to his present employers or to others confidential information which he has obtained while in the employ of the plaintiffs. I am not desirous at the present moment of saying anything which would in the least affect the tribunal before whom these matters will ultimately come, and more so because I have not heard Mr. Danckwerts upon these matters, in which it is suggested the defendant has acted in breach of his duty towards his employers. When I say my judgment proceeds on the assumption that there may have been a breach I must not be understood as expressing any opinion that there has been in fact such a breach. Assuming for the moment, for the purposes of my judgment, that there has been such conduct on the part of the defendant as would in the ordinary course in this court lead to the court making an injunction against him until judgment or further order, what ought I to do having regard to the contract between the parties here? I think it is abundantly clear upon the authority of Robb v. Green [1895] 2 Q. B. 315, that the real principle upon which the employee is restrained from making use of confidential information which he has gained in the employment of some other person is that there is in the contract of service subsisting between the employer and employee an implied contract on the part of the employee that he will not, after the service is determined, use information which he has gained while the service has been subsisting

[64] The statement of facts is abridged and parts of the opinion here omitted are printed at page 249, supra.

to the detriment of his former employer. It rests, in my opinion, on the implied contract, and it seems to me it goes almost without saying that, in order to arrive at a decision whether a particular contract is to be implied, it becomes absolutely necessary to resort to the contract of service to ascertain what is the meaning of that particular contract, and what implications can properly and legitimately be drawn from that contract of service. That involves as a necessity the construction of the contract. Now it appears to me that in whatever way one looks at it the parties here have agreed that this contract shall be construed according to the German law; and it may be—I do not say it is, but it may be—that, construing this contract according to the law of Germany, the German court would not deduce from this any implied obligation such as might have been deduced if the contract had to be construed according to English law, or if indeed the only contract between the parties was the contract established by the relationship of master and servant subsisting between them.[65] * * *

## SECTION 8.—VIOLATION OF COMMON-LAW RIGHTS RELATING TO LITERARY AND SIMILAR PRODUCTIONS

### KARNO v. PATHE FRERES, LONDON.

(King's Bench Division, 1908. 99 Law T. 114.)

Action tried by Jelf, J., without a jury.

The plaintiff in his statement of claim alleged that he was the proprietor of the sole rights in Great Britain and Ireland of representing or performing or causing to be represented or performed a dramatic piece, being a farce or pantomimical sketch entitled "The Mumming Birds or Twice Nightly"; that the defendants had at various times since the 14th Oct., 1906, infringed the plaintiff's right by representing or causing to be represented at various places of dramatic entertainment his dramatic piece without the consent of the plaintiff; that the defendants carried on business as makers of and dealers in cinematographs and the accessory apparatus thereof, and also of films or photographs for use therein and by the apparatus and films scenic representations of living and moving beings were given; that by a catalogue issued by the defendants and entitled "Supplement for Jan. 1907," they offered to supply such films to proprietors of or performers at music halls and other places of public entertainment, and that such catalogue included a film No. 1625 entitled "At the Music

[65] The court made an order on the summons staying the action.

Hall," and this film when used in the cinematographic apparatus produced a representation of the plaintiff's dramatic piece; that the defendants had sold or supplied or let on hire to various persons, proprietors of or performers at music-halls and other places of dramatic entertainment, copies of the film "At the Music Hall" for the purpose of being used and with the knowledge that they were to be used with cinematographic apparatus at music-halls and other places of dramatic entertainment; that by the use of the films so supplied by the defendants in such apparatus the aforesaid dramatic piece had been represented in various music-halls or other places of dramatic entertainment, and that the plaintiff had suffered great damage by reason of such representations.

The plaintiff claimed: An inquiry as to the various places of dramatic entertainment at which by means of films sold or supplied by the defendants there had been representations of the dramatic piece, and of the number of representations at each such place; payment of a penalty of 40s. for each of the representations, or in the alternative an inquiry as to and payment of damages sustained in respect of each such representation, and an injunction to restrain the defendants from infringing the plaintiff's right by representing or causing to be represented the plaintiff's dramatic piece. * * *

April 29.—JELF, J.,[66] after referring to the statement of claim as above set out, read the following judgment:

The case raises important questions under the Dramatic Copyright Act 1833, commonly known as Bulwer-Lytton's Act (3 & 4 Will. IV, c. 15) § 1, which I have to construe by the light of the recent decision of the Court of Appeal in Tate v. Fullbrook, 98 L. T. Rep. 706, [1908] 1 K. B. 821. The defendants contended (1) that the sketch in question was not such a "dramatic piece" as to be entitled to protection under the Act. (2) That the alleged cinematographic reproduction was not in fact or in law a "representation" of the plaintiff's sketch within the meaning of the Act. (3) That the defendants by merely selling the film were not "causing" the plaintiff's sketch "to be represented."

In order to determine these points, it is necessary to state somewhat minutely the facts which were admitted or proved before me. The plaintiff carries on a lucrative business by composing humorous sketches, training his companies to play them, and sending them round the country and abroad to be performed in music-halls and theatres. One of such sketches is called "The Mumming Birds or Twice Nightly," which is entered by that name under date the 15th Jan., 1906, as a pantomimical sketch in the Book of Registry of Copyrights and Assignments kept at the hall of the Stationers' Company in pursuance of 5 & 6 Vict. c. 45. The plaintiff's name, with his address, appears therein as the author and composer and also as the proprietor of the

[66] The statement of facts is abridged and parts of the opinion are omitted.

sole liberty of representation or performance so far as Great Britain and Ireland are concerned, and the time and place of the first representation or performance is stated to be the 14th April, 1904, at the Star Music-Hall, Bermondsey. In teaching his company the plaintiff instructs them orally what to do and what to say. * * *

The artistes are a male vocalist, a lady vocalist, a conjurer, a quartet of singers, a soubrette, and a wrestler. The piece is acted mainly in pantomime, and the "fun" consists in the incompetence of the performers, the disgust of the audience, the pranks of the boy, who shoots peas or throws buns at the artistes and members of the audience, especially the "swell," and who spoils the conjuring tricks, &c., the general free fights on the stage, in which most of the company take part, and the by-play between the soubrette, the "swell," a female programme attendant, and others. There is no sustained dialogue, but from time to time a few words are spoken. * * *

Now, what the defendants have done is this: They have manufactured a cinematographic film, photographed from living persons whom they have placed on a stage to act, got up like the plaintiff's players, and these figures, when their pictures are thrown upon the sheet, appear to go through the same antics, the same succession of pranks, and the same scenic "business" as that portrayed in the plaintiff's sketch, the incidents being presented substantially in the same order and by the same characters. * * *

At the request of the parties, and in order the better to judge as to the alleged plagiarisms, I attended a special private performance at the Oxford Music-Hall on the 6th inst., at which the plaintiff's sketch was performed and was followed immediately by the "living pictures" produced by the film of the cinematograph twice repeated; and I have no hesitation in finding as a fact, whatever the result may be in law, that the one piece is copied in all essential particulars from the other. It was, moreover, proved to my satisfaction that when the plaintiff is about to give a performance in a provincial town the purchasers from the defendants of the film in question habitually anticipate such performance by giving an exhibition of the "living pictures," and so destroy or damage the success of the plaintiff's show, people refusing to go to the latter, on the ground that they have seen it all before. In selling these films to these purchasers the defendants well knew that they were bought for the purpose and with the intention on the part of the purchasers of exhibiting the "living pictures" in places of entertainment, and they obtain large prices for them, on the ground that they will be in this way profitable to the purchasers. * * *

Looking to the object of the statute, which is evidently to protect the results of independent labour and composition in dramatic work and to extend to dramatic compositions the same protection as that already given to books, I see no reason in the nature of things why a

dramatic composition which is entirely pantomimic or performed in dumb show, and neither reduced or reducible into writing, should not be protected against piracy as being a piece "composed"—that is, "put together"—by its author. * * *

If, indeed, it could be shown that in the present case there are words capable of being printed and published as a literary piece, then I think it might be held that the cinematographic reproduction is a representation of a substantial part of the whole piece, though, of course, no words are reproduced, and Tate v. Fullbrook, ubi sup., might on that ground be distinguishable on the facts, but, as I have said, I do not think there is any literary substratum on which to found this contention. The defendants' first objection therefore prevails. Inasmuch, however, as Tate v. Fullbrook, ubi sup., and the present case may some day be reviewed by the House of Lords, I think it best to state shortly, for what it is worth, my opinion on the other two points taken by the defendants. In my opinion, if the "Mumming Birds" were within the protection of the Act, the cinematographic reproduction of it, such as I find this to be, would, in fact and in law, be a representation of the plaintiff's sketch within the meaning of the Act. It is represented to the eyes of the spectators. If the parts were played by living persons the spectators would see them moving about and copying what is done in the "Mumming Birds." Mere pictures or even stationary tableaux vivants would not, I think, infringe the right of sole representation, but, as the cinematograph shows the figures moving, just as the living persons, I think this reproduction would be held to be within the language as well as within the mischief of the Act. As to the defendants' third point, I was at first inclined to think that, by selling the film to other persons in the manner, with the knowledge and under the circumstances already described the defendants were "causing" the plaintiff's sketch "to be represented" within the meaning of the statute. But on further consideration, and after perusing the case of Russell v. Briant, 8 C. B. 836, and comparing it with Marsh v. Conquest, 10 L. T. Rep. 717, 17 C. B. N. S. 418, I have come to the opposite conclusion, and I think there is no evidence on which I could properly hold the defendants liable. In the former case Wilde, C. J., says (8 C. B., at p. 848):

"No one can be considered as an offender against the provisions of the Act so as to subject himself to an action of this nature, unless by himself or his agent he actually takes part in a representation which is a violation of copyright."

And the same view is taken in Lyon v. Knowles, 7 L. T. Rep. 670, 3 B. & S. 556. It might, indeed, be plausibly argued that the defendants who make and sell the infringing instrument without which the infringement could not take place, and do so with the knowledge and intention that it will and shall be used for that purpose do take an important part in the infringement itself, but I think on the whole the inference would be held to be too remote and too far-reaching in the

consequences to be accepted. If this view is correct, then, even if the action were otherwise maintainable, it ought to have been brought, not against the defendants, but against the actual proprietors of the piratical performance impugned.

Judgment for the defendants with costs, except the costs of the issue as to title.

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## EDISON v. EDISON POLYFORM MFG. CO.

(Court of Chancery of New Jersey, 1907. 73 N. J. Eq. 136, 67 Atl. 392.)

Bill by Thomas A. Edison against the Edison Polyform Manufacturing Company to restrain defendant from the use of the name "Edison" as a part of its corporate title or in connection with its business or advertisements.

STEVENS, V. C.[67] The complainant, who is an inventor of electrical instruments and processes, and enjoys in this regard a world-wide reputation, early in his career compounded a medicinal preparation intended to relieve neuralgic pains by external application. It was first made for the personal use of Mr. Edison and his assistants, and not for sale. In the year 1879 a Mr. Lewis and a Mr. Jacobs went to his laboratory in Menlo Park to examine his inventions. While there Mr. Edison happened to mention the fact that he had been a sufferer from facial neuralgia, and that he had made a preparation which he had called "Polyform" and which he had found to be a good pain killer. Lewis and Jacobs were so impressed with its merits that they asked him to sell it. He finally agreed to sell for $5,000. The arrangement was that he would apply for a patent and execute an assignment. The patent does not appear to have been issued, but a written assignment of his right to it and to the preparation was made on September 2, 1879. On November 7, 1879, a company, called the "Menlo Park Manufacturing Company," in which Mr. Edison had no interest, was organized under the laws of Connecticut, and it proceeded to manufacture and sell the preparation. It did so for several years on a small scale, with little or no success, and finally failed. It was succeeded by a corporation, organized on September 3, 1886, under the laws of Maine, called the "Edison Polyform Company." This company, too, met with little success. It was, in turn, succeeded by a New York company, which did nothing. Finally a New Jersey company, the present defendant, was on May 23, 1893, formed by certain gentlemen living in Chicago. This corporation is now carrying on the business of making and selling Polyform in that city. The present suit was commenced October 9, 1903. There has been some delay in prosecuting it, caused, I suppose, by the death of complainant's solicitor. I do not think, however, that as the case

[67] Parts of the opinion are omitted.

stands there is any question of laches. The case must be decided on its merits.

The prayer of the bill is that the defendant company may be restrained from using the name "Edison" as a part of its corporate title or in connection with its business, or in connection with any advertisements circulated or published by it, and from holding out that complainant is the inventor or manufacturer or seller of the preparation sold by defendant. What the defendant company is doing is to manufacture and sell a liquid preparation containing apparently all but one of the drugs (viz., morphine) mentioned in Mr. Edison's formula. On each bottle is a label, containing on the one side directions for use, and on the other a picture of Mr. Edison and the following words: "Edison's Polyform. I certify that this preparation is compounded according to the formula devised and used by myself. Thos. A. Edison." Mr. Edison testifies that he has never authorized the use of his picture and that he has never made or authorized this certificate. As to the present defendant, there is absolutely no pretense that he has. As to the predecessors of the defendant, there is evidence that the picture and certificate were used; but it would seem that, when Mr. Edison heard that they were, he objected. He says that he objected to any use whatever of his name or picture. Mr. Grant says, but does not show by competent proof, that he objected only to the representation of machinery around the head. I do not regard the matter as important, because, even if Mr. Edison had given a license to use a picture and certificate to the first vendees—persons whom he knew and in whom he may have reposed confidence—it would not by any means follow that others, unlicensed and whom he did not know, would possess the same privilege. In the original assignment of the formula no authority whatever to use either name or picture was conferred. * * *

The cases relating to the law of unfair trade have no application. They decide merely that a trader or manufacturer has no right to put off his goods as the goods of his competitor. The defendant does not put off his goods as being of Mr. Edison's manufacture. It asserts that it is itself the maker of them. What it does, however, falsely declare, is that it is Mr. Edison who is certifying that the preparation which the company is making and selling is made according to the Edison formula. It is, by its corporate name, by the certificate, and by the picture, holding out that Mr. Edison is connected with the enterprise and supervising its work. The question is whether Mr. Edison is without standing to complain because he is not a business competitor. * * *

That the subject is attended with difficulty and that the line between what the court will restrain and what it will not restrain is hard to draw with absolute precision, is undoubted. This is well illustrated by the case of libel. If you call a business man a thief, or a physician

a quack, in a printed publication, you undoubtedly do that which tends, and very directly tends, to diminish his earnings; and yet all the authorities, up to this time at least, agree that, because libel is a crime and is actionable at law, equity will not interfere. Prudential Insurance Company v. Knott, L. R. 10 Ch. 142, is an illustration. * * *

There must be limits to the so-called right of privacy. It is certain that a man in public life may not claim the same immunity from publicity that a private citizen may. Corless v. Walker Co. (C. C.) 64 Fed. 280, 31 L. R. A. 283. And as far as my researches have extended I do not find that it has yet been decided that injury to property in some form is not an essential element to relief. * * *

I regard the case of Vanderbilt v. Mitchell [72 N. J. Eq. 910, 67 Atl. 97, 14 L. R. A. (N. S.) 304], just decided by the Court of Appeals, as conclusive. That court, as I have said, condemned Roberson v. Rochester Folding Box Co. [171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828], and cited with approval Routh v. Webster [10 Beav. 561], and Walter v. Ashton [(1902) 2 Ch. 282]. It appeared in Vanderbilt v. Mitchell that complainant's wife, having had born to her, two years after her marriage, a son who was not complainant's son, falsely stated to the attending physician that the complainant was the father of the child. This statement was credited by the physician, who inserted it in his birth certificate, sent by him to the bureau of vital statistics, where it was recorded. The record, by the terms of our statute, is prima facie evidence of the facts therein stated. The complainant prayed that this fraudulent record might be canceled, and that an injunction might issue restraining both mother and child from claiming thereunder the status, name, or property of a child lawfully begotten by complainant. The defense set up was that complainant did not show that any of his property rights had been affected, and such was the decision of Garrison, V. C.; but on appeal it was held that the complainant was entitled to relief. It was pointed out by Dill, J., that, inasmuch as the statute made the recorded certificate prima facie evidence of the facts stated in it, it could be used as evidence in a suit brought against the complainant for necessaries furnished to the child. This of itself, brought the case well within the ruling in Routh v. Webster, supra. It was a false statement, which exposed the complainant to the risk of pecuniary liability; but the court went further. It appeared that the complainant was a beneficiary of a vested remainder in land under a trust which was being executed according to the laws of New York. Under the laws of that state a man cannot devise more than half of his estate to charity where he leaves (inter alios) a child. His right to make an absolute devise of his property was thus threatened, and the impairment of this right was held to give him a standing in a court of equity to attack the certificate. Judge Dill, in concluding his illuminating opinion, said that the question whether the bill might not have been rested on the ground of an interference with personal,

as contradistinguished from property, rights, was not decided, for the reason that the case "presented the property feature to an extent sufficient to satisfy even the rule adopted by the court below."

The Court of Appeals has thus emphatically declared that the term "property right" is not to be taken in any narrow sense, and that the tendency of equity in cases of this description should be to extend, rather than to restrict, the jurisdiction. Judge Dill says:

"From time immemorial it has been the rule not to grant equitable relief, where a party praying for it had an adequate remedy at law; but modern ideas of what are adequate remedies are changing and expanding, and it is gradually coming to be understood that a system of law which will not prevent the doing of a wrong, but only affords redress after the wrong is committed, is not a complete system, and is inadequate to the present needs of society."

It is difficult to imagine a case in which preventive relief would be more appropriate than the present. In a perfectly unauthorized way a certificate falsely purporting to be made by Mr. Edison, and also false in fact, because the preparation is not compounded with all the ingredients of the formula, is put by a company bearing Edison's name upon every bottle of Polyform which it sells. That there may be no mistake as to who is intended, the certificate is accompanied with a likeness.

I think an injunction should be granted restraining the defendant company from holding out, either in the name of the company, or by certificate, or by pictorial representation, that Mr. Edison has any connection with or part in the complainant's business. I cannot divorce the company's name from the other parts of the representation. It is, as the evidence stands, part of the fraudulent contrivance. The abstract question whether a company can innocently use, as a part of its title, the name of a distinguished living character, is not before me for decision, and no opinion is expressed about it.[68]

[68] Mr. Justice Hughes, delivering the opinion of the court in Thaddeus Davids Co. v. Davids (1914) 223 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, says (inter alia): "Thaddeus Davids Company, manufacturer of inks, etc., brought this suit for the infringement of its registered trademark 'Davids.' It was alleged that the complainant was the owner of the trademark; that it had been used in interstate commerce by the complainant and its predecessors in business for upwards of eighty years; that on January 22, 1907, it had been registered by the complainant as a trademark, applicable to inks and stamp pads, under the act of February 20, 1905 (chap. 592, 33 Stat. at L. 724, U. S. Comp. Stat. Supp. 1911, p. 1459); that the complainant was entitled to such registration under § 5 of the act by reason of actual and exclusive use for more than ten years prior to the passage of the act; and that the defendants, Cortlandt I. Davids and Walter I. Davids, trading as Davids Manufacturing Company, were putting inks upon the market with infringing labels. The bill also charged unfair competition. Upon demurrer, the validity of the trademark was upheld by the circuit court of appeals ([1910] 102 C. C. A. 249, 178 Fed. 801), and on final hearing upon pleadings and proofs, complainant had a decree ([1911] 190 Fed. 285). This decree was reversed by the circuit court of appeals, which held that there was no infringement of the registered trademark, and that the suit, if regarded as one for unfair competition, was not within the jurisdiction of the court, the parties being citizens of the same state ([1912] 114 C. C. A. 355, 192 Fed. 915). Certiorari was granted. As the mark consisted of an ordinary surname, it was not the subject of exclusive appropri-

ation as a common-law trademark. * * * In the case, therefore, of marks consisting of names or terms having a double significance, and being susceptible of legitimate uses with respect to their primary sense, the reproduction, copy, or imitation which constitutes infringement must be such as is calculated to mislead the public with respect to the origin or ownership of the goods, and thus to invade the right of the registrant to the use of the name or term as a designation of his merchandise. This we conceive to be the meaning of the statute. It follows that where the mark consists of a surname, a person having the same name and using it in his own business, although dealing in similar goods, would not be an infringer, provided that the name was not used in a manner tending to mislead, and it was clearly made to appear that the goods were his own, and not those of the registrant. This is not to say that, in this view, the case becomes one simply of unfair competition, as that category has been defined in the law; for, whatever analogy may exist with respect to the scope of protection in this class of cases, still the right to be protected against an unwarranted use of the registered mark has been made a statutory right, and the courts of the United States have been vested with jurisdiction of suits for infringement, regardless of diversity of citizenship. Moreover, in view of this statutory right, it could not be considered necessary that the complainant, in order to establish infringement, should show wrongful intent in fact on the part of the defendant, or facts justifying the inference of such an intent. Lawrence Mfg. Co. v. Tennessee Mfg. Co. (1891) 138 U. S. 537, 549, 34 L. Ed. 997, 1004, 11 Sup. Ct. 396; Singer Mfg. Co. v. June Mfg. Co. (1896) 163 U. S. 169, 41 L. Ed. 118, 16 Sup. Ct. 1002; Elgin Nat. Watch Co. v. Illinois Watch Case Co. (1900) 179 U. S. 665, 674, 45 L. Ed. 365, 379, 21 Sup. Ct. 270. Having duly registered under the act, the complainant would be entitled to protection against any infringing use; but, in determining the extent of the right which the statute secures, and what may be said to constitute an infringing use, regard must be had, as has been said, to the nature of the mark, and its secondary, as distinguished from its primary, significance. The distinction between permissible and prohibited uses may be a difficult one to draw in particular cases, but it must be drawn in order to give effect to the act of Congress. That the distinction may readily be observed in practice is apparent. In this case, for instance, if the defendants had so chosen, they could have adopted a distinct mark of their own, which would have served to designate their inks and completely to distinguish them from those of the complainant. It was not necessary that, in exercising the right to use their own name in trade, they should imitate the mark which the complainant used, and was entitled to use under the statute, as a designation of its wares; or that they should use the name in question upon their labels without unmistakably differentiating their goods from those which the complainant manufactured and sold. We agree with the circuit court that infringement was shown. The complainant put its mark 'Davids' prominently at the top of its labels. The defendants, in the same position on its labels, put 'C. I. Davids.' At the bottom of their labels the defendants placed 'Davids Mfg. Co.' The use of the name in this manner was a mere simulation of the complainant's mark which it had duly registered; it constituted a 'colorable imitation' within the meaning of the act. The decree of the circuit court accordingly restrained the defendants from the use of the words 'Davids Manufacturing Company,' and from the use of the word 'Davids' at the top of their labels in connection with the business of making and selling inks. We think that the complainant was entitled to this measure of protection. The decree of the Circuit Court of Appeals must therefore be reversed and that of the Circuit Court affirmed. It is so ordered."

## NATIONAL TELEGRAPH NEWS CO. et al. v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals of the United States, Seventh Circuit, 1902. 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805.)

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The bill in the Circuit Court was by appellee, a corporation of New York, against the appellants, The National Telegraph News Company, a corporation of Illinois, and F. E. Crawford and A. K. Brown, citizens of Illinois; and the appeal is from an interlocutory order restraining the appellants, and each of them, their servants, agents and employés, from copying from the appellee's electrical instruments and printing machines, known as tickers, for the purpose of publishing, selling or transmitting through their own tickers, or otherwise disposing of, or using, any of the news or information—such as base-ball, foot-ball, racing, athletics, stock, grain and produce quotations, financial and other reports—which may thereafter be collected, formulated and transmitted by the appellee through its tickers; and from publishing, selling or using the matter so copied until the lapse of fully sixty minutes from the time such news items are printed by appellee's tickers.

The further facts appear in the opinion of the court.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

GROSSCUP, Circuit Judge,[69] delivered the opinion of the Court:

The appellee, the Western Union Telegraph Company, does a general telegraphing business, having offices in every state, village, hamlet and railroad station in the country, and wires connecting the same with central offices through the country.

About 1881 there was invented an instrument which, by means of a type wheel, actuated by electrical impulse, automatically prints in plain, ordinary type, upon a strip of paper, messages transmitted electrically from a distance. The instrument is now generally known as the "ticker," and is commonly found in the offices of brokers, bankers and other persons interested in the current price of securities, and in hotels, saloons and other places where people, who are interested in the happenings of the race tracks, athletic clubs, base-ball associations, and in pending events generally, are in the habit of gathering. Upon the perfecting of this instrument appellee entered, in addition to its general telegraph business, upon a business heretofore new to it. It collected at various points, where it had offices, news relating to events there transpiring, and, after accumulating in its central offices such product by means of its wires, redistributed to its tickers, in the offices and places of its patrons, by means of local wires, what was deemed of suffi-

[69] Parts of the opinion are omitted.

cient interest. The news thus gathered and printed upon strips of paper is open to the inspection of all persons who may come within these places.

The appellants, The National Telegraph News Company, and F. E. Crawford and A. K. Brown, its officers, own and control within the city of Chicago, a system of wires, connecting their operating office with tickers of their own, in the offices and places of patrons of their own. The evidence in the record before us shows that they have been appropriating vi et armis the news appearing upon the appellee's tape; and thereupon, with the loss of a few moments only, redistributing such news over their own wires and tickers to their own patrons. Such appropriation is not denied; but is defended as appellants' lawful right, upon the ground, chiefly, that upon the appearance of the printed tape upn the appellee's tickers, in the places of appellee's patrons, there is such a publication as, within the meaning of the law, dedicates the contents of the tape to the public, and deprives appellee of any further monopoly therein.

The contention is grounded, chiefly, upon the assumption that the matter thus printed is, unless the subject-matter of copyright, unprotected against appropriation by the public; and, if the subject-matter of copyright, comes under section 4956 of the Revised Statutes (U. S. Comp. St. 1901, p. 3407), which provides that no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the librarian of Congress, or deposit in the mail addressed to the librarian of Congress at Washington, a printed copy of the title of the book, or other article, or a description of the painting, drawing, chromo, statue, statuary, or a model or design for a work of the fine arts, for which he desires copyright. * * *

It is obvious, also, that if appellants may lawfully appropriate the product thus expensively put upon the appellee's tape and distribute the same instantaneously to their own patrons, as their own product, thus escaping any expense of collection, but one result could follow—the gathering and distributing of news, as a business enterprise, would cease altogether. Appellee could not, in the nature of things, procure copyright under the Act of Congress upon its printed tape; and it could not, against such unfair conditions, without some measure of protection, compete with appellants upon prices to be charged their respective patrons. And in the withdrawal of appellee from this business, there would come death to the business of appellants as well; for without the use of appellee's tape, appellants would have nothing to distribute. The parasite that killed, would itself be killed, and the public would be left without any service at any price.

The general question raised by appellants' contention, then, is this: Is the printed tape, coming out of appellee's tickers, a book or article within the meaning of the copyright laws of the United States, and especially of section 4956 (U. S. Comp. St. 1901, p. 3407), and if not a book or article within the meaning of the copyright law, is there any

remedy that will protect this feature of appellee's business against the kind of piracy shown?

We are of the opinion that the printed tape would not be copyrightable, even if the practical difficulties were out of the way. When the federal constitution was adopted the right of property in literary production had been already securely established in English law. Its source, whether in natural right, or in the statute of Anne, was still in doubt; but that an author had ownership of some species over the production of his brain—an ownership as distinctive as that of the creator of corporeal property—was conceded by all. Indeed, it could not be otherwise in a civil polity that recognizes the individual, and his right to enjoy what he creates, as the unit of organized society.

But when the federal constitution was adopted, the application of this right to productions other than those strictly literary had not yet been mooted. The great case of Donaldson v. Beckett, 2 Brown, Parl. Cas. 129, had been decided only thirteen years previously. The business world, that in this day permits nothing to escape as a means for its exploitation had not yet pressed into her service art and books. Business catalogues, circulars containing market quotations, sheets, such as Dun's and Bradstreet's directories—the whole staff of aides-de-camp to commerce, now familiar to all—were then practically unknown. In the public mind, the publication of a book meant that literature, as Literature, had received an accession. * * *

But, obviously, there is a point at which this process of expansion must cease. It would be both inequitable and impracticable to give copyright to every printed article. Much of current publication—in fact the greater portion—is nothing beyond the mere notation of events transpiring, which, if transpiring at all, are accessible by all. It is inconceivable that the copyright grant of the constitution, and the statutes in pursuance thereof, were meant to give a monopoly of narrative to him, who, putting the bare recital of events in print, went through the routine formulæ of the copyright statutes.

It would be difficult to define, comprehensively, what character of writing is copyrightable, and what is not. But, for the purposes of this case, we may fix the confines at the point where authorship proper ends, and mere annals begin. * * *

Judged by a test like this, the printed matter on the tape in question is in no sense copyrightable. It is, at most, the mere annal of events transpiring. True, the happenings of a race track, or the incidents of a college boat race, may be put in narrative, involving creative imagination; or the doings of a board of trade become the basis of a useful book or article evincing originality. But the printed tape under consideration is no such book or article, and affects no such dignity. It is, in its totality, nothing more or less than the transmission by electricity, over long distances, of what a spectator of the event, occupying a fortunate position to see or hear, would have communicated, by word of mouth, to his less fortunate neighbor. It is an exchange merely, over

wider area, of ordinary sight-seeing; and the exchange is in the language of the ordinary sight-seer. Matter of this character is not, within the meaning of the copyright law, the fruit of intellectual labor, and would not, if actually copyrighted, be protected by the courts. Iron Works v. Clow, 27 C. C. A. 250, 82 Fed. 316.

Indeed, the printed tape under consideration has no value at all as a book or article. It lasts literally for an hour, and is in the waste basket when the hour has passed. It is not desired by the patron for the intrinsic value of the happening recorded—the happening, as an happening, may have no value. The value of the tape to the patron is almost wholly in the fact that the knowledge thus communicated is earlier, in point of time, than knowledge communicated through other means, or to persons other than those having a like service. In just this quality—to coin a word, the precommunicatedness of the information—is the essence of appellee's service; the quality that wins from the patron his patronage.

Now, in virtue of this quality, and of this quality alone, the printed tape has acquired a commercial value. It is, when thus looked at a distinct commercial product, as much so as any other out-put relating to business, and brought about by the joint agency of capital and business ability. In no accurate view can appellee be said to be a publisher or author. Its place, in the classification of the law, is that of a carrier of news; the contents of the tape being an implement only, in the hands of such carrier, in its engagement for quick transmission. This is Service; not Authorship, nor the work of the Publisher.

This, then, brings us to the second inquiry: Is there any remedy that will protect appellee, in this feature of its business, against the piracy of outsiders? Has appellee, in the performance of this service, no appeal to the law?

It will be noted, first, that the business is, as an entirety, a lawful one. It meets a distinctive commercial want, and in some of its branches, at least, adds to the facilities of the business world. Indeed, no argument against its lawfulness has been advanced.

The business involves, also, the use of property. This consideration brings it at once, in a general way, within the protecting care of courts of equity. At first glance the immediate act restrained in the order below—the use of the information by a rival enterprise until after sixty minutes—may not appear as a trespass upon, or injury to, property, other than to the extent that there may be property in the printed matter. But such a view falls short of looking far enough. Property, even as distinguished from property in intellectual production, is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. What is called tangible property has come to be, in most great enterprises, but the embodiment, physically, of an underlying life—a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment. Such, for example,

are properties built upon franchises, on grants of government, on good will, or on trade names, and the like. It is needless to say, that to every ingredient of property thus made up—the intangible as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch—equity extends appropriate protection. Otherwise courts of equity would be unequal to their supposed great purposes; and every day, as business life grows more complicated, such inadequacy would be increasingly felt.

Nowhere is this recognition by courts of equity of the intangible side of property better exemplified, than in the remedies recently developed against unfair competition in trade. An unregistered trade name or mark is, in essence, nothing more than a symbol, conveying to eye and ear information respecting origin and identity; as if the manufacturer, present in person, and pointing to the article, were to say, "These are mine"; and the injunctive remedy applied is simply a command that this form of speech—this method of saying, These are mine—shall not be intruded upon unfairly by a like speech of another.

Standing apart, the symbol or speech is not property. Disconnected from the business in which it is utilized it cannot be monopolized. But used as a method of making an enterprise succeed, so that its appropriation by another would be a distinctive injury to the enterprise to which it is attached, the name, or mark, becomes at once the subject-matter of equitable protection. Here, as elsewhere, the eye of equity jurisdiction seeks out results, and though the immediate thing to be acted upon by the injunction is not itself, alone considered, property, it is enough that the act complained of will result, even though somewhat remotely, in injury to property.

Considering that in such case, equity, without question, lays its restraining hands upon the injurious appropriation of words that belong to the common language of mankind—than which nothing could be freer to the uses of men—there ought, it would seem, to be no difficulty, in the case under consideration, to find the power so manifestly needful.

The case under consideration may be summed up as follows: The business of appellee is that of a carrier of information. The gist of its service to the patron is, that, by such carriage, the patron acquires knowledge of the matter communicated earlier than those not thus served. The ticker, with its printed tape, is an implement or means only to this commercial end, which the patron, or the patron's patron, may utilize to the end intended, but may not appropriate to some end not intended, especially if such appropriation result in injury to, or total destruction of, the service. In short, the law being clearly inadequate to that purpose, equity should see to it, that the one who is served, and the one who serves, each gets what the engagement between them calls for; and that neither, to the injury of the other, shall appropriate more. * * *

Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers, or of the great telegraph and cable

lines, to be denied appeal to the courts, against the inroads of the parasite, for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public, cannot be made to fit the relations of the public and this dissimilar class of servants? Are we to fail our plain duty for mere lack of precedent? We choose, rather, to make precedent—one from which is eliminated, as immaterial, the law grown up around authorship—and we see no better way to start this precedent upon a career, than by affirming the order appealed from.

Affirmed.

NOTE.—BAKER, Circuit Judge, though not sitting in this case, read, in connection with the following case, Illinois Commission Co. v. Cleveland Tel. Co., 119 Fed. 301, 56 C. C. A. 205, the briefs and record herein, and took part, informally, in the conferences. He authorizes the statement that the reasoning and conclusions arrived at in this case meet with his concurrence.

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## GEE v. PRITCHARD.

(In Chancery before Lord Eldon, 1818. 2 Swanst. 403, 36 E. R. 670.)

The bill charged that Pritchard was proceeding to print and publish, or cause to be printed and published, the letters of the Plaintiff, or true copies or copy thereof, and extracts therefrom, and that he and the Defendant Anderson had caused public notice thereof to be given by advertisement in the newspapers, and otherwise, and particularly in a newspaper called the Morning Post, on Friday the 9th of July, in the words following: "In the press, and speedily will be published, by William Anderson, bookseller, Piccadilly, 'The Adopted Son, or, Twenty Years at Beddington,' containing Memoirs of a Clergyman, written by himself, and interspersed with interesting correspondence;" and that Anderson was printing and about to publish the same, or some work in which the letters, or copies thereof, or extracts therefrom, were introduced. * * *

The bill prayed, that the Defendants might be respectively restrained by injunction from printing or publishing the original letters, or any copies or copy of the original letters, so written by the Plaintiff, or any extracts or extract therefrom, and might be decreed to deliver up to the Plaintiff, or to destroy, the original copy of the letters so taken or made by the Defendant Pritchard, and all printed and other copies thereof, or of any extracts therefrom, which they might respectively have in their possession or power. * * *

**"It was therefore prayed, that the Defendants may be respectively restrained, by the order or injunction of this Court, from printing or publishing the said original letters written by the Plaintiff, or extracts or extract; which, upon hearing, &c., is ordered accordingly, until the Defendants shall appear to, and fully answer, the Plaintiff's bill, or this Court make other order to the contrary." Reg. Lib. A. 1817, fol. 1819.**

On this day [July 28] a motion was made, on behalf of the Defendant, to dissolve the injunction. * * *

THE LORD CHANCELLOR.[70] I am of opinion, that the Plaintiff has a sufficient property in the original letters to authorize an injunction, unless she has by some act deprived herself of it. Laying out of the case much of what Mr. Wetherell has urged with so much ingenuity. I say only that though a letter is a subject of property, capable of being much more largely dealt with, in communication, than books, as, by reading to others, repeating passages, &c., yet the Court has never been alarmed out of the practice of granting injunctions relative to letters to the extent to which it grants them in the case of books, because persons may assemble others, and read and recite to them: it is not deterred from giving that relief because it cannot give other relief more effectual.

In stating what Lord Hardwicke says on the subject, though I cannot at the moment refer to cases, I state that which, in cases, has been handed down as the law of the Court. In Pope v. Curl, Lord Hardwicke went out of his way to state what he thought the doctrine on the subject of letters. Though the letters of eminent men, no one can suppose that they were all meant for publication; there are many passages in Swift's letters which he would be unwilling to have published. Lord Hardwicke says:

"Another objection has been made by the Defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver; but I am of opinion that it is only a special property in the receiver: possibly the property of the paper may belong to him, but this does not give a license to any person whatsoever to publish them to the world."

If he had stopped there, doubt might have been entertained whether the receiver was not at liberty to publish them to the world, but he proceeds:

"For, at most, the receiver has only a joint property with the writer." 2 Atk. 342.

No one can read the case of Thompson v. Stanhope without seeing that this was understood at that time to be the doctrine of the Court. Publication was there advertised in November, and the application to the Court not made till March, and on that circumstance Lord Apsley proceeded in recommending the arrangement which he afterwards mentions:

"The executors cannot be said to have given their consent, though his Lordship thought they would have done better if they had applied earlier, before the expense of printing was incurred." Amb. 739, 740.

That is a strong part of the case. Those were letters of two classes, written by a father to his son; one class relating to the characters of individuals. The communication being made by letter is prima facie evidence, that that is all the communication which, on the subject of those characters, the writer intends to make. So of what relates to

[70] The statement of facts is abridged.

education: though they concern public characters, and a public subject—education, no one can maintain, that those discussions found in private letters gave to the person who received the letters a right to carry into public the opinions of the writer on those public characters, and the system of education. Lord Apsley therefore granted the injunction, observing, that the Defendant "did very ill in keeping copies of the characters, when Lord Chesterfield meant that they should be destroyed and forgotten." Lord Apsley also cites the case of Mr. Forrester, which certainly does apply to letters. I believe the parties came to a compromise.

The doctrine is thus laid down, following the principle of Lord Hardwicke: I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.

Such is my opinion; and it is not shaken by the case of Lord and Lady Perceval v. Phipps. I will not say that there may not be a case of exception, but if there is, the exception must be established on examination of the letters; and I think that it will be extremely difficult to say where the distinction is to be found between private letters of one nature, and private letters of another nature. For the purposes of public justice publicly administered, according to the established institutions of the country, the letters must always be produced; I do not say that of justice administered by private hands; nor do I say that there may not be a case, such as the Vice Chancellor thought the case before him, where the acts of the parties supply reasons for not interfering: but that differs most materially from this case. In April last, the Defendant having so much of property in these letters as belongs to the receiver, and of interest in them as possessor, thinks proper to return them to the person who has in them, as Lord Hardwicke says, a joint property, keeping copies of them without apprising her, and assigning such a reason as he assigns for the return. Now I say, that, if in the case before the Vice-Chancellor, Lady Perceval had given to Phipps a right to publish her letters, this case is the converse of that; and that the Defendant, if he previously had it, has renounced the right of publication.

On these grounds the injunction must be continued.

Motion refused.[71]

[71] Abernethy v. Hutchinson (1825) 3 Law J. Ch. (O. S.) 209:

"The bill was filed by the distinguished surgeon, Mr. Abernethy, against G. L. Hutchinson, John Knight and Henry Lacey. The prayer was, that an account might be taken of the profits derived by the defendants, any or either of them, from the sale of surgical lectures delivered by the plaintiff—and that they might be restrained from printing and publishing any other work or works, publication or publications, being or purporting to be lectures delivered,

or to be delivered, by the plaintiff; and also from reprinting and republishing the surgical lectures, or any works or work, publications or publication, being or purporting to be delivered by the plaintiff, or any or either of them. * * * On the 4th day of October, 1824, the plaintiff commenced the delivery of a course of lectures on the principles and practice of surgery, at the Theatre of St. Bartholomew's Hospital, to his pupils, and to students and persons desirous of acquiring a knowledge of surgery, and who, previously to the commencement of the intended course, had respectively been admitted by him as attendants upon such course, and had signed their names respectively in a book provided for that purpose, and had paid the fees for the privilege and permission of attending the same. * * * On the 9th day of October, 1824, was published a number, or part, of a periodical work, called 'The Lancet,' in which was described, as in the very words and figures thereof, in the name of the plaintiff, the lecture which he had so as aforesaid delivered on Monday evening, October the 4th; that the said work held out to the public, that it then gave, and that, from time to time, it would continue to give, plaintiff's said lecture and lectures with minute fidelity: that this number of The Lancet contained a notice or advertisement, that a lecture, on the principles and practice of surgery by the plaintiff, would be published, in every succeeding number of The Lancet, until the course should be concluded. * * * The defendant, Hutchinson, filed an affidavit, stating, * * * That the lectures delivered by the plaintiff have been delivered extemporaneously, and were not read from any papers or other writing at the time of the delivery thereof, and are illustrations of the principles of surgery, as laid down by John Hunter, and others, for the most part derived by the plaintiff from cases in the performance of his duty as a surgeon in the said hospital. Upon the case appearing from these affidavits, the plaintiff moved for an injunction, according to the prayer of his bill.

"The Lord Chancellor [Lord Eldon]. * * * With regard to the question of literary property, I have no right to interfere by injunction—unless I have a very strong opinion that the legal right is with the plaintiff. Now, looking at all that has passed with respect to literary property, and particularly with respect to the case of Millar v. Taylor (1769) 4 Burr. 2303, which was first before the Court of King's Bench, and afterwards before the House of Lords, (though there was a vast deal of argument on the question of what sort of property a man may have in his unpublished ideas or sentiments, or the language which he uses,) yet I do not recollect, in the course of those proceedings (particularly in the House of Lords), that any question was put to the Judges that did not adapt itself to the case of a book or a literary composition;—for of the questions which were there put to the Judges, the first was, Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent? The next question was, If the author had such a right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person afterwards reprint and sell for his own benefit such book or literary composition, against the will of the author? The third question was, if such an action would have lain at common law, was it taken away by the statute of Anne, and was an author, by that statute, precluded from any remedy except on the foundation of the statute, and on the terms and conditions prescribed thereby? On these questions, the Judges of the land differed. On the first question, one of them was of opinion that, at common law, an author of any book or literary composition had not the sole right of first printing and publishing the same for sale; and that he could not bring an action against any person who printed, published, and sold the same, unless such person had obtained the copyright by fraud or by violence. So that, although this Judge was of opinion, that at law the author was not the party who had the sole right of first printing and publishing a composition for sale, yet he was also of opinion, that to give him a right of action against those who first printed and published the same for sale, it was necessary to show, in order to maintain an action, that the person who had first printed and published had gotten it either by violence or by fraud. Now, if it can be made out, as matter of contract between Mr. Abernethy and those who attend his lectures, that they should *not* be at liberty to print or publish the same,

I should say, then, that supposing notes of all that he delivered in his lectures to be taken, and supposing it to be a proper thing for the use of the students that that should be done, yet, I never would permit a third person to make use of the delivery of those notes to that third person, for the purpose of doing that which the person delivering those notes would not himself be permitted to do. I should call that, in the sense in which a court of equity uses the word, a gross fraud. * * * It was therefore a question, whether a stranger, not bound by contract, could be enjoined. Various considerations would arise out of this; for a court of equity would be called upon to say, whether the means, by which the defendants were enabled to publish the lectures, might or might not be used. One view of the case which ought not to be lost sight of, was, that supposing the lectures to have been taken down by a pupil, who afterwards communicated them to the publishers, and you could not get at the pupil, you could not maintain an action. But in that case, the publishers might come under the jurisdiction of the Court, upon the ground of having made a fraudulent use of that which had been communicated to them, by one who had committed a breach of trust.

"June 17.—The Lord Chancellor stated, that where the lecture was orally delivered, it was difficult to say, that an injunction could be granted upon the same principle, upon which literary composition was protected; because the Court must be satisfied that the publication complained of was an invasion of the written work, and this could only be done by comparing the composition with the piracy. But it did not follow, that, because the information communicated by the lecturer was not committed to writing, but orally delivered, it was therefore within the power of the person who heard it, to publish it. On the contrary, he was clearly of opinion, that whatever else might be done with it, the lecture could not be published for profit. He had the satisfaction now of knowing, and he did not possess that knowledge when this question was last considered, that this doctrine was not a novel one, and that this opinion was confirmed by that of some of the judges of the land. He was, therefore, clearly of opinion, that when persons were admitted, as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling. There was no evidence before the Court of the manner in which the defendants got possession of the lectures; but as they must have been taken from a pupil, or otherwise in such a way as the Court would not permit, the injunction ought to go upon the ground of property; and although there was not sufficient to establish an implied contract as between the plaintiff and the defendants, yet it must be decided, that as the lectures must have been procured in an undue manner from those who were under a contract not to publish for profit, there was sufficient to authorize the Court to say, the defendants shall not publish. He had no doubt whatever that an action would lie against a pupil who published these lectures. How the gentlemen, who had published them, came by them, he did not know; but whether an action could be maintained against them or not, on the footing of implied contract, an injunction undoubtedly might be granted; because if there had been a breach of contract on the part of the pupil who heard these lectures, and if the pupil could not publish for profit, to do so would certainly be what this Court would call a fraud in a third party. If these lectures had not been taken from a pupil, at least the defendants had obtained the means of publishing them, and had become acquainted with the matter of the lectures, in such a manner that this Court would not allow of a publication. It by no means followed, because an action could not be maintained, that an injunction ought not to be granted. * * * Injunction granted."

## ROUTH v. WEBSTER.

(In Chancery, 1847. 10 Beav. 561, 50 E. R. 698.)

In 1846 a joint stock company, called "The Economic Conveyance Company," was established, having for its object the carrying passengers by steamboat and omnibus at the average rate of 1d. a mile. The Defendants, the provisional directors, had published prospectuses, in which the name of the Plaintiff was used, without his authority, as a trustee of the company. They also paid monies into the bankers of the company to the Plaintiff's account as trustee.

The Plaintiff, conceiving that he might be subjected to responsibility by the unauthorized use of his name, filed his bill against the directors, and now moved for an injunction to restrain them from using his name in connection with the company.

THE MASTER OF THE ROLLS [LORD LANGDALE]. The sort of opposition made to the application to prevent the unauthorized use of the Plaintiff's name furnishes a specimen of the anxiety of the Defendants to avoid unnecessary litigation.

I think that the Plaintiff is entitled to the injunction. I have no doubt that the Plaintiff never did consent to be a trustee. The Defendant Webster might have thought he did: if he did, his belief rested upon a very slight foundation. However, the name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee; his name was also used at the bankers'; and though he may not be subjected to the duties of trustee, yet it is plain that he is exposed to some risk by the unauthorized act of the Defendants in using his name. Money was placed in his name at the bankers', and he is left to get rid of his responsibility as he can.

The Defendants having published his name as a trustee, some negotiation took place for giving the Plaintiff an indemnity, and which he was willing to accept as a condition for his not applying for an injunction. This was not given, and then the matter remained as it was before. He now moves for an injunction to prevent the Defendants proceeding in the same course for the future, and the Defendants, not pretending that they have a right to continue the use of his name, and disavowing any intention of doing so, nevertheless file affidavits in opposition to the application.

I am of opinion that the Plaintiff is entitled to the injunction: and, if it subjects the Defendants to expense, let it be a warning to them as well as to others not to use the names of other persons without their authority. What! Are they to be allowed to use the name of any person they please, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and are they then to be allowed to escape the consequences by saying they have done it by inadvertence? Certainly not.

Is not the Plaintiff entitled to be protected against a repetition of those misrepresentations which have already been made? I am willing to believe the statement made on behalf of the Defendants, that they do not intend to repeat their misrepresentations; but I think the Plaintiff is not bound to rely on their assurance, and that he is entitled to be protected by the order and injunction of this Court.[72]

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## REICHARDT et al. v. SAPTE et al.

(Queen's Bench Division. [1893] 2 Q. B. 308.)

1893. July 24. HAWKINS, J.[73] The action was brought by Mr. Reichardt and Mr. Goldsworthy against Mr. Sapte and Mr. Alport. In it the plaintiffs, under statute 3 & 4 Wm. IV, c. 15, claimed the sole liberty of representing, at any place of dramatic entertainment in the United Kingdom, a play of which they were the joint authors, called the "Picture Dealer"; and they charged the defendants with having infringed that liberty by representing at divers places of dramatic entertainment a play, called "A Lucky Dog," which was, as they alleged, in substance the same as "The Picture Dealer." They claimed damages for this infringement, and an injunction to restrain its future representation.

The short history of the authorship of "The Picture Dealer" is, according to Mr. Reichardt's evidence, as follows: In the autumn of 1889 he and his co-plaintiff, Goldsworthy, commenced to write the play. It was finished in the month of March, 1892, and on May 3 in the same year it was typewritten. On May 4 it was sent to Mr. Thorne, the lessee of the Vaudeville Theatre, to read, with a view to its being produced on the stage. Mr. Alport was Mr. Thorne's manager. Several applications were made for its return, but Mr. Reichardt says he did not get it back till July 7. Anyhow, it was performed publicly at the Ladbroke Hall, Notting Hill, on June 30, 1892. "A Lucky Dog," said to be a piracy of "The Picture Dealer," was first represented on the stage of the Strand Theatre at a matinee on July 4, 1892. The history of "A Lucky Dog" is as follows: It was written and completely composed between the end of 1889 and the early part of 1890 by Mr. Sapte, on the suggestion of his wife, Mrs. Sapte. It was then entitled "Peter." It was read by Mr. Blackmoore, a dramatic agent, early in the latter year, in manuscript. On November 5, 1890, three copies were made—typewritten. It was offered to, and read by, the stage manager

[72] Abstract of Order.—Restrain the Defendants "from printing, publishing, or circulating any prospectus or other document of or relating to a certain company called the Economic Conveyance Company, mentioned and referred to in the Plaintiff's bill in this cause, with the Plaintiff's name thereto, and from, in any manner, using the name of the Plaintiff, so as to identify him as a party interested or associated with the said company."

[73] The statement of facts and parts of the opinion are omitted.

of the Criterion Theatre at Christmas in the same year. In February, 1891, it was offered to, and read by, the brother of the manager of the Comedy Theatre. In July, 1891, it was read by Miss Kingsley in Australia. The name of "A Lucky Dog" was afterwards substituted for "Peter," but the play was in all other respects the same. It was acted and first published at a matinee at the Strand Theatre on July 4, 1892. As a fact I find that the defendants' play, "A Lucky Dog," was finished completely and typewritten early in November, 1890, whereas the plaintiffs' play, the "Picture Dealer," was not finished before March, 1892. The plaintiffs' play, however, was first publicly acted on June 30, 1892, whilst the defendants' was not so acted until a few days afterwards. I am satisfied that the defendants' play was in no respect taken or copied from, or suggested by, the plaintiffs', but, as between the parties to the action, was in every respect an original play. Upon this state of things I have to consider whether, even assuming the two plays to be substantially alike either wholly or in material parts, the plaintiffs can maintain this action. By statute 3 & 4 Wm. IV, c. 15, s. 1, it is enacted that:

"From and after the passing of this Act"—June 10, 1833—"the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom * * * any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof." * * *

Finding, as I have done and do, that "A Lucky Dog" was an original play composed, though not printed or published, by the defendants, and of which they were joint authors, and that it was completely finished some fifteen months or so before "The Picture Dealer" was completed, and that no part of "The Picture Dealer" was used or taken directly or indirectly in the formation and composition of "A Lucky Dog"—however similar the two plays may be in many respects—I can see nothing to deprive the defendants of their right to claim the sole liberty of representation of their play under the first section of the statute; and if that right was vested in them, it seems to me logically to follow that, in allowing their play to be represented as they did at the Strand and other theatres, they were acting within their right; and, if so, no action can be maintained against them for so doing. I care not to discuss, for it is not necessary to do so, the question whether they could have sued the plaintiffs for infringing upon their right by causing "The Picture Dealer" to be represented at the Ladbroke Hall. They clearly could not do so now, for the limited period of twelve months within which such action must be brought (section 3) has expired. Possibly, assuming the plaintiffs' play to have been as original as the defendants', they might, consistently with the defendants' right, have acquired a similar right for "The Picture Dealer." * * *

In the view I take of this case it becomes unnecessary to consider the question whether, if the plaintiffs' play had been first written, the defendants' play was an infringement of the plaintiffs' right of representation. There are, no doubt, many similarities in the two plays which, in the absence of evidence to the contrary, would have led me strongly to suspect that they had both been written from one common source, or that "The Picture Dealer" had been taken from "A Lucky Dog"; for the many coincidences to be found in them are certainly remarkable. There is, however, no evidence of a common source, nor is there any that the plaintiffs ever saw the defendants' play before its production; whilst the evidence which was given has satisfied me that the defendants' play was finished for more than a year before the plaintiffs', and that the right of the defendants to the sole representation of "A Lucky Dog" had been acquired before the plaintiffs' play was finished. Under these circumstances, I think the defendants are entitled to my judgment.

Judgment for the defendants.

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## POLLARD v. PHOTOGRAPHIC CO.

(Chancery Division, 1889. 40 Ch. Div. 345.)

NORTH, J.[74] In the month of August last the female Plaintiff called at the place of business in Rochester of the Defendant, a person who carries on business as, and is sued by the name of, the Photographic Company, and there had her photograph taken in various positions, and for this and for photographs taken of other members of her family she paid a sum of £7. 10s. The evidence is silent as to what passed upon this occasion, and therefore I infer that the transaction was one of the ordinary kind, and that no special terms or conditions of any sort were agreed upon. In November last it came to the knowledge of the Plaintiffs that the Defendant was exhibiting in his shop window, apparently for the purpose of sale, one of the photographs of the female Plaintiff got up as a Christmas card. A copy of the photograph as originally taken and also the copy so exhibited in the window are now before me, and it appears that the former, which is what is commonly called a vignette, has been decorated by the addition thereto, above and below the figure, of scrolls of what I suppose are intended for leaves, with the superscription, also in leafy letters, of the words "A Merry Christmas and a Happy New Year." This step was taken by the Defendant without any license or consent from and without the knowledge of the Plaintiffs, who had never authorized the use of the photograph by the Defendant in any manner, much less its public exhibition or sale for profit as a Christmas card. They accordingly placed the matter in the hands of their solicitors, and

[74] The statement of facts and parts of the opinion are omitted.

a clerk of theirs, Mr. Andrews, subsequently called at the Defendant's shop and purchased the exhibit with the above words on. * * *

The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say "express or implied," because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that a photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer: and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only.

The principles upon which I rest my judgment are well known, and of familiar application; and, though I am not aware that any case has been decided as to the negative of a photograph, there are many analogous cases in the books. In Murray v. Heath, 1 B. & Ad. 804, 811, the owner of some drawings employed the defendant to engrave plates from them, and the defendant, having done so, struck off some impressions from the plates before handing them over, which impressions his assignees sold after his bankruptcy. An action was brought by the owner of the drawings, founded on the Copyright Acts, and also in trover for the prints so struck. The action failed on both these heads, but Lord Tenterden said, in the course of his judgment:

"The engraver having contracted to engrave the plate, and to appropriate the prints taken from it to the use of another, an action at common law would lie against him for the breach of that contract." * * *

The phrase "a gross breach of faith" used by Lord Justice Lindley in that case applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof. It may be said that in the present case the property in the glass negative is in the Defendant, and that he is only using his own property for a lawful purpose. But it is not a lawful purpose to employ it either in breach of faith, or in breach of contract. * * *

It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of protection being due for the products of a man's own skill or mental labour; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 & 26 Vict. c. 68, § 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed.

The result is that in the present case the copyright in the photograph is in one of the Plaintiffs. It is true, no doubt, that section 4 of the same Act provides that no proprietor of copyright shall be entitled to the benefit of the Act until registration, and no action shall be sustained in respect of anything done before registration; and it was, I presume, because the photograph of the female Plaintiff has not been registered that this Act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the Act cannot be enforced until after registration, this does not deprive the Plaintiffs of their common law right of action against the Defendant for his breach of contract and breach of faith. This is quite clear from the cases of Morison v. Moat, 9 Hare, 241, and Tuck v. Priester, 19 Q. B. D. 629, already referred to, in which latter case the same act of Parliament was in question.

But the counsel for the Defendant did not hesitate to contend boldly that no injunction could be granted in a case where there could be no injury to property in respect of which damages could be recovered in an action at law; and he alleged that this is such a case, and relied on such decisions as Southey v. Sherwood, 2 Mer. 435, and Clark v. Freeman, 11 Beav. 112. I have already pointed out why, in

my opinion, this is not such a case; but, if it were, the alleged consequences would not follow. Supposing that the present photograph actually was, or that by manipulation of the negative or by the addition of the rest of the figure, or of a background, it was rendered, a libel upon the Plaintiffs, by exposing them, for instance, to contempt or ridicule, it is quite clear that in such a case a Court of Law could give damages, and could also, ever since the passing of the Common Law Procedure Act of 1854, grant an injunction; and ever since the passing of the Judicature Acts each branch of the High Court has the same power. See Quartz Hill Consolidated Gold Mining Company v. Beall, 20 Ch. D. 501. The right to grant an injunction does not depend in any way on the existence of property as alleged; nor is it worth while to consider carefully the grounds upon which the old Court of Chancery used to interfere by injunction. But it is quite clear that, independently of any question as to the right at law, the Court of Chancery always had an original and independent jurisdiction to prevent what that Court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence, as was pointed out by Lord Cottenham in Prince Albert v. Strange, 1 Mac. & G. 25. For these reasons the Defendant is wholly in the wrong; and as he denies the jurisdiction of the Court, the injunction must go as a matter of course; and as the parties have agreed that this motion is to be treated as the trial of the action the injunction will be perpetual, and the Defendant must pay the costs of the action.[75]

[75] Mayall v. Higbey (1862) 1 Hurlstone & Coltman, 148–152:

"The first count of the declaration stated that the defendant wrongfully and unlawfully took and kept possession of the plaintiff's goods, that is to say, photographic portraits, and while the said goods continued to be the property of the plaintiff, and were not the property of the defendant, and were wrongfully and improperly in his possession, and while the plaintiff was of right entitled to prevent, by writ of injunction thereinafter claimed, the defendant from using the same by making therefrom, and photographically printing from negatives obtained therefrom, reduced or other copies of such portraits, and from selling such copies, wrongfully and unlawfully used the same by making therefrom, or photographically printing from negatives obtained therefrom, reduced and other copies of such portraits; and thereby the said portraits of the plaintiff have become less valuable to him, and he has been deprived of the profits which he would have derived by selling copies or duplicates of such portraits or of the photographic negatives from which the said portraits had been obtained. * * * Pleas (inter alia).—First: not guilty. Secondly, to the first count: that the goods were not the plaintiffs. Thirdly, to the same count and to the claim of writ of injunction: that the goods were not wrongfully and improperly in the possession of the defendant. * * * At the trial, before Pollock, C. B., at the London Sittings after last Hilary Term, the following facts appeared: The plaintiff, who was a photographer, had lent to one Tallis, the proprietor of a newspaper called 'The Illustrated News of the World,' a number of photographic portraits of eminent individuals, for the purpose of being engraved and published in that newspaper. Tallis having become insolvent, assigned all his estate and effects to trustees for the benefit of his creditors. The trustees sold the newspaper and stock in trade by auction, together with about ninety photographic portraits belonging to the plaintiff. The defendant bought these portraits, and by photographically printing from negatives he obtained reduced copies, which he published and

## CORLISS et al. v. E. W. WALKER CO. et al.

(Circuit Court of the United States, D. Massachusetts, 1893. 57 Fed. 434.)

In Equity. Bill by Emily A. Corliss and others against the E. W. Walker Company and others to restrain respondents from publishing a biography and selling a picture of George H. Corliss.

COLT, Circuit Judge. This suit is brought by the widow and children of George H. Corliss to enjoin the defendants from publishing and selling a biographical sketch of Mr. Corliss, and from printing and selling his picture in connection therewith. The bill does not allege that the publication contains anything scandalous, libelous, or false, or that it affects any right of property, but the relief prayed for is put upon the novel ground that such publication is an injury to the feelings of the plaintiffs, and against their express prohibition.

The counsel for plaintiffs, in argument, put the case upon the ground that Mr. Corliss was a private character, and that the publication of his life is an invasion of the right of privacy, which a court of equity should protect. In the first place, I cannot assent to the proposition that Mr. Corliss was a private character. He held himself out to the public as an inventor, and his reputation became world-wide. He was a public man, in the same sense as authors or artists are public men. It would be a remarkable exception to the liberty of the press if the lives of great inventors could not be given to the public without their own consent while living, or the approval of their family when dead. But whether Mr. Corliss is to be regarded as a private or public char-

sold. On application to a Judge at Chambers, an order for an injunction had been obtained to restrain the defendant from using the portraits, by making therefrom, and photographically printing from negatives obtained therefrom, reduced or other copies of the photographs, and from selling such copies. A verdict was found for the plaintiff on the first count, with 40s. damages, and on the second count with £25 damages; leave being reserved to the defendant to move to enter the verdict for him on the first count, if the Court should be of opinion that the right alleged and the right to an injunction were not proved. * * *

"[Pollock, C. B. It is essential not only that the defendant should not make copies, but also that he should not sell them. If a person surreptitiously copied a picture, a Court of equity would interfere to prevent him from availing himself of it in any manner whatever. The right of a person as against another who has surreptitiously copied his work is distinct from the right of copyright, which is the creation of the statutes.] * * *

"[Bramwell, B. The wrongful act of which the plaintiff complains is a compound one, namely, copying the plaintiff's works and selling the copies. The plaintiff claims damages for the injury done to him by taking the copies, and an injunction to restrain the defendant from doing further injury by selling them. If the plaintiff had recovered substantial damages on the first count, we might, as in the case of a penalty, in our discretion have refused an injunction.]

"Pollock, C. B. The damages on the first count were merely nominal, and only in respect of the infringement of the plaintiff's right. The question of copyright does not arise. The rule ought to be discharged, and the injunction must issue.

"Martin, B., and Bramwell, B., concurred. Rule discharged."

acter (a distinction often difficult to define) is not important in this case. Freedom of speech and of the press is secured by the constitution of the United States and the constitutions of most of the states. This constitutional privilege implies a right to freely utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity, or scandalous character, may be a public offense, or, by its falsehood and malice, may injuriously affect the standing, reputation, or pecuniary interests of individuals. Cooley, Const. Lim. (6th Ed.) 518. In other words, under our laws, one can speak and publish what he desires, provided he commits no offense against public morals or private reputation. Schuyler v. Curtis, 15 N. Y. Supp. 787, recently decided by the New York supreme court, and upon which the plaintiffs rely, is not in point. In that case the court enjoined the defendants from erecting a statue of Mrs. Schuyler. The right of publication was not in issue in that case.

There is another objection which meets us at the threshold of this case. The subject-matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402; Kerr, Inj. (2d Ed.) 1. It follows from this principle that a court of equity has no power to restrain a libelous publication. Boston Diatite Co. v. Florence Manuf'g Co., 114 Mass. 69, 19 Am. Rep. 310; Brandreth v. Lance, 8 Paige (N. Y.) 24, 34 Am. Dec. 368. The opinion of Vice Chancellor Malins in Dixon v. Holden, L. R. 7 Eq. 488, to the contrary, is disapproved by Lord Chancellor Cairns in Assurance Co. v. Knott, 10 Ch. App. 142. In Kidd v. Horry (C. C.) 28 Fed. 773, Mr. Justice Bradley, in speaking of Dixon v. Holden, and several recent English cases, declares that they depend on certain acts of parliament, and not on the general principle of equity jurisprudence. But in the present bill it is not pretended that the publication is libelous, and therefore there can be no question as to the want of jurisdiction in this case.

As to the picture which accompanies the published sketch, the case stands on a different footing. The defendants obtained from the plaintiffs a copy of a portrait and a photograph of Mr. Corliss, from which they have made two plates, one of which they propose to insert in the publication. But it appears from the evidence that these pictures were obtained on certain conditions, which the defendants have not complied with. This matter directly concerns the exclusive right of property which the plaintiffs have in the painting and photograph, and it would be a violation of confidence, or a breach of contract between the parties, to permit the defendants, under these circumstances, to use either of the plates. Pollard v. Photographic Co., 40 Ch. Div. 345; Prince Albert v. Strange, 1 Macn. & G. 25. The injunction is denied as to the publication, and granted as to the use of the plates.

## DRUMMOND v. ALTEMUS.

(Circuit Court of the United States, E. D. Pennsylvania, 1894. 60 Fed. 338.)

This is a bill by Henry Drummond against Henry Altemus to enjoin the publication and sale of a book purporting to contain certain lectures delivered by complainant.

DALLAS, Circuit Judge. From the facts as developed on the hearing of this motion for an interlocutory injunction it appears that the defendant has published, and to a considerable extent has sold, a book purporting to contain certain lectures delivered by the plaintiff, which, in fact, does not present those lectures correctly, but with additions and omissions which essentially alter the productions of the author. This is sought to be justified by the averment that the lectures in question had not been copyrighted, and that their author had dedicated them to the public. The subject of copyright is not directly involved. The complainant does not base his claim to relief upon the statute, but upon his right, quite distinct from any conferred by copyright, to protection against having any literary matter published as his work which is not actually his creation, and, incidentally, to prevent fraud upon purchasers. That such right exists is too well settled, upon reason and authority, to require demonstration; and, although it is equally well established that an author may, by dedication of any product of his pen to the public, irrecoverably abandon his title, yet, in this case, the fact relied on by the defendant to support his assertion of dedication wholly fails to vindicate the publication complained of. The complainant did send to a journal called the "British Weekly," and permit its publishers to print in its columns, reports of eight of the lectures to which this suit relates, but these did not give, and could not be understood as giving, a full and exact presentation of those particular lectures, and of the remaining four lectures of the series no report of any kind was furnished to the press or placed before the public.

The defendant's book is founded on the matter which had appeared in the British Weekly, and, if that matter had been literally copied, and so as not to misrepresent its character and extent, the plaintiff would be without remedy; but the fatal weakness in the defendant's position is that, under color of editing the author's work, he has represented a part of it as the whole, and even, as to the portion published, has materially departed from the reports which he sets up in justification. The title of the book is "The Evolution of Man; being the Lowell Lectures Delivered at Boston, Mass., April 1893, by Professor Drummond." It is true that all the reports, except one, in the British Weekly, appear under a heading in the same words; but the ordinary reader is not likely to rely upon display lines of a public journal to give a precise indication of the contents of an article to which they are prefixed, whereas such a title as we have in this instance, given to a

book in permanent form, may reasonably be, and usually is, relied on as truly stating the nature of its contents. A most important circumstance in this connection is that the defendant, while precisely adopting his title from the headlines of the reports, has so altered their text as to make it appear, contrary to the whole tenor of the reports themselves, that what his book contains is the precise language of the author of the lectures, although, as has been said, it contains only some of the lectures, not all of them, and presents none of them fully or correctly. The complainant's right has been fully made out, and the case shown is manifestly one which calls for the interposition of the court at this stage. An order will be made for a temporary injunction.

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## ATKINSON v. JOHN E. DOHERTY & CO.

**(Supreme Court of Michigan, 1899. 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507.)**

HOOKER, J.[76] The late Col. John Atkinson was a well-known lawyer and politician. After his death, the defendant, a manufacturer of cigars, brought out an article that he named the John Atkinson cigar, and sought to put it upon the market under a label bearing that name and a likeness of Col. John Atkinson. The widow of Col. Atkinson filed a bill to restrain this, and upon the hearing the circuit court made a decree dismissing the bill with costs, and the complainant has appealed.

As a rule, names are received at the hands of parents,—surnames by inheritance, and Christian names at their will. But this is not an invariable rule, for many names are adopted or assumed by those who bear them. But in neither case is the right to the use of a name exclusive. A disreputable person or criminal may select the name of the most exemplary for his child, or for his horse or dog or monkey. We have never heard this questioned. No reason occurs to us for limiting the right to apply a name, though borne by another person, to animate objects. Why not a John Atkinson wagon, as well as a John Atkinson Jones or horse or dog. Society understands this, and may be depended upon to make proper allowances in such cases; and although each individual member may, in his own case, suffer a feeling of humiliation when his own name or that of some beloved or respected friend is thus used, he will usually, in the case of another, regard it as a trifle. We feel sure that society would not think the less of Col. John Atkinson if cigars bearing his name were sold in the shops. Nor are his friends brought into disrepute thereby. So long as such use does not amount to a libel, we are of the opinion that

[76] Parts of the opinion are omitted.

Col. John Atkinson would himself be remediless, were he alive, and the same is true of his friends who survive.

It is urged in this case that the connection of the name with cigars wounds the feelings of the widow, and extreme and improbable illustrations of the possibilities of a rule which should permit the indiscriminate use of names of deceased persons are given. * * * The sentiment which prompts the feeling of annoyance at such an act is aroused by any aspersion of the dead. It is natural and commendable, as are all recognitions of the proprieties of life; but it does not follow that such an act is an actionable wrong, or that equity will intervene by injunction to prevent it, though we are quite sure that the disapproval of society would ordinarily have the latter effect. * * *

The limitation upon the exercise of these rights being the law of slander and libel, whereby the publication of an untruth that can be presumed or shown to the satisfaction, not of the plaintiff, but of others (i. e. an impartial jury), to be injurious, not alone to the feelings, but to the reputation, is actionable. Should it be thought that it is a hard rule that is applied in this case, it is only necessary to call attention to the fact that a ready remedy is to be found in legislation. We are not satisfied, however, that the rule is a hard one, and think that the consensus of opinion must be that the complainants contend for a much harder one. The law does not remedy all evils. It cannot, in the nature of things; and deliberation may well be used in considering the propriety of an innovation such as this case suggests. We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence that does not respect it. We can only say that it is one of the ills that, under the law, cannot be redressed.

The decree of the learned circuit judge is affirmed. The other justices concurred.

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## MANSELL v. VALLEY PRINTING CO.

(Court of Appeal. [1908] 2 Ch. Div. 441.)

Appeal from a decision of Swinfen Eady, J. [1908] 1 Ch. 567.

The question raised by this appeal was whether the owner of an unpublished picture could, at common law and apart from statutory protection, recover damages against a person who had, innocently and in good faith, published a pirated copy of the picture.

The facts are given in greater detail in the report of the case in the court below, but the following summary, taken from the judgment of the Master of the Rolls, is sufficient for the purposes of this report.

The plaintiff was the exclusive owner of two pictures and designs suitable for advertisements which had been produced for him by an artist named Higham, at a cost of £43. Rankine, another artist in the

plaintiff's employ, surreptitiously made copies of these pictures, and having left the plaintiff's employ sold them as original drawings to the defendant company. The defendant company published them without notice of the plaintiff's title, and before registration by the plaintiff under the Fine Arts Copyright Act, 1862. On complaint made by the plaintiff the defendant company at once offered to stop any further publication and to hand over all copies, but under the circumstances they declined to pay damages for their innocent publication.

The plaintiff thereupon commenced the present action against the defendant company and Rankine, claiming damages against both defendants and an injunction against Rankine.

Swinfen Eady, J., gave judgment for the plaintiff for £43 damages, the cost of the pictures, against both defendants.

The defendant company appealed.

July 11. COZENS-HARDY, M. R., after stating the question now raised for decision and the material facts as given above, continued:

We have had an interesting argument as to the nature and extent of the common law right of an author before publication. It seems to me that, for the purpose of the present case, there is no uncertainty in the law.

In Caird v. Sime, 12 App. Cas. 326, the right of a professor to restrain the publication of lectures orally delivered in his class-room was established by the House of Lords. Although it was a Scottish case, the law applicable is treated as being the same as in England. Lord Halsbury there said (12 App. Cas. 337):

"It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his unpublished literary productions. It is further incapable of denial that that proprietary right may still continue notwithstanding some kind of communication to others."

And Lord Watson (12 App. Cas. 343) said:

"The author of a lecture on moral philosophy, or of any other original composition, retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public."

The law thus laid down is based upon property, irrespective of implied contract or breach of duty. It does not depend upon property in the paper or MS. It is an incorporeal property. I do not think it necessary to occupy time by referring to the earlier authorities, including authorities in the House of Lords, which plainly establish the same proposition. I will only remark in passing that in Caird v. Sime, 12 App. Cas. 326, the sheriff substitute ordered all copies of the publications to be delivered up, and that the House of Lords affirmed this order. This is inconsistent with the dicta of Wigram, V. C., in Colburn v. Simms, 2 Hare, 543, upon which the appellants relied to some extent, although I doubt whether the Vice-Chancellor's judgment really assists the appellants. Caird v. Sime, 12 App. Cas. 326, was decided in 1887. More than a century earlier a very important case came before the House of

Lords: I refer to Donaldsons v. Becket, 4 Burr. 2408, decided in 1774. It is best reported in Cobbett's Parliamentary History, vol. 17, pp. 954–1003. The great question there raised was whether an author, after the expiration of the statutory protection given by the statute of Anne, had a perpetual right of literary property at common law, and this question was decided in the negative. The judges were summoned, and several questions were put to them, of which the first was as follows: (1) Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale and might bring an action against any person who printed, published, and sold the same without his consent. All the judges except three answered this question in the affirmative. This weighty authority, in my opinion, is decisive of the present appeal. It shews that an action on the case would lie against any person who prints and publishes an unpublished book without consent. And when it is established that the right is a proprietary right, it is plain that the element of motive or intention on the part of the defendant is wholly irrelevant.

It could not be contended since Prince Albert v. Strange, 2 De G. & Sm. 652, 1 Mac. & G. 25, 1 H. & T. 1, that the owner of an unpublished picture stands in any different position from the owner of an unpublished literary work. The case of Turner v. Robinson, 10 Ir. Ch. Rep. 121, 131, 132, 510, is, however, a direct authority on the point. The Master of the Rolls there states the law in language which I desire to adopt:

"There is no statute for the protection of the copyright in painting. The only remedies, therefore, which a painter has in case of piracy are—first, an action at the common law; secondly, a suit in equity for an injunction founded on the common law right; thirdly, a suit in equity, where the piracy has been accompanied by circumstances of fraud, or breach of trust, confidence or contract, express or implied."

And again:

"By the common law, copyright or protection exists in favour of works of literature, art or science, to this limited extent only, that while they remain unpublished no person can pirate them, but that after publication they are by the common law unprotected."

In my opinion the judgment of Swinfen Eady, J., which is based substantially on the reasons I have expressed, was correct, and the appeal must be dismissed with costs.[77]

[77] The concurring opinions of Tarwell and Kennedy, L. JJ., are omitted.

## SECTION 9.—INVASION OF SO-CALLED RIGHT OF PRIVACY

### ROBERSON v. ROCHESTER FOLDING BOX CO. et al.

(Court of Appeals of New York, 1902. 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828.)

PARKER, C. J.[78] * * * The complaint alleges that the Franklin Mills Company, one of the defendants, was engaged in a general milling business and in the manufacture and sale of flour; that before the commencement of the action, without the knowledge or consent of plaintiff, defendants, knowing that they had no right or authority so to do, had obtained, made, printed, sold, and circulated about 25,000 lithographic prints, photographs, and likenesses of plaintiff, made in a manner particularly set up in the complaint; that upon the paper upon which the likenesses were printed and above the portrait there were printed in large, plain letters, the words, "Flour of the Family," and below the portrait, in large capital letters, "Franklin Mills Flour," and in the lower right-hand corner, in smaller capital letters, "Rochester Folding Box Co., Rochester, N. Y."; that upon the same sheet were other advertisements of the flour of the Franklin Mills Company; that those 25,000 likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons, and other public places; that they have been recognized by friends of the plaintiff and other people, with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement, and her good name has been attacked, causing her great distress and suffering, both in body and mind; that she was made sick, and suffered a severe nervous shock, was confined to her bed, and compelled to employ a physician, because of these facts; that defendants had continued to print, make, use, sell, and circulate the said lithographs, and that by reason of the foregoing facts plaintiff had suffered damages in the sum of $15,000. The complaint prays that defendants be enjoined from making, printing, publishing, circulating, or using in any manner any likenesses of plaintiff in any form whatever; for further relief (which it is not necessary to consider here); and for damages.

It will be observed that there is no complaint made that plaintiff was libeled by this publication of her portrait. The likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize. * * * Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants'

[78] Parts of the opinions of Parker, C. J., and Gray, J., are omitted.

impertinence in using her picture, without her consent, for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes; but, as it is distasteful to her, she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and, as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of $15,000. There is no precedent for such an action to be found in the decisions of this court. Indeed, the learned judge who wrote the very able and interesting opinion in the appellate division said, while upon the threshold of the discussion of the question:

"It may be said, in the first place, that the theory upon which this action is predicated is new, at least in instance, if not in principle, and that few precedents can be found to sustain the claim made by the plaintiff, if, indeed, it can be said that there are any authoritative cases establishing her right to recover in this action."

Nevertheless that court reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a "right of privacy"; in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent, or any other of the great commentators upon the law; nor, so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness, and no inconsiderable ability, in the Harvard Law Review (volume 4, p. 193) in an article entitled "Rights of a Citizen to His Reputation." The so-called "right to privacy" is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers; and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. * * *

If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right, and with many persons would more seri-

ously wound the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. * * *

The first case is Prince Albert v. Strange, 1 Macn. & G. 25, 2 De Gex & S. 652. * * * The opinion contained no hint whatever of a right of privacy separate and distinct from the right of property.

Pollard v. Photographic Co., 40 Ch. Div. 345, is certainly not an authority for granting an injunction on the ground of threatened injury to the feelings, although it is true, as stated in the opinion of the appellate division, that the court did say in the course of the discussion that the right to grant an injunction does not depend upon the existence of property. * * *

In Gee v. Pritchard, 2 Swanst. 402, B. attempted to print a private letter written him by A., and he was restrained on the ground that the property of that private letter remained in A. * * *

In not one of these cases, therefore, was it the basis of the decision that the defendant could be restrained from performing the act he was doing or threatening to do on the ground that the feelings of the plaintiff would be thereby injured; but, on the contrary, each decision was rested either upon the ground of breach of trust, or that plaintiff had a property right in the subject of litigation which the court could protect.

A more recent English case, decided in 1898, is more nearly in point, and negatives the contention that plaintiff may restrain an unauthorized publication which is offensive to him, namely, Dockrell v. Dougall, 78 Law T. (N. S.) 840. * * * The court said, in effect: * * *

"In order that an injunction may issue to restrain a defendant from using a plaintiff's name, the use of it must be such as to injure the plaintiff's reputation or property." * * *

The case that seems to have been more relied upon than any other by the learned appellate division in reaching the conclusion that the complaint in this case states a cause of action is Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671. In that case certain persons attempted to erect a statue or bust of a woman no longer living, and one of her relatives commenced an action in equity to restrain such erection, alleging that his feelings and the feelings of other relatives of deceased would be injured thereby. At special term an injunction was granted on that ground. 19 N. Y. Supp. 264. The

general term affirmed the decision. 64 Hun, 594. This court reversed the judgment. * * *

Outside of this jurisdiction the question seems to have been presented in two other cases in this country: Corliss v. E. W. Walker Co. (C. C.) 57 Fed. 434, 64 Fed. 280, 31 L. R. A. 283, and Atkinson v. Doherty, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507. The Corliss Case was an action in equity to restrain the publication of the biography and picture of Mr. Corliss. * * * Both the opinion and the decision necessarily negative the existence of an actionable right of privacy. * * *

This distinction between public and private characters cannot possibly be drawn. On what principle does an author or artist forfeit his right of privacy, and a great orator, a great preacher, or a great advocate retain his? * * *

An examination of the authorities leads us to the conclusion that the so-called "right of privacy" has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided. * * *

The judgment of the appellate division and of the special term should be reversed, and questions certified answered in the negative, without costs, and with leave to the plaintiff to serve an amended complaint within 20 days, also without costs. * * *

GRAY, J. (dissenting). * * * The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. * * *

In the social evolution, with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mold of an earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence if equity were powerless to extend the application of the principles of common law or of natural justice in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social or commercial conditions. * * * Lord Chancellor Cottenham observed in Wallworth v. Holt, 4 Mylne & C. 619:

"I think it is the duty of this court [meaning equity] to adapt its practice and course of proceeding to the existing state of society, and not, by a strict adherence to forms and rules, under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy. * * *"

The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to

their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity. * * *

It seems to me that the principle which is applicable is analogous to that upon which courts of equity have interfered to protect the right of privacy in cases of private writings, or of other unpublished products of the mind. The writer or the lecturer has been protected in his right to a literary property in a letter or a lecture, against its unauthorized publication, because it is property, to which the right of privacy attaches. Woolsey v. Judd, 4 Duer, 399; Gee v. Pritchard, 2 Swanst. 402; Abernethy v. Hutchinson, 3 Law J. Ch. 209; Folsom v. Marsh, 2 Story, 100, Fed. Cas. No. 4,901. * * *

A careful consideration of the question presented upon this appeal leads me to the conclusion that the judgment appealed from should be affirmed.

O'BRIEN, CULLEN, and WERNER, JJ., concur with PARKER, C. J. BARTLETT and HAIGHT, JJ., concur with GRAY, J.[79]

[79] For an expression of the contrary view, that such a right of privacy exists, and should be recognized by the courts as a personal right, apart from any incidental property right, see Pavesich v. New England Life Ins. Co. (1905) 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561, where Cobb, J., speaking for the court, said (the case involved the publication of defendant's picture, without his consent, for advertising purposes): "The question therefore to be determined is whether an individual has a right of privacy which he can enforce, and which the courts will protect against invasion. It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim to a right of privacy, independent of a property or contractual right, or some right of a similar nature, had, up to that time, never been recognized in terms in any decision. The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the lawmaking power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case, 'although there be no precedent, the common law will judge according to the law of nature and the public good.' Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, 'it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.' Broom's Legal Maxims (8th Ed.) 193. * * * The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. * * * The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guarantied to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law. * * * The right of privacy, however, like every other right that rests in the individual, may be waived by

him, or by any one authorized by him, or by any one whom the law empowers to act in his behalf, provided the effect of his waiver will not be such as to bring before the public those matters of a purely private nature which express law or public policy demands shall be kept private. This waiver may be either express or implied, but the existence of the waiver carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver. * * * The most striking illustration of a waiver is where one either seeks or allows himself to be presented as a candidate for public office. He thereby waives any right to restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon his qualifications for the office, or the advisability of imposing upon him the public trust which the office carries. But even in this case the waiver does not extend into those matters and transactions of private life which are wholly foreign, and can throw no light whatever upon the question as to his competency for the office, or the propriety of bestowing it upon him. * * * The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, but also to the well-being of society. The law stamping the unbreakable seal of privacy upon communications between husband and wife, attorney and client, and similar provisions of the law, is a recognition not only of the right of privacy, but that, for the public good, some matters of private concern are not to be made public, even with the consent of those interested. It therefore follows from what has been said that a violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. Civ. Code 1895, § 3807. In an action for an invasion of such right the damages to be recovered are those for which the law authorizes a recovery in torts of that character, and, if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right. The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other. * * * The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such wide scope as has been indicated would impose a very serious limitation upon the right of privacy, but, if it does, it is due to the fact that the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with the free expression of one's sentiments, and the publication of every matter in which the public may be legitimately interested. In many cases the law required the individual to surrender some of his natural and private rights for the benefit of the public, and this is true in reference to some phases of the right of privacy as well as other legal rights. Those to whom the right to speak and write and print is guarantied must not abuse this right, nor must one in whom the right of privacy exists abuse this right. * * * It seems that the first case in this country where the right of privacy was invoked as the foundation for an application to the courts for relief was the unreported case of Manola v. Stevens, which was an application for injunction to the Supreme Court of New York, filed on June 15, 1890. The complainant alleged that while she was playing in the Broadway Theatre, dressed as required by her role, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes, by the defendant, and she prayed that an injunction issue to restrain the use of the photograph. An interlocutory injunction

was granted ex parte. At the time set for a hearing there was no appearance for the defendant, and the injunction was made permanent. See 4 Harv. Law Rev. 195, note 7. The article in this magazine which refers to the case above mentioned appeared in 1890, and was written by Samuel D. Warren and Louis D. Brandeis. In it the authors ably and forcefully maintained the existence of a right of privacy, and the article attracted much attention at the time. It was conceded by the authors that there was no decided case in which the right of privacy was distinctly asserted and recognized, but it was asserted that there were many cases from which it would appear that this right really existed, although the judgment in each case was put upon other grounds when the plaintiff was granted the relief prayed. The cases especially referred to were Yovatt v. Wingard, 1 J. & W. 394 (1820); Abernethy v. Hutchinson, 3 L. J. Ch. 209 (1825); Prince Albert v. Strange, 2 De Gex & Sm. 652 (1849); Tuck v. Priester, 19 Q. B. D. 639 (1887); Pollard v. Phot. Co., 40 Ch. Div. 345 (1888). * * * It must be conceded that the numerous cases decided before 1890 in which equity has interfered to restrain the publication of letters, writings, papers, etc., have all been based either upon the recognition of a right of property, or upon the fact that the publication would be a breach of contract, confidence, or trust. It is well settled that, if any contract or property right or trust relation has been violated, damages are recoverable. There are many cases which sustain such a doctrine. * * * The decision of the Court of Appeals of New York in the Roberson Case gave rise to numerous articles in the different law magazines of high standing in the country—some by the editors and others by contributors. In some the conclusion of the majority of the court was approved, in others the views of the dissenting judges were commended, and in still others the case and similar cases were referred to as apparently establishing that the claim of the majority was correct, but regret was expressed that the necessity was such that the courts could not recognize the right asserted. An editorial in the American Law Review (volume 36, p. 636) said: 'The decision under review shocks and wounds the ordinary sense of justice of mankind. We have heard it alluded to only in terms of regret.' * * * There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guaranties to a person the right to publish his sentiments on any subject. Such conduct is not embraced within the liberty to print, but is a serious invasion of one's right of privacy, and may in many cases, according to the circumstances of the publication and the uses to which it is put, cause damages to flow which are irreparable in their nature. * * * So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability, just as in the present day we stand amazed that Lord Coke should have combated with all the force of his vigorous nature the proposition that the court of chancery had jurisdiction to entertain an application for injunction to restrain the enforcement of a common-law judgment which had been obtained by fraud, and that Lord Hale, with perfect composure of manner and complete satisfaction of soul, imposed the death penalty for witchcraft upon ignorant and harmless women. * * *"

## ELIOT v. JONES et al.

## ELIOT v. CIRCLE PUB. CO. et al.

(Supreme Court of New York, Special Term, New York County, 1910. 66 Misc. Rep. 95, 120 N. Y. Supp. 989.)

Actions by Charles W. Eliot against E. Milton Jones, doing business as the University Library Extension, and by Charles W. Eliot against the Circle Publishing Company and another. On motion for an injunction pendente lite.

NEWBURGER, J. The plaintiff is the president emeritus of Harvard University, and is now editing an edition of books being published by Collier & Son, and known and advertised by them as "The Harvard Classics" and "Dr. Eliot's Five-Foot Shelf of Books," for which plaintiff receives remuneration from Collier, payable from time to time. The plaintiff at no time has given his consent to the use of his name by the defendants. The defendant E. Milton Jones does business under the name of University Library Extension. In the months of November and December, 1909, the defendants caused to be published in several publications in this city an advertisement announcing the sale by them for the price of $14.75 of 10 volumes of books, entitled "Dr. Eliot's Famous Five-Foot Shelf of the World's Greatest Books," and "Dr. Eliot's Five-Foot Shelf," and "Dr. Eliot's Set." The plaintiff claims that the advertisement is published without his consent, and that the defendants had no authority to use plaintiff's name; that the plaintiff's reputation will be injured by the use of his name in connection with the inferior edition advertised by the defendants. The answer of the defendant Jones admits that he is now preparing for publication and sale a series of books, including selections by Dr. Charles W. Eliot, and that they are not published with the consent or authority of Dr. Eliot. The defendant Jones further claims that the advertisements complained of were inserted in the magazines and newspapers without his direction.

The affidavits clearly show that not only had he knowledge of, but supplied the material for, the advertisements. Section 2 of chapter 132, of the Laws of 1903 provides:

**"Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained, may maintain an equitable action in the Supreme Court of this state against the person, firm or corporation, so using his name, portrait or picture, to prevent and restrain the use thereof."**

The Court of Appeals in Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223, 85 N. E. 1097, 34 L. R. A. (N. S.) 1143, 127 Am. St. Rep. 945, has sustained the constitutionality of this act. Mr. Justice Willard Bartlett, in delivering the opinion of the court in that case, said:

**"The statute merely recognizes and enforces the right of a person to control the use of his name or portrait by others, so far as advertising or trade purposes are concerned. This right of control in the person whose name or picture is sought to be used for such purposes is not limited by the statute. The**

requirement of his written consent in order to effectuate a valid transfer of the privilege of thus using his name or portrait is not any more liable to constitutional objection than the requirement of the statute of frauds that an executory contract for the sale of personal property exceeding $50 in price must be made in writing in order to be enforceable."

The Circle Publishing Company has interposed no defense and consents to the issuance of the injunction. Plaintiff has made out such a case as warrants the intervention of a court of equity.

The motion for an injunction pendente lite is therefore granted. Settle order on notice.

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## SECTION 10.—INFRINGEMENT OF STATUTORY MONOPOLY RIGHTS

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### PARK & POLLARD CO. v. KELLERSTRASS et al.

**(Circuit Court of the United States, W. D. Missouri, 1910. 181 Fed. 431.)**

In Equity. Suit by the Park & Pollard Company against Ernest Kellerstrass and the Fidelity Printing Company. On motion for preliminary injunction.

PHILIPS, District Judge. This is a bill in equity praying for a temporary and permanent injunction against the defendants from printing, publishing, advertising, and distributing, either by mail or gift, certain books or pamphlets entitled "The Kellerstrass Way of Raising Poultry." The one marked "Exhibit E" was published in 1909, and the other, "Exhibit F," was published in 1910. The complainant, a corporation, for many years had been engaged in the manufacture and sale of poultry feeds, and poultrymen's supplies, in the state of Massachusetts, and in the study, care, feeding, and raising of poultry, and during the years 1906, 1907, 1908, 1909, and finally in 1910, had issued books designated as "The Park & Pollard Year Book," "Year Book & Almanac," and "The Park & Pollard Company, Boston, Mass.," which had been copyrighted pursuant to law. The bill charges that the defendant Kellerstrass, engaged in the business of raising a like high class of chickens and pursuing methods for their care and cultivation in Jackson County, Mo., had, through the defendant Fidelity Printing Company, caused to be printed for him the book in 1909, "Exhibit E" of the complaint, entitled "The Kellerstrass Way of Raising Poultry," and in 1910 a book or pamphlet with like title, which the defendant Kellerstrass used for exploiting his business and for sale and distribution. The bill charges that said books or pamphlets so printed, published, and distributed by the defendants were and are an invasion and infringement of complainant's said copyright.

The defendant Kellerstrass on the hearing of the application for a temporary injunction presented his affidavit, in effect, admitting that the said book issued in 1909 contained matter constituting an invasion of the complainant's copyright, and that, on discovering the same, he ceased said publication or distribution or use of said book, and has destroyed all the copies thereof remaining undistributed, and that the plates for printing the same had been broken up or recast for other purposes, but denies that the "Exhibit F," printed, published, and distributed and used for the year 1910, in any wise constitutes an invasion or infringement of the complainant's said copyrighted book; and asserts that it is the sole intellectual production of the defendant Kellerstrass based upon his personal experience, observation, and original suggestion. In view, however, of the manifest piracy in his antecedent book of 1909 from the complainant's antecedent production, the conclusion is irresistible that in preparing and constructing his last book of 1910, even if he did not have the complainant's book present before him, its matter, arrangement, and suggestions were present in his mind.

While it is to be conceded to the defendants that there is much more in the book or pamphlet gotten up by them for the year 1910 that in no wise interferes with or appropriates the conceptions and suggestions contained in the complainant's book, yet a comparison of certain parts of the two books in question clearly demonstrates the fact that the author of the defendants' book has in some instances appropriated the language, ipsissimis verbis, of the complainant's book, and in other instances has appropriated the thought and suggestions of the complainant after such a fashion as to leave little doubt that it was imitative, and with studied effort, by transposition and rearrangement, he has sought to conceal the fact of such imitation and appropriation.

While the restraining order can only apply to the portions of the book which constitute piracy or invasion of the complainant's copyright, and should only operate upon the forbidden matter, yet, as what is permissible and what is improper are so interwoven and combined in one and the same book that the defendant without elimination cannot use or employ what is his own without employing and using that which is not, he ought not at this juncture to exact of the court the task of such separation so as to relieve him therefrom. When he shall have made the proper, complete, erasures, he can then be heard as to a modification or restriction of the decree. In view of the statement made by the defendant Kellerstrass in his affidavit, presented on this hearing, that he has abandoned the publication, distribution, or use of the book, "Exhibit E," published in 1909, and that the type and matrices for printing the same have been destroyed, and therefore there is no injury therefrom threatened, the restraining order as to that is refused, but is granted as to "Exhibit F," the book published in the year 1910.

## FROHMAN et al. v. FERRIS.

(Supreme Court of Illinois, 1909. 238 Ill. 430, 87 N. E. 327, 43 L. R. A. [N. S.] 639, 128 Am. St. Rep. 135.)

Error to Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Bill by Charles Frohman and others against Richard Ferris for an injunction and other relief. There was a judgment of the Branch Appellate Court for the First District reversing a decree of the circuit court, and plaintiffs bring error.

For prior report, see 131 Ill. App. 307.

This is an appeal from a judgment of the Appellate Court reversing a decree of the superior court in a proceeding begun in the circuit court by plaintiffs in error for an injunction and other relief against defendant in error.

There is no controversy as to the facts. In 1894 Charles Haddon Chambers and B. C. Stephenson, dramatic authors and playwriters, citizens and residents of London, England, created and invented a dramatic composition entitled "The Fatal Card." Said composition was original with said Chambers and Stephenson, possessed considerable literary merit, and was of substantial value to the authors as a literary product. It was a melodrama in five acts, written in manuscript form, and was never printed. It was with the consent of the authors publicly performed at the Adelphi Theater, London, England, September 6, 1894, by A. and S. Gatti, theatrical managers, who had acquired an interest from the authors in the royalties to be derived from a performance of the play. Plaintiff in error Charles Frohman is a citizen of the United States, and on March 25, 1895, purchased all the right, title, and interest of Stephenson in said melodrama, with the exclusive right to produce and perform it in the United States of America and Canada. The play was never copyrighted in the United States. It was publicly produced under the supervision of Frohman in cities of the United States and Canada and appears to have met with popular favor and to have been a success financially. Afterwards George E. MacFarlane adapted the composition of Chambers and Stephenson, called it by the same name, "The Fatal Card," and transferred it to defendant in error, who caused it to be copyrighted in the United States, and thereafter produced and performed it in various cities of the United States until enjoined from so doing under the bill filed in this case. It is not denied that the master's conclusion that the MacFarlane play is "substantially identical with the play claimed by the complainants" was justified by the evidence.

The bill alleged that at the time Ferris obtained from MacFarlane the pirated copy of "The Fatal Card" he had full knowledge of complainants' rights; that he deceived the public by inducing them to believe that the play produced was the play of said Charles Frohman

and his associates; that he made large profits by the production of said play, to the injury of the complainants, and the bill prayed for an accounting, and that the further production of the play by defendant in error be enjoined. After answer and replication filed, the case was referred to a master in chancery to take the testimony and report his conclusions of law and fact. The master reported that in his opinion complainants failed to establish an exclusive right to produce the play in the United States, and that the prayer of their bill should be denied and the bill dismissed. Objections to this report filed by the complainants were overruled by the master, and the cause was heard by the chancellor on the report of the master and exceptions filed thereto by complainants. A decree was entered disapproving the master's report, and finding that complainants had the exclusive right in the United States to represent and perform, and to allow others to represent and perform, the said melodrama, "The Fatal Card," and to otherwise use and enjoy the same, and it was ordered that the temporary injunction theretofore issued be made perpetual, and that the defendant, Ferris account to the complainants for the profits and royalties received by him through the production of the play. From this decree the defendant prosecuted an appeal to the Appellate Court for the First District, and that court reversed the decree of the superior court and remanded the case, with directions to dismiss the bill. Complainants in said bill have sued out a writ of error from this court to review the judgment of the Appellate Court.

FARMER, J.[80] Plaintiffs in error base their exclusive title and right to perform said play upon what they contend to be their rights under the common law. Defendant in error contends that the public performance of the play in England with the consent of its authors, without causing it to be copyrighted in this country, was, so far as this country is concerned, such an act of dedication to the public as to extinguish the common-law rights of the authors or their assignees in the United States. At common law the author of a literary composition had an absolute property right in his production which he could not be deprived of so long as it remained unpublished, nor could he be compelled to publish it. This right of property exists at common law in all productions of literature, the drama, music, art, etc., and the author may permit the use of his productions by one or more persons to the exclusion of all others and may give a copy of his manuscript to another person without parting with his property in it. Drone on Copyright, p. 101 et seq.

"So, also, without forfeiting his rights, he may communicate his work to the general public, when such communication does not amount to a publication within the meaning of the statute. * * * It may be transmitted by bequest, gift, sale, operation of law, or any mode by which personal property is transferred." Id. 104.

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[80] Parts of the opinion are omitted.

Upon the publication of the production the author's common-law rights ceased, and it became public property unless protected by statute.

To protect the rights of authors in their productions after publication, statutes, in various countries have been enacted. Prior to 1891 an alien could not under the copyright statutes in the United States obtain a copyright upon his production, and the publication by an author in a foreign country by printing his production was held to have the effect of destroying his common-law rights in his production in this country and it became public property here. In March, 1891, Congress passed an act which extended to citizens of foreign countries the privilege of copyright in this country when such foreign countries granted the same privilege to citizens of the United States, and the statute provided that the existence of the conditions that authorized citizens of foreign countries to avail themselves of the privileges of copyright in this country—

**"shall be determined by the President of the United States by proclamation made from time to time, as the purposes of this act may require." Act March 3, 1891, c. 565, § 13, 26 Stat. 1110 (U. S. Comp. St. 1901, c. 3417).**

On July 1, 1891, the President of the United States by proclamation announced that the laws of Great Britain and the British possessions permitted citizens of the United States the benefit of copyright on substantially the same basis as citizens of those countries, and the act of Congress therefore became effective and its benefits available to citizens of Great Britain and the British possessions. Section 4956 of our copyright statute (U. S. Comp. St. 1901, p. 3407) provides that:

**"No person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the Librarian of Congress, or deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book or other article * * * for which he desires a copyright, nor unless he shall also, within ten days from the publication thereof, deliver at the office of the Librarian of Congress, or deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book or other article."**

Even after the taking effect of the act of 1891, an English author could not, after publication of his production in England, secure a copyright in this country, but in order to avail himself of that privilege, it became necessary that simultaneously with his publication and securing a copyright in England he also comply with the copyright statutes in this country. A publication of his production without such compliance with our statutes prevented him from afterwards securing the benefits of our copyright statutes, and rendered the publication public property in this country. There is no provision in our statute for securing to the author of a drama the exclusive right to perform it except where the drama is printed in a book, but the common-law rights apply in such cases, and the author does not lose his rights in the production by public representation. Drone on Copyright, p. 119. * * *

The effect of the English statutes was to substitute, after the first publication, for the common-law right of the author the statutory right to represent or perform his production for the period limited by the statute. The public performance of the play in England had the effect of divesting the authors of their common-law rights, and investing them with the right conferred by the statutes. * * *

It is not disputed that a performance of "The Fatal Card" in England was, by the statute referred to, a publication, and that in that country the author's common-law rights thereupon ceased. Defendant in error contends that, when the authors of the drama surrendered their common-law rights in England for the rights conferred by the statutes, they ceased to have any common-law rights in the production in England or elsewhere. The plaintiffs in error contend that as under our laws the performance of the manuscript drama is not a publication of it, and does not deprive the author of his common-law rights, and, as our statute provides no means for copyrighting a drama unless it is printed and published in a book, our courts in deciding what is such a publication as to divest the author of his common-law rights are not to be governed by what the English statute declares shall constitute a publication thereof. It is not by virtue of any statute that it has been decided the publication of a book, either in this country or in England, is a surrender by the author of his common-law rights and a dedication to the public unless protected by copyright under the statute. The basis of such decisions is that by causing the book to be printed without the protection of the copyright, the author is deemed to have relinquished all rights, both common law and statutory, and to have dedicated his production to the public; and this applies to books published in foreign countries as well as in this country. In the absence of the provision of the English act referred to, that the first public representation or performance of a dramatic piece shall be deemed equivalent, in the construction of that act, to the first publication of a book, it could not be claimed that the performance of "The Fatal Card" in England was a publication any more than would its performance in this country, while it remained unprinted, be deemed a publication. The object of copyright statutes is to protect the authors' rights to their own productions. There is no international copyright law or agreement between this country and England providing for the copyrighting of manuscript dramas, and we have seen "The Fatal Card" could not have been copyrighted in this country without printing. * * *

It would seem, therefore, that there is a logical distinction to be observed in dealing with the effect upon the authors' rights of the public performance of an unprinted drama and the publication of a printed book. It is not contended that the English statute has any extraterritorial effect, but, as we have said, the contention is that, as under the English statute a performance of the drama was made a publication of it so that the authors' common-law rights ceased and

their statutory rights attached in that country, it necessarily follows that the authors and their assignees can claim no common-law right in this country. * * *

If "The Fatal Card" had been first performed in this country, the English courts would have treated it as a dedication to the public and to have had the effect of divesting the author of any rights whatever, under the laws of England, to its exclusive production.

As the English decisions appear to be based upon provisions of the statute referred to,* and there is no such statute in this country, we are of opinion they are not decisive of the question here involved, and this view is sustained, we think, by the cases first above cited.* The view of the Appellate Court was that in Crowe v. Aiken [2 Biss. 208, Fed. Cas. No. 3,441] supra, the learned chancellor did not have in mind the construction of the English statute adopted by the courts in the decisions we have cited. Crowe v. Aiken was decided in 1870 and Boucicault v. Chatterton [5 L. R. Ch. Div. 267] was not decided until 1876, but Boucicault v. Delafield [1 H. & M. 597] was decided in 1863, and Judge Drummond said in Crowe v. Aiken:

**"I understand that it has been decided in England that the public performance, even in a foreign country, of the play of which an English subject is the author, defeats his claim to the copyright under the British statutes."**

From this expression it would seem clear that the author of the opinion was familiar with the doctrine announced in the Delafield Case, so that the opinion in that respect could not have been based upon any misapprehension. To our minds it is squarely in point and its reasoning sound. Besides, it is in harmony with sound principles of justice, and we are disposed to follow it rather than adopt the rule that we are bound by the decisions of the English courts made under their statute.

The judgment of the Appellate Court will therefore be reversed, and the decree of the superior court affirmed.

Judgment reversed.

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## REECE FOLDING MACH. CO. v. EARL & WILSON.

**(District Court of the United States, N. D. New York, 1913. 205 Fed. 539.)**

In Equity. Suit by the Reece Folding Machine Company against Earl & Wilson, a corporation. On demurrer to bill of complaint, which seeks to restrain by injunction the defendant from violating the terms and conditions of two certain leases and licenses for the use of certain patented folding machines.

RAY, District Judge. The complainant, Reece Folding Machine Company, is a corporation of the state of Massachusetts engaged in the business of manufacturing and leasing automatic machines for in-

*Referred to in the omitted portion.

folding edges of cloth blanks for collars, cuffs, and shirt bosoms. The defendant, Earl & Wilson, is a corporation of the state of New York, engaged in the manufacture and sale of collars, cuffs, and shirts in the city of Troy, N. Y.

Prior to March 12, 1910, the Reece Folding Machine Company had secured United States letters patent for 30 or more alleged inventions relating to automatic machines for infolding cloth blanks for collars, cuffs, and shirt bosoms. March 12, 1910, the Reece Company entered into a lease, license, and agreement whereby it leased and licensed to the Earl & Wilson Company 31 specific collar band machines, and on the 7th day of April, 1910, the said Reece Company entered into another lease and license agreement whereby it leased and licensed to said Earl & Wilson 16 specified collar top machines. Each of these leases specifies by number all the patents relating to this art owned by the Reece Company, and each specifies by number the machines leased thereby. The lessor specifically agrees to keep and perform all the conditions of the lease and license, and specifies the consideration to be paid as rent for the machines, which consideration to be paid is measured by the work done on each machine. The third clause or subdivision of each of these leases or license agreements provides as follows:

"(3) The lessee shall not in any way violate or infringe or contest the validity of any of the patents under which he is hereby licensed, or the sufficiency of their specifications, or the validity of the title of the lessor to the said patents or any of them."

By subdivision 8 it is provided that in case the lessee shall cease to do business, or shall desire to terminate the lease and license, the lessor will cancel same on surrender of the machines in good condition. By paragraph 7 of such lease or agreement it is provided that the machines are to remain the sole and exclusive property of the lessor and that—

"If the lessee at any time refuses or neglects to perform or violates any of the conditions or covenants of this or any other lease or license now or hereafter existing between the parties hereto, the lessor shall have the right to terminate this and any and all other leases and licenses then existing between the parties hereto by giving written notice that it has elected so to do," etc.

These leased machines were delivered to Earl & Wilson, which corporation has used them ever since and is now using them. The defendant has paid the consideration. After the execution of these leases the defendant corporation, Earl & Wilson, caused to be constructed a machine for the infolding of collars, cuffs, etc., for which it obtained United States letters patent, and the defendant has constructed at least 21 of these machines and is now using them in its factory at Troy, N. Y., side by side with the said leased machines, and has thereby not only largely extended and increased its business, but has made it unnecessary, as incidental to this increase of business, to lease more machines of the complainant's manufacture.

The complainant alleges that these machines so constructed by the

defendant and put in its factory at Troy, N. Y., infringe at least eight of its patents above referred to and specified in the said leases and license agreements, and that the complainant by reason of said infringement is greatly damaged and injured, and in appropriate language that defendant threatens to continue such violation of the aforesaid license agreements, and that it has and will suffer large damages and injury and large losses of profits and royalties, and that such violations of such leases or license agreements will occasion irreparable damage to the complainant and its business by the example and encouragement set to other lessees to violate their leases and to other manufacturers to infringe the said patents, and that such damages would be incapable of adequate measurement, and that unless the said violations of the said leases and licenses by such infringements of the patents is enjoined by the court the complainant will suffer great and interminable injury, and be put to the expense and trouble of a multiplicity of successive and numerous suits at law for recovery from the said defendant of the damages occasioned by the unlawful acts alleged. In short, the complainant alleges a violation of these leases and license agreements by infringement of the patents and the use of an infringing machine made by the defendant, and also alleges as a ground for injunctive relief that such relief is necessary to prevent a resort to a great number or multiplicity of actions at law, and also that the damages sustained are and will be incapable of adequate measurement.

To this bill of complaint the defendant interposes a demurrer on the grounds: (1) That the facts stated do not show such a cause of action as entitles the complainant to injunctive relief; and (2) that it appears on the complainant's own showing that it has full, complete, and adequate remedy at law.

It goes without saying that if the complaint shows on its face that a multiplicity of actions will be unnecessary, and that the complainant has full, complete, and adequate remedy at law for the injuries complained of, the action cannot be sustained as one in equity for injunctive relief. Nothing is better settled than that contracts will not be enforced by injunction when the injured party has full, complete, and adequate remedy at law for the breach thereof.

To make out a cause of action, the complainant will be compelled to prove that the defendant has violated subdivision 3 of these leases by infringing one or more of the patents specified therein. By the terms of these leases or license agreements, same are to run during the life of all the patents, to wit, for the term of 17 years.

Whether the defendant infringes one or more of the complainant's patents specified in the lease, it has the right at any time to end the lease and agreement by returning the machines to the Boston office of complainant in good condition, on payment of all sums earned by such machines up to that time, on giving the notice required. If the defend-

ant infringes one or more of these patents, the complainant may bring and maintain an action at law to recover damages for such infringement, or the complainant may bring an action in equity for an injunction restraining such infringement, and as incidental thereto ask and have an accounting for damages and profits.

Under clause 3 of these leases or license agreements Earl & Wilson assumed no greater obligation to the complainant than they were already under in so far as infringement of the patents is concerned. License or no license, agreement or no agreement, the law imposes upon Earl & Wilson the obligation not to infringe either of the patents mentioned. Clause 3 goes further than this, and binds Earl & Wilson not to contest the validity of either of said patents, or the sufficiency of their specifications, or the validity of the title of the Reece Company thereto. There is no charge in the bill of complaint in this suit that any action or suit has been brought for infringement of either of said patents, and that the defendant is violating the agreement by contesting the validity of either of said patents or the sufficiency of their specifications or the validity of the lessor's title thereto. The lessor seeks in this action to restrain the lessee from violating a negative covenant that he will not infringe certain patents under and in accordance with which the complainant has made certain machines, which machines have been leased to the defendant, the licensee, and which licensee is now using them under and pursuant to the lease or license.

If this suit can be maintained, and if clause 3 is binding, then on the trial, when it appears, if it does appear, that the defendant is infringing either of said patents under which it has licensed the defendant, the defendant will be precluded from contesting the validity of such patent, or the sufficiency of the specifications thereof, or the title of the lessor of such patent.

The demurrer admits the infringement of eight United States letters patent, which defendant has agreed not to infringe and the validity of which it has agreed not to contest. The consideration was a license to use the machines made under these patents and which license is in force, and the defendant is using the machines under the license. Why is not this a case for injunctive relief? Infringement is conceded. The letters patent are presumed to be valid in the first place, and defendant, so long as it operates under the licenses, has agreed not to contest the validity of the patents or the sufficiency of the specifications. Must the complainant be driven to eight separate actions to restrain these infringements, or may it be done in one action? It is true that ordinarily courts will not interfere by injunction to enforce contracts. But there are many cases where this is done, and should be done. In General Electric Company v. Westinghouse Electric Company (C. C.) 151 Fed. 664, this court considered this subject, with the aid of most able counsel on each side, and I cannot add anything of

value to the discussion there presented. I think the court has power to grant injunctive relief in such a case as this, if the proofs sustain the allegations.

The demurrer is overruled, but defendant may answer in 30 days.

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## KRYPTOK CO. v. STEAD LENS CO.

**(Circuit Court of Appeals of the United States, Eighth District, 1911. 190 Fed. 767, 111 C. C. A. 495, 39 L. R. A. [N. S.] 1.)**

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Bill by the Kryptok Company against the Stead Lens Company for infringement of patent. From an order enjoining complainant from bringing other suits for infringement of patents, complainant appeals.

SANBORN, Circuit Judge. On June 11, 1909, Kryptok Company, a corporation, exhibited a bill in the court below at Kansas City, in the state of Missouri, against Stead Lens Company, another corporation, for infringement of letters patent Nos. 637,444 and 876,933, on improvements in bifocal lenses, and prayed for an injunction and an accounting of gains and profits and for damages. On September 9, 1909, the Stead Company answered, and denied the validity of the patents and its alleged infringement of them. On April 19, 1910, Kryptok Company closed its evidence in chief, and any delay thereafter in the proceedings in the case seems to have been attributable to the Stead Company. That company was a manufacturer of bifocal lenses alleged to infringe the patents, and Haussman & Co., a corporation of Pennsylvania, was one of their customers, that bought the lenses of the Stead Company at wholesale and sold them at retail. In November, 1910, about 17 months after it instituted its suit against the Stead Company, and about 7 months after it closed its evidence in chief in that suit, Kryptok Company brought a suit, in Philadelphia, against Haussman & Co. for infringement of the patents. Thereupon the Stead Company filed a petition and affidavits in the suit in Kansas City, and prayed that the Kryptok Company be enjoined from prosecuting its suit against Haussman & Co., and from beginning any other suits against others who were purchasing bifocal lenses of the Stead Company; and upon this petition, these affidavits, and counteraffidavits presented by Kryptok Company, the court below entered an order whereby it enjoined Kryptok Company from proceeding farther with its suit against Haussman & Co. and from commencing any suits for infringement of its patents against any of the purchasers of bifocal lenses of Stead Company until the final decree should be rendered in the suit of the Kryptok Company against the Stead Company. From this order the Kryptok Company has appealed to this court.

The grant of a preliminary injunction rests in the discretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial

discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence; and where the court has not departed from them its injunctional orders may not be reversed without clear proof of an abuse of its discretion.

Established principles of equity jurisprudence are (1) that one may not be enjoined from doing lawful acts to protect and enforce his rights of property or of person, unless his acts to that effect are clearly shown to be done unnecessarily, not for the purpose of preserving and enforcing his rights, but maliciously to vex, annoy, and injure another; and (2) that where the injury to the applicant if the preliminary injunction is refused will probably be greater than the injury to the opponent if it is granted it should be issued, while if the contrary is the probable result the application for it should be denied. Russell v. Farley, 105 U. S. 433, 438, 26 L. Ed. 1060; Shubert v. Woodward, 92 C. C. A. 509, 522, 167 Fed. 47, 60; Blount v. Société Anonyme Du Filtre, 53 Fed. 98, 101, 3 C. C. A. 455, 458.

The Stead Company by its petition based its application for this injunction upon two grounds, upon the proposition of law that in this suit against it Kryptok Company could procure all the relief it was entitled to obtain for the infringement of its patents by the Stead Company and by Haussman & Co. and the other customers of Stead Company who bought the infringing article of it at wholesale and sold it at retail, and upon the averment of the fact that the Kryptok Company had brought the suit against Haussman & Co. and threatened to bring like suits against three other customers of the Stead Company, and had notified and were notifying its customers that they were infringing its patents, and had threatened and were threatening its customers with like suits for infringement, not for the purpose of protecting and enforcing its rights under its patents, but for the sole purpose of vexing and annoying the Stead Company, which was morally bound to defend the suits against its customers, and of maliciously injuring its business. The proposition of law whch the Stead Company relied upon was an error of law. There was no denial that the patents were issued and from their issue the legal presumption arose that they were valid. While infringement was denied, the legal right to sue and to prosecute suits for infringement to a hearing must be admitted in the consideration of this injunction, because thus only could that issue ever be tried or determined. Kryptok Company therefore had the legal right to sue Haussman & Co. and every other purchaser and retailer from Stead Company of the infringing lenses, and if it proved their infringement it had the right to an injunction forbidding each of them from selling or using any of the lenses, and to a recovery of the gains and profits each of them had made by purchasing and selling them, and to the damages it had sustained by their infringement. It is always difficult to prove the gains and profits an infringer obtains, and the damages suffered by the owner of a patent from the sales of the infringing article are equally difficult to prove, so that the most valuable relief to which

he is entitled in equity is the injunction against further infringement. Such an injunction against the retailers Kryptok Company could not secure in its suit against Stead Company. It might in that suit recover the gains and profits Stead Company had acquired by its manufacture and sale to its customers of the infringing lenses and the damage Stead Company had inflicted thereby, but it could not in that suit recover the gains and profits the purchasers from Stead Company had made nor the damages their infringements had inflicted. The owner of a patent cannot recover, in a suit against a manufacturer of an infringing article which he sells to retailers, the full relief to which he is entitled in suits against the retailers, and a decree for an injunction and damages against a manufacturer is no bar to suits against those who purchase from the manufacturer and use or sell to others. Birdsell v. Shaliol, 112 U. S. 485, 488, 5 Sup. Ct. 244, 28 L. Ed. 768. The proposition of law, therefore, on which the petition for this injunction is based must fall.

The evidence fairly established these facts: Kryptok Company in October, 1910, more than 11 months after it sued Stead Company and more than 5 months after it closed its evidence in chief, notified Stead Company that it would sue four of the purchasers from it if it did not stop its alleged infringement, and in November, 1910, it sued one of them. But it had the legal right to sue them, and to endeavor by such suits to obtain an injunction to stop their alleged continuing trespass upon its rights. It notified many of the customers of the Stead Company that the lenses they were buying of that company were infringements of its patents, and that if they did not cease dealing in them it would sue them for infringement. But there was danger that if knowing of their infringement, it failed to give these notices, it might thereby lose its right to recover the gains and profits they made anterior to the filing of its bills against them. Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 41, 104 C. C. A. 475, 481, 32 L. R. A. (N. S.) 274, and cases there cited.

The result is that all the acts of Kryptok Company were justified by the law, were well calculated to and tended to preserve and enforce its legal rights under its patents, and these acts fail to convince that they were not done for that purpose, or that they were done unnecessarily and maliciously, for the sole purpose of annoying and vexing Stead Company and injuring their business.

Finally, it is a good defense to an application for a preliminary injunction that the wrong and injury likely to be inflicted upon the opponents of the application by its issue are greater than those which the applicant is likely to suffer from its denial. The only loss which Stead Company would probably have sustained by the prosecution of the suit against Haussman & Co. and the commencement of the threatened suits against three of its other customers, if the injunction had been denied, would have been the cost of defending those suits, which cost, it alleges, it was morally, but not legally, bound to pay. The loss which

Kryptok Company will probably sustain from the issue and continuance of the injunction, if its bills are well founded, will be the postponement of its injunction against the infringement by these customers of its patents for several years, and the loss of those gains and profits made by those customers which it is unable eventually to prove. The evidence is not convincing that the probable loss of the Stead Company from the denial is greater than that of the Kryptok Company from the granting of the injunction.

No case has been cited that sustains an injunction of the character here in question under a similar state of facts. In Acetylene Co. v. Avery Portable Co. (C. C.) 152 Fed. 642, upon which counsel for the Stead Company seem to rely, the suit against the manufacturer was instituted on July 24, 1906, and within three months the complainant had brought ten suits against purchasers from the defendant and threatened more. Perhaps those facts indicated a purpose unnecessarily and maliciously to annoy the defendant and injure its business. But, even so, the court granted an injunction against the commencement of more such suits only, and refused to enjoin the prosecution of the ten that had already been commenced. There is a wide difference between a case in which 10 suits against customers of the defendant are brought within 3 months after the bill against a manufacturer is filed, and probably before the complainant had made his prima facie case, and one in which no such suit is instituted until 17 months after the bill is filed and more than 6 months after the complainant has closed its case in chief.

Because the proposition of law upon which Stead Company founded its petition for the injunction was an error, because the evidence in the petition and affidavits fail to show that Kryptok Company's notices to the customers of Stead Company of their infringement and of coming suits were given, that they commenced the suit against Haussman & Co., or that their threats to sue three other customers of Stead Company were made unnecessarily and maliciously, for the sole purpose of vexing and annoying Stead Company and injuring their business, and because it does not appear that the injury to Stead Company by refusing the injunction would probably be greater than to the Kryptok Company by granting it, the order below must be reversed.

And it is so ordered.

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## NEW FICTION PUB. CO. v. STAR CO.

(District Court of United States, S. D. New York, 1915. 220 Fed. 994.)

In Equity. Suit by the New Fiction Publishing Company against the Star Company. On motion to dismiss bill.

MAYER, District Judge. The defendant has moved under equity rule 29 to dismiss the bill of complaint, upon the ground that upon the face of the bill no cause of action against defendant is disclosed, and

that the court is without jurisdiction to entertain the suit. The parties are New York corporations, with their places of business in the borough of Manhattan, city of New York.

The sole question is whether plaintiff is the assignee of or merely the licensee under a copyright, and, as this question is said to be important, a full statement of the facts as disclosed on the face of the bill seems to be desirable. On July 9, 1913, one Edward Goodman, being the author and proprietor of an unpublished drama entitled "En Deshabille," copyrighted it as provided by the Copyright Act. Before copies of the drama were produced for sale, Goodman entered into an arrangement with plaintiff whereby, as plaintiff claims, he assigned to plaintiff the "serial rights" in and to the drama. Plaintiff paid Goodman $50 by check, and Goodman indorsed the check. The check, with its indorsement, is the evidence upon which plaintiff relies in asserting an assignment, and is as follows:

"No. 697. New York, Dec. 5, 1913.

"The Mutual Bank, 49–51 West 33d Street: Pay to the order of Edward Goodman ($50^{00}/_{100}$) fifty & $^{00}/_{100}$ dollars.

"The New Fiction Publishing Company,
"W. M. Clayton, President."

On the margin of said check:

"The New Fiction Publishing Co., 16 East 33d St., New York."

Indorsed:

"For all serial rights to one act play, En Deshabille. For deposit. Edward Goodman.

"Indorsement correct. The Fifth Avenue Bank of N. Y.

"Received payment through New York Clearing House, Dec. 6, 1913. Addition The Fifth Avenue Bank of New York."

The words "serial rights" have, as plaintiff alleges (and this allegation must be accepted for the purposes of this motion), a definite meaning among publishers, and are understood to comprehend all publishing rights, including magazine and newspaper publishing rights, and excepting only book, dramatic, and moving picture scenario rights.

Prior to the transfer of the "serial rights," viz., about September 16, 1913, Goodman sold to the Managers' Producing Company the right to perform the play on the stage, and thereafter this Managers' Producing Company gave performances at various theaters in the United States and Canada, and, because of the interest aroused by the play, the right to print and publish the drama in a magazine became of value.

Plaintiff is the proprietor of a monthly magazine called "Snappy Stories," and as "En Deshabille" could be readily printed in one issue, it was so printed in the March, 1914, issue. Before that, however, namely, on Sunday, January 18, 1914, and without the consent of Goodman or plaintiff, substantial parts of Goodman's play were published in the New York American, a newspaper owned by defendant.

The allegation is that this publication in the New York American satisfied the public desire to read the play and thereby diminish the

sales and profits of plaintiff's magazine. The relief asked for is that prescribed by section 25 of the Copyright Act in cases of infringement, as follows:

"(1) For an injunction restraining the infringement; (2) for destruction of infringing prints and matrices; (3) for an accounting and payment of all profits ensuing from the sale of the copyrighted material; and (4) for a penalty of $1.00 for each and every infringing copy made or sold by or now in the possession of defendant and the defendant is required to make discovery of the number of such copies made or sold by it and now in its possession."

It is asserted that the March, 1914, issue of "Snappy Stories" was duly copyrighted in February, 1914; but that fact is of no consequence and adds nothing to plaintiff's case, in view of the previous copyright of Goodman.

At the outset, it may be well to clear away some misapprehensions. If the transaction described constitutes an assignment of the copyright, it was not necessary for the purposes of this cause of action that the assignment should be recorded as provided in section 44 of the act. That section protects subsequent purchasers or mortgagees for value, and is akin in principle to the filing or recording acts, which relate to bills of sale or chattel mortgages. As against infringers, an assignee would have a cause of action, irrespective of the recording provisions of the act.

Further, the check transaction, although informal, clearly shows the intention of Goodman to sell to plaintiff all rights to publish in magazines and newspapers.

So that the sole question, as indicated supra, is whether plaintiff is an assignee or licensee. When Goodman obtained his copyright, he acquired the exclusive rights conferred by section 1 of the act, and also the right to assign permitted by section 42. Under the act but one assignment is necessary for absolute protection. Less than an assignment of the entire copyright cannot carry the causes of action (if the right is invaded) which the act accords to the owner or assignee. Mr. Bowker in "Copyright, Its History and Its Law" (Edition 1912) at page 49, aptly states the proposition:

"In respect to the right to limit the use of his work under his sale, gift, loan, grant, lease, etc., for a special purpose, or at a special price, or for a special time, or in a special locality, or to a special person, these powers of limitation, though implied in the grant of copyright, are dependent for their enforcement rather upon the law of contracts than upon copyright law. There can be no such thing as a copyright for a special purpose, or for a special locality, or under other special conditions, for there can be only one copyright, and that a general copyright, in any one work. But specific contracts can be made, enforceable under the law of contracts, as for the sale of a copyrighted book within a certain territory, provided such contracts or limitations are not contrary to other laws. Although record of assignment in the Copyright Office is provided for by the law only for the copyright in general, the separate estates, as a right to publish in a periodical and the right to publish as a book, may be sold and assigned separately, and the special assignment recorded in the Copyright Office, though this does not convey a right to substitute in the copyright notice a name other than that of the recorded proprietor of the general copyright, which can only be changed as specifically provided in the law under recorded assignment of the entire copyright."

That Goodman transferred or licensed to plaintiff only a special or limited right is made especially clear by the fact that he sold the dramatic rights to some one else, and this, obviously, he could not have done, had he divested himself of his copyright by assignment. It must be remembered throughout that the remedies here sought are statutory creations. They have been made drastic to protect authors against wrongful invasions, but they were not intended to be cumulative, so as to subject a defendant to more than one recovery for the redress of one wrong.

Under section 25 of the act, which enumerates the remedies, an infringer, among other things, "shall be liable * * * to pay to the *copyright proprietor* such damages as the *copyright proprietor* may have suffered due to infringement." Yet, if plaintiff's theory were right, the anomalous result would follow that not only plaintiff, but every other licensee of plaintiff, could severally sue the defendant, and each obtain a separate judgment for one and the same violation of a copyright which no one of them owned, but in respect of which each had only certain special or limited rights.

It is urged, however, that under section 3 of the act the right here claimed is distinctly conferred. That section is as follows:

"Sec. 3. That the copyright provided by this act shall protect all the *copyrightable component parts* of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof *all the rights* in respect thereto which he would have if each part were *individually copyrighted* under this act."

Without intending to construe this section further than necessary for the purposes of this case, it is clear that "component parts" does not mean subdivision of rights, licenses, or privileges, but refers to the separate chapters, subdivisions, acts, and the like of which most works are composed.

Finally, it is said that if the owner of rights such as in the case at bar cannot sue under the act, but is remitted to an appropriate action because of the invasion of its contract rights obtained from the author, then that a valuable protection will be lost to the author as the result of the diminished protection to his transferee. I think I fully appreciate the new situations which the enlarged use of copyrighted works has developed commercially. The motion picture scenario, the daily short story in the newspaper, the growing vogue of the concise one-act play and of the short-story magazine, have all been developments towards specialization, which doubtless render particular rights of increasing importance; but if the statute has not met these new developments, and in this regard I do not express any opinion, the time-worn answer of the courts is that the subject-matter then becomes one for legislative consideration.

An examination of many reported cases fails to disclose a disposition of the precise question at bar, but it may be helpful to refer to

Jude's "Liedertafel" Case, L. R. (1907) 1 Ch. 651; Empire City Amusement Co. v. Wilton (C. C.) 134 Fed. 133.

As the suit cannot be maintained under the Copyright Act, and as diversity of citizenship is lacking, the motion to dismiss the bill is granted, with costs.

NOTE.—It will be understood that I am not passing on the question which would be presented if Goodman were a party plaintiff.

## SECTION 11.—LIBEL

### NEW YORK JUVENILE GUARDIAN SOCIETY v. ROOSEVELT et al.

(Court of Common Pleas of New York, 1877. 7 Daly, 188.)

Motion to vacate an injunction. The facts are fully stated in the opinion.

CHARLES P. DALY, C. J.[81] At the close of the argument in this case, I expressed my conviction that the injunction which has been granted, could not be sustained, and stated orally my conclusions upon the other questions discussed, and gave my reasons. But as the plaintiff desired that the authorities cited might be carefully examined by him, as well as by the court, and that he might submit a further brief in the case, liberty was given him to do so. His further brief has been submitted and considered, the various authorities cited have been read by me, and the result of the examination is that I have but to reiterate in a more deliberate form the views and conclusions previously expressed.

It was decided in Brandreth v. Lance, 8 Paige, 24, 34 Am. Dec. 368, that a court of equity has no jurisdiction to restrain the publication of a pamphlet or literary work upon the ground that its publication would be libellous, and the reason given by the chancellor was, that to assume jurisdiction in such a case or in any other case of a like nature, would be infringing upon the liberty of the press, and attempting to exercise a power of preventive justice, which the Legislature has decided cannot be intrusted to any tribunal consistently with the principles of a free government. The cases of The Springhead S. Co. v. Riley, L. R. 6 Eq. Cas. 561, and Dixon v. Holden, L. R. 7 Eq. Cas. 488, are English cases; and if they went as far as is claimed, they would be no authority in this State for disregarding the decision of Chancellor Walworth in the case above cited. In the last of these cases (Dixon v. Holden), Vice-Chancellor Malins undertook to qualify

[81] Part of the opinion is omitted.

the well-settled rule in England, that a court of equity would not restrain by injunction the publication of a libel, by holding that it would restrain it, if the effect of the publication would, in addition to its libellous character be injurious to property.

The propriety of any such qualification was questioned by Vice-Chancellor Wickens in the subsequent case of Mulkern v. Ward, L. R. 13 Eq. Cas. 619, and was expressly overruled afterwards in The Prudential Assurance Co. v. Knott, L. R. 10 Ch. App. 142, showing that the law in England, in this respect, is substantially the same as in this State.

What is averred in the complaint, in the present case, is, that the defendants, as members or visitors of the State Board of Charities, claim the power and right to publish, or authorize to be published, the proceedings before them in their inspection, and examination, under the statute, of the affairs and conduct of the New York Juvenile Guardian Society and its officers, which examinations, it is averred, are secret and ex parte; from which the society or its officer or employé of the society could be before the defendants at any one time, and in which they exclude the society from being present by counsel, and deny their right to cross-examine the witnesses, or to produce testimony on its own behalf, or to know, except from the publication of the proceedings, what charges were made against the society or its officers; and that the publication referred to, consists of evidence, some of which is taken in the form of affidavits, and some in the form of verbal and unsworn statements, charging the society and its officers with mismanagement of its direction and affairs; the perversion or waste of the contributions or donations received by it; the abuse of its power, or perversion of its corporate purposes and duties; and it is further averred that the testimony of the officers and employés of the society is essentially suppressed or garbled and perverted in the publication of it; whereas, if truly reported, it would have justified the work and conduct of the society; and that the accounts of the proceedings, as published so far as it reflects upon the society or its officers, is untrue, defamatory and libellous.

It appears from the affidavits that the investigations conducted by the defendants have been attended by reporters of the public press, and that the publications which have appeared, are of such proceedings as were taken down by the reporters and published in the respective newspapers by the proprietors of which the reporters were employed.

Conceding that this is done with the authority and assent of the defendants, and that the matter thus published is defamatory and libellous, as averred, the publication cannot be restrained by a court of equity; and those injured by such publications, if they are libellous, must seek their remedy by a civil action, or by an indictment in the criminal courts; there being no authority, in this court, as a court of equity, to restrain any such publication; the exercise of any such

jurisdiction being repugnant to the provision of the Constitution, which declares (article 1, § 8) that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and that no law shall be passed to restrain or abridge the liberty of speech or of the press.

This applies to the temporary injunction that has been granted, which is, that the defendants be restrained from publishing any false, defamatory or libellous statements concerning the society or its officers; as well as to the more extensive relief that is asked upon the present motion, which is, that the publication of the proceedings that have taken place upon the investigation, be restrained as defamatory and libellous. The plaintiffs also ask that the defendants be enjoined from carrying on any such investigation; or if that is denied, that they be restrained from conducting it, except in the manner pointed out in the complaint. * * *

Injunction vacated.

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## BOSTON DIATITE CO. v. FLORENCE MFG. CO.

(Supreme Judicial Court of Massachusetts, 1873. 114 Mass. 69, 19 Am. Rep. 310.)

Bill in equity against the Florence Manufacturing Company, Isaac S. Parsons, George A. Burr and George A. Scott, alleging that the plaintiff corporation was and for three years had been engaged in the manufacture of sundry articles, among which were toilet mirrors, made from a composition, invented and patented by one Merrick, which was capable of being moulded by heat and pressure into various shapes, and that they had applied to this material the trade-mark "Diatite," by which it was generally known; that the defendant corporation was engaged in the manufacture of toilet mirrors from another material capable of being moulded and pressed, upon which there were no letters patent; that the defendant Parsons was the president, the defendant Burr the treasurer, and the defendant Scott the agent of the defendant corporation; that Parsons, Burr and Scott, acting as such officers and in the name of the corporation, falsely, fraudulently and maliciously, and for the purpose of injuring the plaintiff and diverting its trade, represented to the plaintiff's customers that the articles manufactured by the plaintiff under its letters patent were manufactured in infringement of letters patent owned by the defendant corporation, and that the defendant corporation was prosecuting a suit against the plaintiff corporation for such infringement. The bill then set forth specific instances in which persons, in the bill named, who intended to make purchases of the plaintiff, had been deterred therefrom by oral and written representations, of the pur-

port above set forth, made to them by the defendants, and had been induced to purchase of the defendant corporation.

The bill prayed that the defendants might be enjoined from making such representations, and that the defendant corporation might be decreed to account for the profits of its sales made by reason of such false representations.

The defendants demurred, because the plaintiff had not stated a case which entitled it to the relief prayed for.

GRAY, C. J. The jurisdiction of a Court of Chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. Huggonson's Case, 2 Atk. 469, 488; Gee v. Pritchard, 2 Swanst. 402, 413; Seeley v. Fisher, 11 Sim. 581, 583; Fleming v. Newton, 1 H. L. Cas. 363, 371, 376; Emperor of Austria v. Day, 3 De G., F. & J. 217, 238–241; Mulkern v. Ward, L. R. 13 Eq. 619. The opinions of Vice-Chancellor Malins in Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, in Dixon v. Holden, L. R. 7 Eq. 488, and in Rollins v. Hinks, L. R. 13 Eq. 355, appear to us to be so inconsistent with these authorities and with well settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported.

The jurisdiction to restrain the use of a name or a trade-mark, or the publication of letters, rests upon the ground of the plaintiff's property in his name, trade-mark or letters, and of the defendant's unlawful use thereof. Routh v. Webster, 10 Beav. 561; Leather Cloth Co. v. American Leather Cloth Co., 4 De G., J. & S. 137, and 11 H. L. Cas. 523; Maxwell v. Hogg, L. R. 2 Ch. 307, 310, 313; Gee v. Pritchard, 2 Swanst. 402.

The present bill alleges no trust or contract between the parties, and no use by the defendants of the plaintiff's name; but only that the defendants made false and fraudulent representations, oral and written, that the articles manufactured by the plaintiff were infringements of letters patent of the defendant corporation, and that the plaintiff had been sued by the defendant corporation therefor; and that the defendants further threatened divers persons with suits for selling the plaintiff's goods, upon the false and fraudulent pretence that they infringed upon the patent of the defendant corporation. If the plaintiff has any remedy, it is by action at law. Barley v. Walford, 9 Q. B. 197; Wren v. Weild, L. R. 4 Q. B. 730.

Demurrer sustained and bill dismissed.

## BONNARD v. PERRYMAN.

(Chancery Division, Court of Appeal. [1891] 2 Ch. 269.)

This was an action for libel. The plaintiffs were Gustave Richard Bonnard and Arthur Henry Deakin, trading as the Mercantile and General Trust at Broad Street Avenue. The defendants were, Charles W. Perryman, the publisher, proprietor, and editor of a weekly newspaper called the Financial Observer and Mining Herald, and Clement Allen, sued as the printer of that newspaper. Both defendants swore that the defendant Allen was not the printer, and that the defendant Perryman was; but there was evidence which satisfied the court that the defendant Allen had, in fact, printed the numbers of the paper referred to below.

The writ was indorsed with a claim for an injunction to restrain the defendants—

"from selling, circulating, or delivering, or communicating to any person or persons, any copy of the Financial Observer and Mining Herald of the 7th of February, 1891, containing an article headed 'The Fletcher Mills of Providence, Rhode Island,' or of the said article, and from printing or publishing in the said newspaper, or otherwise, any statement imputing to the plaintiffs, or either of them, fraudulent or dishonest conduct in connection with the promotion or floating of Sykes Brewery or the City of Baltimore United Breweries, or the promotion of the proposed Providence and National Worsted Mills, Limited, or imputing or suggesting that the plaintiffs, or either of them, have or has bribed, suborned, or conspired with the proprietors or editors of the Financial News, or any other newspaper proprietor or other person, or that they or either of them have or has been guilty of stealing or other dishonest conduct.

"£5000 damages for libel."

A motion was now made on behalf of the plaintiffs for an interim injunction, till trial, substantially in the terms of the claim for an injunction indorsed on the writ. * * *

1891. Mar. 3. NORTH, J.[82] * * * The defendant says nothing ought to be done now: that the question is one that ought to be tried by a jury, and that he has a right to have it tried by a jury, which is a far better tribunal than any judge can be. And so far as that goes I quite agree that a jury is the proper tribunal to decide whether this is or is not the libel it is alleged to be. But the difficulty is this, that I have to consider now whether the publication of this article should or should not be continued in the meantime, and that, inasmuch as I have come to the conclusion that, unless I restrain it, it will be continued, I have no course but to consider for myself as well as I can whether it is a case in which an interlocutory injunction should be granted. * * *

In these circumstances I have come to the conclusion that an injunction must be granted in the terms which I have mentioned. * * *

[82] The statement of facts is abridged and parts of the opinions of North, J., and Kay, L. J., are omitted.

The form of the order, therefore, that I shall make is this, to restrain, not the defendants and each of them, but the defendant Perryman, his servants and agents, until trial or further order, from selling, circulating, or delivering or communicating to any person or persons, or permitting to be sold or circulated, or delivered or communicated, to any person or persons, any copy of the Financial Observer and Mining Herald of the 7th of February, 1891, containing an article headed "Fletcher Mills, Providence, Rhode Island," and from—here I depart rather from the terms of the notice of motion—printing or publishing or selling—repeating the previous words I have used—any copy of the said article, or any extract thereof, or material portion thereof, so far as such extract or portion affects the plaintiffs or either of them.

The defendant Perryman appealed.

The appeal was heard by the full Court of Appeal on the 9th and 10th of April, 1891.

1891. April 21. LORD COLERIDGE, C. J., read the following judgment, in which LORD ESHER, M. R., and LINDLEY, BOWEN, and LOPES, L. JJ., concurred:

The plaintiffs in this case are two gentlemen carrying on business as financial agents under the title of the Mercantile and General Trust. The defendant Perryman is the printer and publisher of a paper called the Financial Observer and Mining Herald. The defendant Allen is in some way (not material to ascertain) connected with the paper, and he appears to have printed the particular number which contains the matter of which the plaintiffs complain. In the number of the 7th of February, 1891, appeared the article which the plaintiffs assert to be a libel upon them, and in respect of which, having issued a writ in the Chancery Division, they applied for and have obtained from Mr. Justice North the injunction which we are asked upon appeal to dissolve. [His Lordship read the order appealed from, and continued:] One point raised in the course of the argument has become immaterial to decide—namely, whether the Court of Appeal, sitting with its full number, can, according to the course and practice of the Court, overrule a Court consisting of three or any other number of members, if the decision which they are asked to review appears to be clearly wrong. It is unnecessary to discuss or to decide this question, because the previous decisions of this Court on the main question before us appear to us to be perfectly correct, and we found our own decision upon them.

Two questions only is it really necessary to decide—(1) is there jurisdiction in the Supreme Court to issue an injunction to restrain the publication of an alleged libel, either at all, or before the libel has been adjudged to be such? And (2) is this a case in which, as matter of discretion, the jurisdiction should be exercised, if it exists? The decision of the first question is, it is manifest independent of the circumstances of any particular case; the decision of the second entirely

depends upon them. As to the first, we are unable to entertain any doubt; the point is clear, and is settled by authority. The authorities, indeed, are few and recent, for very obvious reasons; but they are uniform, and they are clear. Prior to the Common Law Procedure Act, 1854, neither Courts of Law nor Courts of Equity could issue injunctions in such a case as this: not Courts of Equity, because cases of libel could not come before them; not Courts of Law, because prior to 1854 they could not issue injunctions at all. But the 79th and 82d sections of the Common Law Procedure Act, 1854, undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation. This power was, by the Judicature Act, 1873, conferred upon the Chancery Division of the High Court, representing the old Courts of Equity. Nevertheless, although the power had existed since 1854, there is no reported instance of its exercise by a Court of Common Law till Saxby v. Easterbrook, 3 C. P. D. 339, which was decided in 1878. In that case the injunction was not applied for, nor, of course, granted, till after a verdict and judgment had ascertained the publication to be a libel. That case was acquiesced in; and about the same time the Chancery Division began, and it has since continued, to assert the jurisdiction, which has been questioned before us, of granting injunctions on the interlocutory application of one of the parties to an action for libel.

Sir George Jessel in Quartz Hill Consolidated Gold Mining Company v. Beall, 20 Ch. D. 501, distinctly asserted the jurisdiction; and it was considered and established in an elaborate judgment of this Court in Liverpool Household Stores Association v. Smith, 37 Ch. D. 170, in which Lord Justice Cotton, affirming indeed the refusal of Mr. Justice Kekewich to issue the injunction prayed for in that case, asserted the jurisdiction in plain language, and went on to explain the principles on which, in his opinion, the jurisdiction should be exercised. There have been other examples, but these are sufficient; and we do not doubt, upon the true construction of the statutes and upon authority, that as matter of jurisdiction Mr. Justice North's order might lawfully be made. But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free

speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord Esher, M. R., in Coulson v. Coulson, 3 Times L. R. 846:

"To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable."

In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable. Moreover, the decision at the hearing may turn upon the question of the general character of the plaintiffs; and this is a point which can rarely be investigated satisfactorily upon affidavit before the trial,—on which further it is not desirable that the Court should express an opinion before the trial. Otherwise, an injunction might be granted before the trial in a case in which at the trial nothing but nominal damages, if so much, could be obtained. Upon the whole we think, with great deference to Mr. Justice North, that it is wiser in this case, as it generally and in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification. The appeal, therefore, must be allowed, and the order discharged; the costs in this Court and in the Court below to be costs in the cause.

KAY, L. J. * * * I should have granted the injunction, at least as to this part of the libel, and I should have been glad if the Court of Appeal had been prepared to sustain it.

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## WALTER v. ASHTON.

(Chancery Division. [1902] 2 Ch. 282.)

Motion.

This action was brought by the plaintiff, on behalf of himself and all the other proprietors of The Times newspaper, to restrain the defendant from advertising the sale of his cycles in such a way as to suggest or represent that he was carrying on business as a department of, or in connection with, The Times. An application was now made for an interim injunction restraining the defendant, his manager, servants, and agents, "from publishing advertisements and issuing or distributing circulars or letters containing statements asserting or suggesting that cycles offered by him for sale are in fact offered for sale by the propri-

etors of The Times newspaper, and from representing that he is carrying on business as a department of or in connection with The Times, or in any way holding out The Times newspaper, or the proprietors thereof, to be the owners of his business." * * *

March 20. BYRNE, J.[83] As this case presents some elements of great importance and of some novelty, I should have preferred postponing my judgment until I could have put it into writing; but the case is one of a somewhat pressing nature, and it is of importance to the parties that they should have a speedy decision. The action is brought by the plaintiff on behalf of himself and the proprietors of The Times asking for an injunction, and application is now made for an interim injunction in the following terms: [His Lordship read the terms of the injunction, and continued:]

Now, it is no part of the general business of a newspaper to carry on a cycle business, and this is not a question arising between rivals in trade. It appears to me that to entitle the plaintiffs to an interlocutory injunction they have to establish, first, that the defendant has represented the plaintiffs as his principals or partners, or, at least, as responsibly connected with his venture; and, secondly, that there is tangible probability of injury to the property of the plaintiffs in consequence of such representations. Mere annoyance is not enough, nor libel, not being trade libel; nor is a shadowy possibility of actions being brought enough. The case has to be considered apart from those cases turning on trade competition, infringement of rights, trade names, trade-mark, or the ordinary passing off equity. The plaintiffs have, I think, founded their notice of motion on the only ground upon which, if at all, they are entitled to succeed upon the present application. * * *

Taking all those matters together, and having regard to the circulars, the advertisements, and the general conduct of the business carried on by the defendant in reference to these cycles, I have come to the conclusion on the present materials that he has intended to induce people to think either that the proprietors of The Times are the vendors, for whom the person in Chancery Lane, whoever he may be, is the manager of the department, or that they are partners, or in some way pecuniarily and with responsibility connected with the sale of these articles. Now, as I have said, this not being a case as between rival traders, and not being a case turning upon contract, it is not enough to shew a probability of deception of the public for the purpose of this interlocutory injunction, or to shew that persons may be deceived into thinking that these cycles are the manufacture or the property of the Times newspaper: that alone would not be sufficient for the present purpose. I think you must shew some probable risk of injury by what has been done. Now how do the authorities stand in reference to this matter? I think one of the earliest I need refer to is Routh v. Webster, 10 Beav. 561. * * *

[83] The statement of facts is abridged and parts of the opinion are omitted.

Of course there are points of difference between that case and the present; but the injunction was granted on the footing that the plaintiff was exposed to some risk and liability by the unauthorized use of his name. That case was referred to with approval by Lord Cairns in Prudential Assurance Co. v. Knott (1875) L. R. 10 Ch. 142, 146, an action to restrain a trade libel in which the court held there was no jurisdiction to restrain the publication of a libel as such, even if it was injurious to property; and Lord Cairns, after referring to the case of Dixon v. Holden (1869) L. R. 7 Eq. 488, says [in (1875) L. R. 10 Ch. App. Cas. 142, 146]:

"It"—that is, Dixon v. Holden—"professes to proceed mainly upon a case of Routh v. Webster, 10 Beav. 561, because I observe that the Vice Chancellor says: 'The case of Routh v. Webster is an authority going the whole length of what is asked here.'" After stating the facts as I have already given them, Lord Cairns continues: "That case appears, if I may say so, to have been quite rightly decided." * * *

I may mention in passing a case of Clark v. Freeman (1848) 11 Beav. 112, where the court declined to interfere to restrain the sale by the defendant of a quack medicine under the name of "Sir J. Clarke's Consumption Pills," on the ground that it was libel if it was anything, and that there was no injury to the property which was sold. That decision has been frequently the subject of observation by various judges. Lord Cairns, in Maxwell v. Hogg (1867) L. R. 2 Ch. 307, 311, said that it might have been decided in favour of the plaintiff on the ground that he had a property in his own name. And Lord Selborne, in In re Riviere's Trade-Mark (1884) 26 Ch. D. 48, 53, says that Clark v. Freeman, 11 Beav. 112, had seldom been cited but to be disapproved; and Kekewich, J., in a recent case, having in view all that has been said about it, has declined to follow it. The principle is clear enough: the Court does not grant an injunction to restrain the use of a man's name simply because it is a libel or calculated to do him injury; but if what is being done is calculated to injure his property, and the probable effect of it will be to expose him to risk or liability, then, if I rightly understand the law of this court, an injunction is the proper remedy. * * *

This really is only a carrying out of a branch of the law turning upon estoppel by conduct. If a man allows his name to be held out to the public as being the person responsible for the transaction in question, he may be held liable in consequence of this holding out, or in consequence of his conduct, although he may not have originally authorized the act because he has not taken steps which he should take to stop the unauthorized use of his name. I apprehend that a similar principle would apply in the case of allowing a name to be held out by a man representing himself as agent or as principal in a particular transaction, all forming part, as I have said, of the general principle of estoppel by acts. Now in the present case the defence is chiefly founded on this. "I," said the defendant, "have done nothing that the

law has not entitled me to do"; and, taking the single acts and matters complained of, he says, to begin with:

"I am entitled to call my cycle 'Times Cycle' or 'The Times Cycle.' I am entitled to adopt for a mark upon it a similar clock to the clock used by The Times newspaper. I am entitled to have the hands of the clock pointing to the same hour."

And he is perfectly right in what he says. Again, he says:

"I am perfectly entitled to advertise my cycles as 'The Times Cycles' if that is the proper name of the cycle. I am entitled to advertise that payment is according to The Times system (meaning The Times newspaper system), the system inaugurated by the proprietors of The Times."

So he is, and, thus taking each item one by one, he says: "I am entitled to do this, that, and the other." But the real question I have to consider is whether, by what he has done, he has in fact held out the proprietors of The Times as either being principals, or responsibly connected with him, or partners with him in the sale of these cycles. I have come to the conclusion that he has; and I have further come to the conclusion that there was such a reasonable probability of The Times being exposed to litigation, and possibly of being made responsible had they not taken the steps to disconnect their names from the advertisements and circulars that are issued by the defendant, that, although I have hesitated for some time as to whether I ought to do this upon an interlocutory motion, now that the action will come on so quickly for trial when the matter might finally be disposed of upon further evidence still, I think that it is so clear upon the documents and the acts that I have mentioned that this case really falls within the line of authorities commencing with that before Lord Langdale which I cited, that I propose to grant an injunction now in proper form. I may make one other observation. Since the writ was issued the defendant has put out another advertisement in the Daily Mail, in which he does state fairly conspicuously, though not so conspicuously as I should have wished, that his goods had no connection with any newspaper whatever. That, in my judgment, is not sufficient under the circumstances. I think I ought to grant the injunction in the following form: To restrain the defendant, his managers, servants, and agents, until the trial or further order, from representing that the cycles offered by him for sale are in fact offered for sale by the proprietors of The Times newspaper, or representing that he is carrying on business as a department of, or in connection with, The Times newspaper, or in any way holding out The Times newspaper, or the proprietors thereof, to be the owners of his business. The costs will be costs in the action. I think it is only fair, however, that the defendant should have a little time to put things in order.

## AMERICAN MALTING CO. v. KEITEL.

(Circuit Court of Appeals of the United States, Second Circuit, 1913. 209 Fed. 351, 126 C. C. A. 277.)

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the American Malting Company against Adolph Keitel. From an order granting an injunction pendente lite, defendant appeals.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge.[84] The plaintiff seeks to restrain the defendant from issuing printed circulars alleged to contain matters which tend greatly to injure the business, credit, and property of the plaintiff. The American Malting Company is a corporation organized under the laws of the state of New Jersey. Its capital stock is $30,000,000. It does a business of from $7,000,000 to $12,000,000 a year; the amount of its business varying with the price of barley. It is said to be the largest manufacturer of malt in the United States. The defendant is a citizen and resident of the state of New York and holds no stock in the complainant company. The circulars complained of began to make their appearance in 1907 and since July, 1912, have been issued at intervals of a week. They have been mailed to brewers and consumers of malt throughout the United States, as well as to banks and to complainant's stockholders. The corporate name of the plaintiff is mentioned in only a few of the circulars. They contain references, however, to the "gold-brick swindle," the "gold-brick pool," "trust," "malt combine," which plaintiff says were intended to be understood to refer to it, and it alleges that they are so understood by the persons to whom they were sent. The defendant denies that the circulars show that the complainant was mentioned to its damage or that it can be said that the plaintiff in fact was intended. The plaintiff claims that defendant is persistently attempting maliciously to interfere with its existing contracts, is seeking maliciously to induce parties to refrain from dealing with plaintiff and to resist the payment of their debts to it, and is endeavoring maliciously to destroy its business credit and property.

The defendant was convicted of criminal libel in 1911 because of a circular dated January 6, 1910, which he issued. But that conviction is not res adjudicata as to statements made in the subsequent circulars. And we have no exact knowledge as to what the statements were in the January 6, 1910, circular which the jury found to be libelous. The subsequent circulars are unquestionably full of libels on various persons if the allegations they contain are false. They are not libelous so far as the allegations are true. The campaign he is evidently engaged in is against the combination of malters which he alleges is illegal. He charges the combination with keeping up the price of malt by false

[84] Parts of the opinion are omitted.

statements and artifices and with inducing brewers to contract for future delivery at unreasonable prices. He advises brewers not to buy for future delivery and those who have purchased in the season of 1911–1912 to repudiate their contracts. He charges the American Malt Corporation with trying to get the stockholders of the American Malting Company to exchange their stock by means of false representations and also perhaps that the officers of the malting company have made false statements in circulars about its financial condition. The American Malt Corporation is a separate organization distinct from the American Malting Company, and is also organized under the laws of New Jersey, and at the time of this suit held 98 per cent. of the capital stock of the American Malting Company. It is alleged that the American Malt Corporation does not own or control the stock of any other corporation.

The court below awarded a very drastic injunction pendente lite, restraining the publication of the circulars. It, however, added a clause to the effect that, if defendant would accompany each future circular with the statement that his charges were not directed against this particular plaintiff, he might continue issuing them. As one ground of his defense is that the charges are not against the plaintiff, his purpose would not be thwarted by embodying such a statement in each subsequent circular. But he appeals to this court, and it becomes necessary to consider whether the court below had jurisdiction of the subject-matter. If it had not, the preliminary injunction should be vacated and the bill dismissed. This makes it necessary to inquire what power the courts of equity possess to restrain the publication of libels. * * *

Lord Chancellor Hardwicke in 1742 (Huggonson's Case, 2 Atk. 469) declared that:

"Notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it, for, whether it is a libel against the public or private persons, the only method is to proceed at law."

It should be said, however, that in that case equity was asked to punish a past tort, not to restrain a future one. Lord Ellenborough in 1810, in a common-law court (Du Bost v. Beresford, 2 Camp. 511), said, in speaking of a picture, that, if it was a libel upon the persons introduced into it, "upon an application to the Lord Chancellor he would have granted an injunction against its exhibition." But this dictum is known to have excited much astonishment in the minds of all practitioners in the court of chancery. Thus matters stood in England until 1869, when Vice Chancellor Malins granted injunctions against libels. Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551; Dixon v. Holden, L. R. 13 Eq. 355. These decisions were, however, speedily overruled in 1875 in Prudential Assurance Co. v. Knotts, L. R. 10 Ch. App. 142. In Collard v. Marshall (1892) 1 Ch. 571, Chitty, J., said that, before the Judiciary Act, equity had no power to try a libel. In Monson v. Tussands Limited (1894) 12 B. 671, Lopes, L. J., said:

"Prior to the Common-Law Procedure Act 1854, no court could grant any injunction in a case of libel. The Court of Chancery could grant no injunction in such a case, because it could not try a libel. Neither could courts of common law until the Common-Law Procedure Act of 1854, because they had no power to grant injunctions. Whether they had power to grant interlocutory injunctions after 1854, I think doubtful. As a matter of practice they never did."

The Common-Law Procedure Act of 1854 conferred on the English courts of common law the power to grant injunctions in all personal actions of contract or tort, with no limitation as to defamation. And by the Judicature Act of 1873 a power was conferred upon the Chancery Division of the High Court to grant injunctions in cases of libel. But prior to these acts neither courts of law nor courts of equity could issue injunctions in England in such cases. The English law courts began to exercise such jurisdiction in 1878, and about the same time the equity courts began in like manner to exercise theirs. But it is understood that they interfere only in the "clearest cases," and especially by interlocutory injunctions. See Bonnard v. Perryman (1891) Ch. 269 (C. A.); Kerr on Injunctions, 5, 6. For 150 years it has been understood in England that equity had no jurisdiction to enjoin a libel, and the power of the courts of that country to do so rests upon statute.

In the United States a like view of the matter has been taken. In Pomeroy's Equity Jurisprudence, vol. 6, § 629, it is laid down that:

"Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may be. This is the universal rule in the United States and was formerly the rule in England. The present rule in England rests on statute."

In High on Injunctions (4th Ed.) § 1015, that writer states that the doctrine which seems most in accord with the principles governing the jurisdiction of equity by way of injunction is that, the preventive jurisdiction being limited to the protection of property rights which are remediless by the usual course of procedure at law, courts of equity will not restrain the publication of libels or works of a libelous nature, even though such publications are calculated to injure the credit, business, or character of the person aggrieved, and that he will be left to pursue his remedy at law. In a case in the Supreme Court of the United States (1885), Francis v. Flynn, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165, Mr. Justice Field said:

"If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law."

In 1886 the question arose in the Circuit Court for the Third Circuit in Kidd v. Horry, 28 Fed. 773. An injunction was asked to restrain the defendants from publishing certain circular letters concerning the business of the complainants. The injunction was refused. * * *

In 1907 the question arose in the Eighth Circuit (Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' As-

soc. [C. C.] 150 Fed. 413), and the court refused the injunction, saying:

"In the jurisprudence of the United States there is no remedy for the abuse of this right (to freely speak, write, and publish) conferred by the Constitution, except an action at law for damages or a criminal proceeding by indictment or information."

In 1912 the question was before a District Court in Missouri (Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982). The bill was dismissed; the court saying:

"In this country a court of equity is without jurisdiction to restrain the publication of a libel."

The state courts in a number of cases have held that the jurisdiction of equity did not extend to libels and have refused injunctions to restrain their publication. Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310 (1873); Marlin Firearms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310 (1902); Baltimore Life Ins. Co. v. Gleisner, 202 Pa. 386, 51 Atl. 1024 (1902); Mayer v. Journeyman Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492 (1890).

In Flint v. Hutchinson Smoke Burner Co., 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476, the court held that the question of libel should be determined by a jury in an action at law, and that after a verdict for the plaintiff he might have an injunction to restrain the further publication of that which the jury found to be actionable libel or slander.

The fact that the false statements may injure the plaintiff in his business or as to his property does not alone constitute a sufficient ground for the issuance of an injunction. The party wronged has an adequate remedy at law.

In all that has been said we have not lost sight of the fact that the courts have sometimes issued injunctions to restrain the publication of false statements injurious to business or property. The cases in which such a jurisdiction has been assumed have been those which have involved conspiracy, intimidation, or coercion. In 22 Cyc. 900, it is laid down:

"A court of equity has no jurisdiction to restrain a mere libel or slander. Nor does the fact that the false statement may injure plaintiff in his business or as to his property constitute a sufficient ground for an injunction, in the absence of acts of conspiracy, intimidation, or coercion."

And see Beck v. Ry. Teamsters' Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Casey v. Cincinnati Typographical Union (C. C.) 45 Fed. 135, 12 L. R. A. 193. To this class belongs the case of Emack v. Kane (C. C.) 34 Fed. 46 (1888), where District Judge Blodgett issued an injunction to restrain one from issuing circulars threatening to bring suits for infringements against all customers dealing in a competitor's patented article. The gravamen of that case was the attempted intimidation of the complainant's customers by threatening them with suits which the defendants never intended to prosecute. The doctrine announced in that case has been

followed in numerous cases and by this court in Adriance, Platt & Co. v. National Harrow Co., 121 Fed. 827, 58 C. C. A. 163 (1903). But the complainant does not in terms charge the defendant with being engaged in any conspiracy or in any attempt to intimidate or coerce the complainant or its customers. And the alleged false statements and objectionable matter contained in the circulars do not amount to coercion or intimidation in law, either of the complainant or its customers. The customers may be deceived by false statements, but they are left free to form their own judgment and make their own choice. They are not coerced or intimidated or frightened. The circulars contain no threats of violence to the property of the complainant. He threatens to bring no suits either against the complainant or its customers. It is true that, where proper grounds exist for assuming jurisdiction, equity does not refuse jurisdiction because there is incidentally involved the restraining of a libel. A court of equity may restrain a boycott if the boycott is sought to be accomplished by the publication of circulars or printed matter; such a publication may be restrained without a violation of constitutional rights. That was made clear by the decision of the Supreme Court of the United States in Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

It is said that a man has a property right in his business and that an injunction may issue to protect that right against fraud and misrepresentation, notwithstanding the fact that the fraud and misrepresentation may be contained in a libelous publication. That was, as we understand it, the very question which was submitted to the English Court of Appeals in Chancery in 1875 in Prudential Assurance Co. v. Knott, supra. The defendant had published a pamphlet which the plaintiff corporation claimed falsely represented it as being managed with reckless extravagance and as being in a state of insolvency and unable to fulfill its engagements, whereas the company was in an exceedingly prosperous and thriving condition, abundantly solvent and earning large profits, and was managed without extravagance. The bill further charged that the continued publication of the pamphlet would be very injurious to the company's credit and reputation. It accordingly prayed that its publication might be restrained. The injunction was refused. Lord Cairns said:

"It is attempted to give a color to the application by saying that these are libelous publications which will injure property, and then, when that proposition is further defined, it is said that the business of the company, the good will of the company, is property; that the company in its trade will be injured; and that therefore the interference of the court is asked for the protection of property. But, with regard to nine out of ten libels, the same thing might be said. The cases in which actions are brought for libel are usually cases where things are written of men or corporations which have an effect upon their character and upon their trade or business or their character as connected with trade or business; but no case can be produced in which, in these circumstances, the Court of Chancery has interfered. Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction."

He then quotes from the decision of Vice Chancellor Malins in Dixon v. Holden, supra, this passage:

"In the decision I arrive at, I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation."

And says:

"I am unable to accede to these general propositions: They appear to me to be at variance with the settled practice and principles of this court. * * *"

Lord Justice James and Lord Justice Mellish stated that they were of the same opinion.

But while the courts of equity have no jurisdiction to restrain the publication of a libel as such, and while we do not think the facts in the case take it out of the general rule because of any conspiracy, intimidation, or coercion or because of any incidental injury to property rights arising merely from the publication of libelous matter, a court of equity may nevertheless possess the power to restrain the defendant from an unjustifiable and wrongful interference with the plaintiff's contracts, if it shall appear that he is engaged in such an undertaking. See Joyce on Injunctions, § 440a. * * *

The question, however, remains whether the preliminary injunction was properly granted on the facts as they appear in the record. The rule is that preliminary injunctions will not issue except in the clearest cases. Odgers on Libel and Slander (5th Ed.) 426. In Bonnard v. Perryman (1891) 2 Ch. 269, the defendant in his affidavit swore that the statements complained of were true, and the court refused an interlocutory injunction. It said:

"We cannot feel sure that the defense of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded."

In the present case the defendant denies the plaintiff's allegations; and the supporting affidavits presented on behalf of the plaintiff seem too indefinite to justify an interlocutory injunction. The defendant denies, under oath, that the circulars which he issued contained other than facts. He swears that they were published without malice, in good faith, and in order to serve the interests of the consumers of malt. The bill is verified by plaintiff's secretary, and an issue is raised between the two. The plaintiff has presented, in addition to the affidavit of its secretary, the affidavits of three other persons. These affidavits go to show that there are false statements in the circulars. They fail to show that the false statements relate to the complainant. Mr. Loewer's affidavit states that the circulars contained mistaken statements concerning malt market conditions. Mr. Bermuth's affidavit refers to "false statements" but does not specify that any statements which are false relate to the plaintiff. There are numerous statements in the circulars reflecting upon persons other than plaintiff. Some of these statements, if false, are libelous upon the individuals named, but

that does not help plaintiff's case. Mr. McCarthy's affidavit refers to the "false representations" and attributes to them a loss of business on the part of the plaintiff. He refers to "the false information conveyed in the circulars issued by the defendant Keitel with reference to the plaintiff." This is not saying that "the false information" related to the plaintiff, only that it is contained in "the circulars issued by the defendant Keitel with reference to the plaintiff." It may have related to the American Malt Corporation, which is a distinct organization and is mentioned by name, or to individuals who are also assailed by name. The plaintiff is mentioned by name only in rare instances. But the court below embodied in the injunction a clause to the effect that, if the defendant would accompany each future circular with the statement that his statements were not directed against the plaintiff, he might continue his publications. Since one ground of his defense is that his statements are not directed against the plaintiff, we cannot see that he will be in any way harmed if the interlocutory injunction continues in force until final hearing. To do so will preserve the present status, as he contends it is, until at the final hearing on the pleadings and proof it can be determined what the real facts of the case may be.

The disclaimer, however, which the District Judge required is too broad. It requires the defendant to disclaim any charges against the American Malt Corporation. As that corporation is not a party to the suit and therefore is in no position to ask for relief, the injunction order should be modified by omitting any reference to it.

The cause is remanded to the court below, with directions to modify the injunction order by omitting reference to the American Malt Corporation, and to its officers and directors as such, and to the management and business of that corporation, as well as all other matters except advices to the plaintiff's customers to break their contracts.

# CHAPTER V

# BILLS OF PEACE

## HOW v. TENANTS OF BROMSGROVE.

(In Chancery before Sir Heneage Finch, 1681. 1 Vern. 22, 23 E. R. 277.)

There having been two issues directed, the one, whether How the lord of the manor of Bromsgrove had a grant of free warren; and the other, in case he had a grant of free warren, whether there were sufficient common left for the tenants. Upon motion for a new trial, the LORD CHANCELLOR said, these matters were properly triable at common law; and he did not see, what jurisdiction the chancery had of this cause: but it was urged, the bill was brought to prevent multiplicity of suits, and was in its nature a bill of peace: and a new trial was granted, upon payment of full costs.[1]

[1] In Randolph v. Kinney et al. (1825) 3 Rand. (Va.) 394, Carr, J., said: "A bill of peace (say the books) is made use of, where a person has a right which may be controverted by various persons, at different times, and by different actions; or where several persons, having the same right, are disturbed; and the Court will thereupon prevent a multiplicity of suits, by directing an issue to determine the right, and ultimately an injunction. Lansdowne v. Lansdowne (1815) 1 Madd. 135–137; Devonsher v. Newenham (1804) 2 Sch. & Lefr. 208. Lord Redesdale says: 'If there is an assertion of title by suit at law, in which the party fails, but yet asserts it frequently in the same manner, such assertion becomes oppressive; and as it may be made by ejectment, (a proceeding which may be repeated forever,) Courts of Equity may interfere to prevent such an oppressive proceeding. It is on this ground, that Courts of Equity have interfered by bills of peace.' In Tenham v. Herbert (1742) 2 Atk. 483, Lord Hardwicke says: 'It is certain, where a man sets up an exclusive right, and where the persons who controvert it with him, are very numerous, and he cannot, by one or two actions at law, quiet their right, he may come into this Court first, which is called a bill of peace; and the Court will direct an issue to determine the right, as in all disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases, there would be no end of bringing actions of trespass, since each action would determine only the particular right in question, between plaintiff and defendant.' In Mitford's Pleadings, 146, speaking of demurrers for joining distinct claims in one bill, it is said: 'A demurrer of this kind will hold only where the plaintiff claims several matters of different natures: but when one general right is claimed by the bill, though the defendants have several and distinct rights, a demurrer will not hold; as where a person claiming a general right to the sole fishery of a river, filed a bill against several persons, claiming several rights in the fishery, as lords of manors, occupiers of lands, or otherwise. For in this case, the plaintiff did not claim several separate and distinct rights, in opposition to several separate and distinct rights, claimed by the defendants; but he claimed one general and entire right, though set in opposition to a variety of distinct rights, claimed by the several defendants.'"

## LORD TENHAM v. HERBERT.

(In Chancery before Lord Hardwicke, 1742. 2 Atk. 483.)

The plaintiff brought his bill, in order to establish a right to an oyster fishery, and to be quieted in the possession of it, against the defendant Herbert, who claims the piece of ground where this fishery is, as belonging to his manor.

The defendant demurred to this bill, as it is a matter properly triable at law.

LORD CHANCELLOR. Undoubtedly there are some cases, in which a man may, by a bill of this kind, come into this court first; and there are others where he ought first to establish his right at law.

It is certain, where a man sets up a general exclusive right and where the persons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this court first, which is called a bill of peace, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant.

As to the case of the Corporation of York and Sir Lionel Pilkington, 1 Atk. 282, the plaintiffs there were in possession of the right of fishing upon the river Ouse, for nine miles together, and had constantly exercised that right; and as this large jurisdiction entangled them with different lords of manors, it would have been endless for the corporation to have brought actions at law.

But where a question, about a right of fishery is only between two lords of manors, neither of them can come into this court till the right is first tried at law.

Lord Tenham does not charge in this case any possession for the last 38 years, so that this is in the nature of an ejectment bill; the plaintiff says, that this piece of ground aqua cooperta belongs to him; Mr. Herbert insists it belongs to him; so that this may very properly be determined at law, as it is a mere single question, to try the right between two persons; and it is not like the case of the corporation of York, who must have gone all round the compass to have come at their right at law.

Therefore the demurrer must be allowed.[2]

[2] In Eldridge v. Hill and Murray (1816), 2 Johns. Ch. 281, before Chancellor Kent, the defendant Hill had dug a ditch to divert a water course flowing through the defendants' land and thence through the plaintiff's land. Said defendant refusing to fill up this ditch, the plaintiff placed a partial obstruction therein on his own land to give the defendant an opportunity to try his right. The defendant then sued the plaintiff in the Supreme Court, and while such action was still at issue the defendants each commenced in the Justice's Court an action for the continuance of the obstruction (in all fifteen or twenty

## LONSDALE CO. et al. v. CITY OF WOONSOCKET et al.

(Supreme Court of Rhode Island, 1899. 21 R. I. 498, 44 Atl. 929.)

Suit by the Lonsdale Company and others against Samuel P. Cook, city treasurer, and others.

MATTESON, C. J.[3] We think the complainants, though claiming under distinct titles and possessing independent interests, have properly joined in the bill, because they have a common interest in the relief sought by the bill, to wit, the prevention of the diversion of the water of Crook Fall brook from their mill privileges. * * * The city of Woonsocket is properly joined as a respondent, since an injunction is sought against the city.

Inasmuch as the injury complained of is a continuing injury, to redress which numerous suits would have to be brought from time to time, we think the complainants are entitled to relief by injunction, to prevent a multiplicity of suits. * * * Demurrer overruled.

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## WADDINGHAM et al. v. ROBLEDO et al.

(Supreme Court of New Mexico, 1892. 6 N. M. 347, 28 Pac. 663.)

LEE, J.[4] * * * The complainants alleged in their bill five grounds, which, if supported by proper evidence, entitled them to relief in a court of equity. These grounds were: (1) Title and possession in themselves to the Antonio Ortiz grant, or so much of it as is the subject of controversy here; (2) that the Gallinas river was a nat-

actions), and threatened to continue to do so indefinitely. The plaintiff filed a bill praying for an injunction to restrain the defendant H. from further prosecuting the suits before the justice already pending, and from commencing any more, on account of the obstruction aforesaid, until the suit commenced by the defendant, Hill, in the supreme court, be determined. Said the Chancellor: "A bill of peace, enjoining litigation at law, seems to have been allowed only in one of these two cases; either, where the plaintiff has already, satisfactorily, established his right at law, or where the persons who controvert it are so numerous as to render an issue, under the direction of this court, indispensable to embrace all the parties concerned, and to save multiplicity of suits. Lord Bath v. Sherwin (1709) 1 Bro. P. C. 266; Ewelme v. Andover (1684) 1 Vern. 266; Leighton v. Leighton (1720) 1 P. Wm. 671; Trustees of Huntington v. Nicoll (1808) 3 Johns. 566; Tenham v. Herbert (1742) 2 Atk. 483. In the case in Atkyns, Lord Hardwicke refused to interfere between two individuals, until the right was first tried at law. In the present case there has been but one trial at law, and that one was decided against the plaintiff. The controversy is between him and a single individual, and is pending for decision in the supreme court. If the defendant Hill, continues to harass him with fresh suits at law, it is because a new cause of action (as he alleges) continues to arise daily, by the continuation of the nuisance. No case goes so far as to stop these continued suits between two single individuals, so long as the alleged cause of action is continued, and there has been no final or satisfactory trial and decision at law upon the merits." Injunction denied.

[3] Parts of the opinion are omitted.

[4] The court's statement of the case and parts of the opinion are omitted.

ural water-course, flowing through the grant, essential to its enjoyment, and that the defendants were diverting the water thereof without right; (3) that the defendants were constructing a dam in the said river, which was a private nuisance to the complainants; (4) that the defendants were insolvent, and were trespassing upon their title and possession; and (5) that the acts of the defendants and their associates, unless prevented, would necessitate a multiplicity of suits.

Where the right of the complainant is clear, and he is in possession of the land in controversy, equity will, in a proper case, protect that possession by injunction; and where the complainant's right to the use and enjoyment of water is obstructed, he may have an injunction without showing irreparable injury. Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Conkling v. Improvement Co., 87 Cal. 296, 25 Pac. 399; 1 High, Inj. § 795, note 6, and cases cited; Carlisle v. Cooper, 21 N. J. Eq. 576; Weiss v. Steel Co., 13 Or. 496, 11 Pac. 255. Courts of equity have concurrent jurisdiction with courts of law in a case of private nuisance by diverting or obstructing an ancient water-course, and may issue an injunction to prevent the interruption, though the complainant has not established his title at law. Shields v. Arndt, 4 N. J. Eq. 234; 1 High, Inj. § 14; Wood, L. Nuis. § 785, note 2; Carlisle v. Cooper, 21 N. J. Eq. 576; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Parke v. Kilham, 8 Cal. 78, 68 Am. Dec. 310; Holsman v. Bleaching Co., 14 N. J. Eq. 335; Ang. Water-Courses, § 444, and cases cited. Insolvency of the defendants, who are threatening to commit repeated trespasses, has always been recognized as a sufficient reason for the interposition of equity by injunction, (1 High, Inj. § 717, and cases cited; Id. § 727, and cases cited; 10 Amer. & Eng. Enc. Law, 835, note 2; Id. 881, note 1;). as is the prevention of a multiplicity of suits, (1 High, Inj. § 717; 10 Amer. & Eng. Enc. Law, 825.)

It is unnecessary to decide, and we do not intend to be understood as deciding, that the evidence in this case clearly establishes the existence of all these grounds of equity; but, as will hereafter be shown, it is certainly conclusively established that the complainants are the owners of the tract of land known as the "Antonio Ortiz Grant," unless the defendants have acquired title to some portion of it by adverse possession. They have a confirmation of congress and the patent of the government. As against them, the defendants, so far as they rely upon an inchoate grant from Mexico, can have no standing in this court. Beard v. Federy, 3 Wall. 478, 18 L. Ed. 88; U. S. v. Stone, 2 Wall. 525, 17 L. Ed. 765; Ryan v. Carter, 93 U. S. 78, 23 L. Ed. 807; Tameling v. Emigration Co., 93 U. S. 644, 23 L. Ed. 998; Maxwell Land-Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949; Id., 122 U. S. 365, 7 Sup. Ct. 1271, 30 L. Ed. 1211; Chaves v. Whitney, 4 N. M. 178, 16 Pac. 608; Grant v. Jaramillo, 6 N. M. 313, 28 Pac. 508, (this court, at this term.) It is also conclusively estab-

lished that the Gallinas river is a natural water-course, running through the grant, essential to its enjoyment, and that the defendants at the time of the filing of the bill were diverting and attempting to divert the waters thereof without, so far as the extension of their possession to the new lands and the water to irrigate them is concerned, any other right than such as is derived under and by virtue of an inchoate and imperfect grant from Mexico. The fact that a new dam was being constructed is admitted, but the insolvency of the defendants is earnestly disputed. The proposition that a multiplicity of suits would result from the wrongful act of the defendants is obvious. * * *

It is not difficult to determine that a court of equity ought to have jurisdiction to prevent by injunction such a wrong. The remedy at law by ejectment would be wholly inadequate, because, by the terms of the statute cited, the complainants might be compelled to pay large sums of money for improvements which would be wholly valueless to them. The objection of an adequate remedy at law, while untenable, came too late in this case, even though, if made at an earlier stage of the proceeding, it might have been entitled to some consideration. We do not wish to be understood as saying that, if presented at an earlier stage of the proceeding, it would or could have been sustained; on the contrary, we think the complainants had no adequate remedy at law; but, if they had, it was the duty of the defendants to have raised the question before answering. "Ordinarily, where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject-matter, the objection of the adequacy of the remedy at law should be taken at the earliest opportunity, and before the defendant enters upon a full defense." Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; Brown v. Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021. We think, indeed, that this bill might have been sustained upon the single equitable ground of the prevention of a multiplicity of suits, as a bill of peace. Properly understood, a bill of peace, as is said by Prof. Pomeroy, is merely a part of the general jurisdiction of equity to prevent multiplicity of actions. 1 Pom. Eq. Jur. §§ 243, 275. In the note to Woodward v. Seely, 50 Amer. Dec. 449, it is said:

"Bills of peace are of two kinds. To the first class belong those bills brought to establish one general right between a single party on one side and a great number of persons on the other, where such right could not be determined by several suits between the different parties. To the second class belong bills brought between two parties to prevent further litigation of a right after it has been satisfactorily established by one or more trials at law. * * * Bills of the first class require that a community of interest in the subject-matter of the controversy, or a common title from which all the separate claims which are at issue arise, should exist among the individuals composing the numerous body on the one side, or between each of them and his single adversary, in order to the exercise of the equity jurisdiction, where the bill is a strict, technical bill of peace."

And among the illustrations cited are the following:

"It is said that upon this principle bills have been maintained upon the part of the lord of the manor against his tenants to establish a right of free warren; or the right to inclose a part of a common; or by tenants or copyholders, or one of them suing for all, against the lord of the manor, to have a right of common established; or by the tenants against the lord of the manor to establish the right to the profits of a fair held for time out of mind in the manor; or by copyholders against their lord to be relieved of a certain general fine." * * *

Our conclusion, therefore, is that this case should be reversed and remanded.

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## GRAHAM v. DAHLONEGA GOLD MINING CO. et al.

(Supreme Court of Georgia, 1883. 71 Ga. 296.)

Graham filed his bill against the Dahlonega Gold Mining Company and the Etowah & Battle Branch Gold Mining Company, alleging, in brief, as follows:

Complainant is the owner of certain lots in Lumpkin county of the value of $10,000, principally valuable for mining and mineral purposes, but also valuable for farming purposes. Through these lands, from time immemorial, have flowed two branches or creeks in their natural channels, and the water and water-power thereof are essential to the proper use and enjoyment of the lands for mining or agricultural purposes. On January 1, 1879, defendants, or one of them, through their officers and agents, with force and arms unlawfully entered on complainant's land and cut, dug and erected a water-ditch, flumes and trestles on adjoining lands, so as to carry the water from these creeks by a different channel, and deprive him of its use, rendering his land almost wholly valueless. Both of defendants are claiming title to the water-ditch by which the water is thus conveyed away; and they are engaged in litigation as to the same in the superior court of Lumpkin county and the Supreme Court of the state. The record in the case is voluminous, and leave of reference is asked without attaching it. Complainant does not know which is the owner, but both have concluded to commit this trespass on him for their mutual benefit. The damage is already great, and if continued will be irreparable. The remedy at law is inadequate, because the defendants are foreign corporations, have little visible property in the state, are engaged in expensive and exhaustive litigation, and are now insolvent, or will soon be so. One of defendants has already recovered a judgment against the other for $7,000 which would be senior to a judgment for complainant for damages. Such a judgment would be unproductive. The prayers were for the recovery of damages already done for the restoration of the water diverted, and for injunction to restrain interference therewith.

Defendants demurred to the bill on the grounds stated in the decision. The demurrer was sustained, and complainant excepted.

HALL, J. This was a bill to restrain a trespass, which consisted in the continued and permanent diversion of a stream running through complainant's land through a ditch opened by the defendants. The bill set forth that the damage occasioned by this diversion of the water was irreparable, in that it deprived him of its use for agricultural, domestic and mining purposes, there being valuable gold mines on the premises which he was unable to work or otherwise utilize for the want of this water thus diverted, used and appropriated by the defendants. The insolvency of defendants was substantially, though not very distinctly charged. There was a prayer for the restoration of the water to its natural channel and for a perpetual injunction, as also for the usual and necessary relief.

A demurrer was filed to this bill in the lower court, and sustained upon the grounds following:

(1) Because it did not show any cause of action against defendants, or any title to relief.

(2) For want of equity.

(3) Because complainant had an adequate remedy at law.

(4) Because the bill was multifarious in joining the defendants, between whom no combination of concert of action was charged.

(5) Because complainant has referred in the bill to various suits in equity and decrees, and has failed to attach exhibits of the same to his bill. Error is assigned to the decree dismissing this bill.

1. There is nothing in the last ground of the demurrer. The litigation between the defendants about the ditch conveying the water of this and other streams is only incidentally referred to in the stating part of the complainant's bills, and is not at all material to any question raised by the pleadings; indeed it strikes us as impertinent to the issues sought to be made thereby. Besides these pleadings are shown to be voluminous, and the right to refer them is asked, as they are in the court where this bill is pending, if it should be deemed necessary.

2. There is manifest equity in this bill, and while there is a remedy at common law, the remedy is not adequate to meet the exigencies of the case made here. The complaint is not against a mere fugitive or temporary trespass. The damages would seem to be irreparable, in that the complainant is deprived of the full use and enjoyment of his premises for want of the water diverted; he requires it for domestic use, and agricultural purposes, and without it is unable to ascertain and develop the mineral resources of his land; besides, it sufficiently appears from the statements in the bill, that if the defendants are not already insolvent, they are rapidly approaching it by being engaged in exhausting and expensive litigation. Each day that this diversion continues is a fresh trespass, and gives an action for nominal damages, if not something more, and the court may well interpose for the avoidance of circuity and multiplicity of suits. Code, § 3219, and cases cited under this section. If the trespass be destructive of the very

nature and substance of the estate, equity will grant relief. Peterson v. Orr, 12 Ga. 464, 58 Am. Dec. 484; McGinnis v. Justices of Inferior Court of Gordon County, 30 Ga. 47; Griffin v. Sketoe, 30 Ga. 300. As to the interposition of equity to quiet litigation and prevent multiplicity of suits, see Code, § 3233.

3. The bill is certainly not multifarious; distinct and independent matters are not joined in the same suit. Several matters of a distinct and independent nature are not therein joined against the several defendants to the bill. The complainant here claims one general right against both these respondents. This objection is not favored by courts of equity, for the sufficient reason that:

"It is the interest of the parties as well as the interest of the public, that all matters in controversy between them should be settled by one suit, when it can be done with safety and without great practical inconvenience." Nail v. Mobley, 9 Ga. 278, and authorities there cited.

To this case may be added many subsequent ones determined by this court on the same line of policy. There is not even a misjoinder of parties defendant in this bill. As we have before stated, it is brought to enjoin trespassers and to establish and quiet complainant's right to the use of this stream, which has been appropriated by these defendants. Any participation in this wrong by any party renders him liable; it extends to one who procures it to be done, whether he subsequently aids further in its actual perpetration or not, and whether it be an actionable wrong per se, or grows out of a breach of contract, and such a person is made liable to a suit either alone or jointly with the actor. Code, § 3012. In suits at law, where several trespassers are sued jointly, the plaintiff may recover against all of them damages for the greatest injury done by either; and for the settlement of the portions of the finding, as between themselves, to which each is liable, the jury may specify in their verdict the particular amount to be recovered of each, and in such cases the judgment might be entered severally. Code, § 3075. But where the finding is against all, and the judgment, in accordance therewith, is entered jointly against them, and is paid off by one, the others are liable to him for contribution. Id. § 3076. Nothing could evince more strongly than this the purpose of the legislature to end by a single suit the controversy growing out of the commission of such wrong between all the parties participating in its commission. In reason and justice, and according to the very spirit of these provisions of the law, this purpose is to be kept in view, whether the proceeding is at law or in equity.

Judgment reversed.

## GUESS et al. v. STONE MOUNTAIN GRANITE & RY. CO.

(Supreme Court of Georgia, 1881. 67 Ga. 215.)

JACKSON, C. J. Sundry parties residing on Church street in Stone Mountain sued the defendant for damages in the use it made of the street as a railway track in excavating and embanking thereon, thus rendering it well nigh useless, in running cars on it at irregular times and with an incompetent or rickety sort of engine, which scattered cinders, soot and smoke all over their yards and into their houses, decreasing greatly their value, and in thus making the business of the corporation a nuisance to all the neighborhood; and all this under a charter to do private business, not in any sense for the use of the public, but for the private emolument and gain of the stockholders only, and that therefore it was a mere trespasser on the street, and there without shadow of right. The bill was filed to restrain the plaintiffs in these divers suits to settle the rights of the railway company and of these plaintiffs, setting up leave from the town council to use the street, a charter from the state, etc., alleging multiplicity of suits, multiplication of suits, and repetition of suits from time to time, and asking that the whole matter be settled in one case, fixing the rights of all parties.

The chancellor granted the injunction with the consent order that the case thus made be tried at the next, March, term of the court. This grant is assigned as error.

We think that if the complainant has any chartered rights at all to use the street, by the leave of the city council of Stone Mountain first had thereto, the bill is not without equity, but rests on equitable jurisdiction of avoiding a multiplicity of suits and settling interminable litigation on one trial, fixing thereby everybody's rights, and doing justice to all.

Whilst this private corporation, not being a public carrier, or organized for any great public purpose, like railways from town to town, could not exercise the right to take private property for public use, even with compensation, against the will of the owner of that property, yet it has the chartered right to run a road from Stone Mountain to the quarries at the mountain itself, to haul the granite to the Georgia railroad, and to connect therewith, by the purchase or lease, or other leave given by the owners of property along their route; and as the company shows the grant of the use of the street in question by the town council of the town of Stone Mountain, we cannot say that it is a mere interloper and trespasser, so that equity will shut its doors to its entrance as a suitor.

The demurrer to the bill rested on two grounds. First, that it was brought too late, within ten days of the trial term of the trespass suits, and secondly, for want of equity. The chancellor drew the sting of the first ground by requiring the complainant to try the equity case on its

merits at the next term the first to which it was returnable, and as soon as it could be tried, if filed thirty days before the court, according to the rule. And we have seen that there is equity in the bill under the view we take of it.

If the present mode of running these cars be persisted in, and the affidavits and answer make the true case on the trial before the jury, the defendants to the bill will be entitled to have such a decree as will constrain the complainant to improve the mode now used in running them, as well as damages for the past, as the case now strikes us; and if their property lying on the street is so permanently injured as the answer and affidavits allege, they will be entitled to damages therefor. But we do not now rule positively on these points, preferring, as the chancellor did, it seems from his interlocutory injunction and order thereon, that the case on law and facts be fully tried before the jury on the merits, when, if parties are not satisfied with the result before the court and jury, either may have the case reviewed here on the full equities thereof.

Within a month or two the trial will be had and nobody can be permanently injured by the temporary injunction.

We cannot say that the chancellor should have absolutely prohibited the running the cars in the meantime, as the cross-bill prayed, but on a view of the whole case, we think that the disposition he made of it is legal, wise and just.

Let the judgment, therefore, be affirmed.

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## SMITH v. BANK OF NEW ENGLAND.

**(Supreme Court of New Hampshire, 1898. 69 N. H. 254, 45 Atl. 1082.)**

Suit by Anna L. Smith, on behalf of herself and 78 others, against the Bank of New England, for breach of trust. To the bill the defendant demurred.

Bill in equity, in behalf of the plaintiff and all others of like interest, alleging that the plaintiff is the owner of certificates of deposit issued by the Union Trust Company, which are indorsed by the defendants in the manner stated below; that on March 29, 1892, it was agreed between the trust company, a corporation organized under the laws of Iowa, and doing business in that state, and the defendants, that the trust company should issue certificates of deposit to an amount to be thereafter fixed, and should assign and transfer to the defendants, to be held by them in trust to secure the payment of the certificates, real estate and other securities approved by the defendants to an amount exceeding, at their face value, by 10 per cent. the amount of the certificates; that the defendants should thereupon certify upon each of the certificates that its payment was so secured; that the trust company might at any time withdraw any of the securities upon sub-

stituting others of equal or greater value; that, under and in pursuance of the agreement, the trust company issued certificates of deposit to the amount of $69,000, and the defendants certified thereon that, to secure the payment thereof, they held securities of the full value of 10 per cent. in excess of the amount of the certificates, though they in fact held only 505 shares of bank stock, of the face value of $50,500; that subsequently the trust company withdrew the bank stock, and substituted other securities, which were accepted and approved by the defendants, of the face value of $91,000, but all of which, except 180 shares of bank stock, of the face value of $18,000, were wholly worthless, as the defendants then knew, or by due care would have learned; that the defendants neglected to cause the 180 shares of bank stock to be properly transferred to them, in consequence of which, upon a liquidation of the affairs of the bank, the full value of the stock was paid to the trust company; that whether the trust company paid this money, or any part of it, to the defendants, the plaintiff does not know, and prays to be informed; that 78 other persons (whose names and residences are stated) hold certificates of deposit similar in all respects to those owned by the plaintiff, but that the amount held by each of them and the extent of their respective interests are unknown to the plaintiff, and can only be determined upon an accounting; and that the trust company is in the hands of a receiver, and has no substantial assets. The prayer of the bill is (1) for an order requiring all persons in like interest to join in the action or be barred from sharing in the decree; (2) for discovery and an accounting; and (3) for a determination of the damage caused by the defendants' negligence in the management of the trust estate, and a decree that the defendants shall pay the same. The defendants demurred because (1) the bill is multifarious; (2) the plaintiff has a plain and adequate remedy at law; and (3) the bill is without equity.

CARPENTER, C. J. The bill is not multifarious, nor would it be if all the holders of certificates were in fact made parties to it either as plaintiffs or defendants. They are all equally and directly interested in the disposition of any trust funds now held by the defendants, and in any damages that may be awarded against them for a breach of the trust. All the matters in controversy relate exclusively to the alleged conduct and misconduct of the defendants as trustees. It not only appears that by the joinder of all others of like interest with the plaintiff the defendants will not be embarrassed or subjected to any expense or inconvenience in making their defense, nor that any injustice will be done them, but that the matters in dispute can be more conveniently, economically, and expeditiously adjusted in one suit. Chase v. Searles, 45 N. H. 511; Eastman v. Bank, 58 N. H. 421, 422; Page v. Whidden, 59 N. H. 507, 509. The prevention of useless litigation and a multiplicity of needless suits is a recognized ground of equity jurisdiction. It is upon this principle that bills of peace are sustained. 1 Story, Eq. Jur. § 853. The bill may be brought as well

by the numerous claimants of the right in question as by him against whom the claim is made. Cowper v. Clerk, 3 P. Wms. 155, 157; Conyers v. Abergavenny, 1 Atk. 285; Powell v. Powis, 1 Younge & J. 159; Phillips v. Hudson, 2 Ch. App. 243.

The plaintiff's bill is in the nature of a bill of peace. One if its objects is to obtain an adjudication of the rights of the parties in one suit instead of 79 suits. For the present purpose it may be assumed that the only cause of action disclosed by the bill is for damages caused by the defendants' negligence, for which the plaintiff and the other holders of certificates have each a plain and adequate remedy at law. If the parties in interest severally brought actions at law, the question of the defendants' negligence would be exactly the same in all the actions, and would necessarily be determined upon the same evidence. Substantially, the damages of the several plaintiffs would be assessed upon the same principle. In each case the same witnesses would have to be called, at the same cost. Each trial would consume the same length of time and subject each party to the same expense. For the determination of one issue the public must provide 79 sessions of the court and 79 juries. In short, a single issue, upon which the rights of all parties interested in the controversy depend, must be tried 79 times, and the parties and the public be subjected to the worse than useless expense of 78 trials.

The defendants' position that "the equity jurisdiction of the court to prevent a multiplicity of suits cannot properly be invoked, except by the person who may be subjected to them," is supported by no authority and has no foundation in principle. A speedy and inexpensive adjudication of their common right is quite as important to the numerous plaintiffs as to the single defendant, and it may be much more so. Cases may often happen where a rejection of their application for equitable intervention to prevent a multiplicity of suits would operate practically as a denial of justice. Suppose, e. g., that each of one hundred persons held an interest coupon for, say, six dollars, on bonds issued by a town or other corporation, and that the only controverted question was the validity of the bonds; each coupon holder would have a clear, and, in a legal sense, an adequate, remedy at law. But if he recovered in an action at law he would realize nothing, as the necessary expenses of the suit would exceed the amount recovered. If, on the other hand, the question were determined in one suit, each might realize substantially the amount of his demand. To hold that equity will intervene in behalf of the corporation, but not in behalf of the coupon holders, to compel the issue to be tried in one suit, would bring deserved reproach upon the administration of justice. "The weight of authority," says Mr. Pomeroy, "is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, * * * where there is, and because there is, merely a community of

interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." 1 Pom. Eq. Jur. § 269. Such would be the doctrine here, if there were no authority on the subject. Any reasonably necessary process for conveniently and economically ascertaining rights and furnishing a remedy for their violation may be used. Webster v. Hall, 60 N. H. 7; Metcalf v. Gilmore, 59 N. H. 417, 434, 47 Am. Rep. 217; Walker v. Walker, 63 N. H. 321, 56 Am. Rep. 514; Brooks v. Howison, 63 N. H. 382, 388. For the enforcement of the rights of parties our common law provides "the best inventible procedure." Gage v. Gage, 66 N. H. 282, 294, 29 Atl. 543, 28 L. R. A. 829; Owen v. Weston, 63 N. H. 599, 600, 602, 4 Atl. 801, 56 Am. Rep. 547.

An order may be made at the trial term (if the defendants desire or deem it necessary for their protection against other suits) that all the certificate holders who, upon proper notice, fail to appear as plaintiffs on or before the time set for the trial, or other specified time, shall be forever barred from participating in any of the trust funds, or in any damages that may be awarded by reason of the defendants' negligence, and from hereafter bringing any action. The bill may be maintained to avoid a multiplicity of suits. This result makes it unnecessary to consider whether it might be maintained upon other grounds. Demurrer overruled.

PARSONS, J., did not sit. The others concurred.

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## SHEFFIELD WATERWORKS v. YEOMANS.

(In Chancery, 1866. L. R. 2 Ch. App. 8.)

The bill in this case was filed against John Yeomans and five Defendants on behalf of themselves and all other the persons named in any of certain pretended certificates, and stated, that in March, 1864, a reservoir belonging to the Company of Proprietors of the Sheffield Waterworks, the Plaintiffs in this case, burst, and occasioned an inundation, whereby many persons lost their lives and the property of very numerous persons was damaged. That, by the Sheffield Waterworks Act, 1864, commissioners were appointed who were to inquire into the damages occasioned by the inundation, and any person claiming damages under the Act was directed to lodge a statement of his claim at the office of the commissioners. Where on any claim damages were assented to by the company, or assessed by the commissioners, the costs of the claimants were to be borne and paid by the company, and the commissioners were to certify accordingly. All such costs were to be payable by the company at the expiration of six months after the making of the commissioners' general certificate, but were, in case of difference to be taxed and settled on production

of a certificate of the commissioners by a Master of a Superior Court of law at Westminster. If any costs payable under the Act were not paid within twenty-eight days after demand in writing, the certificate of the commissioners respecting such costs should have the effect, as against the company, of a judgment recovered for the amount of such costs. That the claimants for compensation under the Act were 7,315 in number, and many of them were poor and ignorant, and employed improper persons to represent them; and the commissioners, therefore, made a regulation that no certificate should be issued except to the claimant in person. That there was a difference of opinion between the commissioners as to whether the powers of the commissioners had not expired, and 1500 certificates, which the Plaintiffs alleged to be invalid, were delivered by some of the commissioners to the Defendant John Yeomans, the town clerk of Sheffield. That unless the Court interfered, the Defendant John Yeomans, and other persons by his permission, would produce these invalid certificates and have them taxed, whereupon judgment would be issued, and such proceedings would seriously prejudice the Plaintiffs, by compelling them to defend themselves on very numerous improper taxations, occasioning them very large costs and expenses. That the question whether these certificates were valid or invalid was the same as to all of them, and that the persons named therein were too numerous to be made Defendants, but were properly represented by five of them, who were named as Defendants.

And the bill prayed that the Defendant John Yeomans might be restrained from delivering these certificates except as the Court should direct, and that the Defendants and all other persons named in any of these certificates might be restrained from having them taxed, or procuring any taxation or judgment against the Plaintiffs, and that all these certificates might be delivered up to be cancelled, and, if necessary, that it might be declared that the same were invalid.

To this bill the Defendants, except Yeomans, demurred, and the Vice-Chancellor Kindersley overruled the demurrer.[5] * * *

LORD CHELMSFORD, L. C. The Vice-Chancellor appears to have decided this case against the Defendants on two grounds: First: That the bill was a bill of peace, and therefore proper in its form and character. Secondly: That the point raised by the demurrer depended upon questions of fact which had to be proved, and that ought therefore to be reserved for the hearing. His Honour accordingly overruled the demurrer, reserving to the Defendants the benefit of it at the hearing, and reserving till the hearing the costs of the demurrer.

Perhaps, strictly speaking, this is not a bill of peace, as the rights of the claimants under the alleged certificates are not identical; but it appears to me to be within the principle of bills of this description. The rights of the numerous claimants for costs all depend upon the

[5] The statement of facts is abridged.

same question—the validity of certificates sealed under the circumstances stated in the bill. Each of the 1500 persons, if he obtained the certificate from Mr. Yeomans, might produce it to a Master of one of the Superior Courts of common law, and obtain as a matter of course a taxation of the costs. He might then enter up judgment and sue out execution, and no application could be made in any of the common law Courts to stop the proceedings, although it may turn out in the result of this suit that the certificates are wholly invalid. It is true that, if the certificates have no validity, a motion might be made in the Court where judgment was entered up, and from which the execution issued, to set aside that execution, but not until considerable expense had been incurred, and possibly after the same course of proceeding to judgment and execution had been taken by many of the claimants. It seems to me to be a very fit case, by analogy, at least, to a bill of peace, for a Court of equity to interpose and prevent the unnecessary expense and litigation which would be thus occasioned, and to decide once for all the validity or invalidity of the certificates upon which the claims of all the parties depend.

The remaining question is, whether the question ought to be decided upon demurrer. It was pressed very strongly upon me that this was always considered to be a matter entirely for the discretion of the Judge, and that no case could be produced in which, when it had been determined in the Court below that the question ought not to be disposed of upon demurrer, the Appeal Court had overruled that decision. Whether any such case can be found or not (and none has been produced), it seems to me that where a Judge of great experience and judgment has arrived at the conclusion that a case ought not to be decided upon demurrer, whether on account of its importance, or by reason of facts and circumstances, which he considered necessary to be found in order satisfactorily to decide the question raised by the bill, it would not be a proper exercise of the authority of an appellate Court to overrule this decision, unless it was satisfied that the whole case was open upon the demurrer. I agree, however, with the Vice-Chancellor, that the question of the validity of the certificates for costs is not capable of a satisfactory determination without the proof of facts which are not admitted by the demurrer, and I must decline to anticipate such proof by deciding the case upon the pleadings as they stand; therefore, the Vice-Chancellor's order appealed from must be affirmed, and the appeal dismissed with costs.

## CITY OF HUTCHINSON v. BECKHAM.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1902. 118 Fed. 399, 55 C. C. A. 333.)

Appeal from the Circuit Court of the United States for the District of Kansas.

On September 5, 1901, James H. Beckham and James G. McKnight, the appellees, exhibited a bill of complaint against the city of Hutchinson, in the state of Kansas, et al., in the circuit court of the United States for the district of Kansas, wherein they averred, in substance, that they were engaged in business at Kansas City, in the state of Missouri, of which latter state they were residents and citizens, as "wholesalers and jobbers of groceries"; that their storerooms and offices were, and for a long time had been, located at Kansas City, Mo.; that they were engaged in interstate commerce, it having been their practice for a long time to sell groceries in many cities and towns in the state of Kansas and elsewhere, and particularly to retail grocers doing business in the city of Hutchinson, Kan., and in that vicinity; that in order to make a speedy delivery of goods sold in the latter city, after they were ordered, they had theretofore established and still continued to maintain a depot for the storage of groceries in original packages in the city of Hutchinson, which depot was in charge of an agent of the complainants, who represented them in said city and vicinity. * * * The bill further averred, in substance, that the city of Hutchinson, acting by its mayor and councilmen, on June 25, 1900, had enacted a certain ordinance by the terms of which a license tax in the sum of $1,200 per annum was imposed upon the complainants as well as upon other jobbers who had goods stored in the city of Hutchinson for distribution to retail dealers, but who did not keep and maintain their principal office for the transaction of business in said city; that by the terms of said ordinance no persons engaged as jobbers of merchandise who did maintain their principal office in the city of Hutchinson, and did store goods therein for distribution to retail dealers, were required to pay said license tax, but were wholly exempt therefrom; that on August 1, 1900, the first section of said ordinance was amended so as to provide that licenses issued thereunder by the city should expire on the last day of June and the last day of December next after they were issued, and that the license fee should be at the rate of $1,200 per year, or $100 per month. * * * It was further averred that the complainants were liable to be proceeded against and compelled to pay a fine of not less than $10 nor more than $100, and to stand committed until the fine was paid, or to be confined in the city jail not less than 10 days nor more than 30 days, or to suffer both fine and imprisonment, in the discretion of the police judge, if they failed to comply with the provisions of said ordinance; that, by reason of the complainants' failure

to comply with the provisions of said ordinance, the defendant city had instituted criminal proceedings against their agents, and caused them to be imprisoned, and had threatened and were about to institute a great number of other like prosecutions against them, and to daily apprehend and imprison the complainants' agents until they complied with the provisions of the ordinance. In view of the premises, the complainants charged that the aforesaid ordinance was wholly illegal and void, and they prayed that the court would by its decree so declare, and perpetually enjoin the defendants from attempting to enforce the provisions thereof. The defendants below filed a general demurrer to the bill, which was overruled. Thereupon the defendants declined to plead further, and a final decree was entered in favor of the complainants below, granting the relief prayed for. From such decree the defendants prosecuted an appeal to this court.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge,[6] after stating the case as above, delivered the opinion of the court.

The decree below is challenged in this court on two grounds only, the first and principal contention being that the lower court had no jurisdiction of the controversy because the amount involved was, as it is said, less than $2,000, exclusive of interest and costs. Incidentally it is also claimed that the complainants had an adequate remedy at law, and no right, for that reason, to appeal to a court of chancery for relief. Inasmuch as no attempt has been made in the argument to defend the validity of the ordinance, and as counsel for the city have based their right to a reversal wholly on the two grounds above stated, we shall assume that the ordinance is invalid, as the lower court held, and proceed to inquire whether the amount involved was sufficient to confer jurisdiction and whether the case was properly cognizable by a court of equity.

Concerning the last of these questions, which will be noticed first, it is quite sufficient to say that the complaint which was filed in the lower court may be appropriately termed a "bill of peace." Story, Eq. Jur. §§ 852, 853. It was filed to obtain a definite determination that the ordinance complained of was void, also to prevent harassing litigation, and to establish the complainants' right to transact business in the city of Hutchinson, as it had been doing for some years, without complying with the terms of the ordinance. One paragraph of the bill, as heretofore shown, alleged that the city authorities, for the purpose of enforcing compliance with the ordinance, had already caused the arrest of their agents, and were threatening to make further like arrests, and to institute numerous criminal prosecutions, and thereby prevent them from receiving, storing, and making speedy de-

[6] The statement of facts is abridged and part of the opinion is omitted.

liveries of goods, as had been their habit. Now, conceding that the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the city, yet, as the right of appeal existed from any judgment which might have been rendered therein, it is apparent that months, and possibly some years, might have elapsed before the invalidity of the ordinance would have been definitely established, and that in the meantime the complainants might and probably would have been compelled to defend a multitude of suits, and submit to daily interruptions of their business, which would have proven to be very annoying, and probably disastrous. In such a case, the rule that a suit in equity will not lie to restrain the collection of an illegal tax, merely on the ground of its illegality, does not apply, because circumstances are alleged which show that if left to their remedy at law the complainants would probably be subjected to numerous prosecutions, besides sustaining great and irreparable loss in the prosecution of their business. When, in addition to the fact that an illegal tax has been imposed, it further appears that the persons or corporations upon whom it is imposed will be called upon to defend a multitude of suits, or that they will sustain great injury if the state or municipality is left free to enforce the tax by the usual remedies, courts of equity never hesitate to assume jurisdiction and grant injunctions against those who are seeking to enforce the collection of the tax if it appears to be clearly illegal. Dows v. City of Chicago, 11 Wall. 108, 110, 20 L. Ed. 65; Railway Co. v. Cheyenne, 113 U. S. 516, 525, 5 Sup. Ct. 601, 28 L. Ed. 1098; City of Ogden v. Armstrong, 168 U. S. 224, 239, 240, 18 Sup. Ct. 98, 42 L. Ed. 444; Heywood v. City of Buffalo, 14 N. Y. 534. * * *

The decree below is accordingly affirmed.

# CHAPTER VI

## BILLS QUIA TIMET

### MARTIN et al. v. GRAVES et ux.

(Supreme Judicial Court of Massachusetts, 1863. 5 Allen, 601.)

Bill in equity by the residuary devisees of John Sparhawk, deceased, alleging that the defendants through fraud and undue influence procured from Sparhawk in his lifetime, without consideration, the execution of a deed of land to Sarah Graves, the female defendant, in which the right of occupying the premises was reserved to Sparhawk and his wife, during their joint lives and the life of the survivor of them; and that the defendants have refused to deliver up or cancel the deed, but claim title to the premises, subject to the life estate of the widow of Sparhawk. The defendants filed a general demurrer.

J. H. Robinson, for the defendants. The plaintiffs have a plain, adequate and complete remedy at law. Somes v. Skinner, 16 Mass. 348; Pool v. Lloyd, 5 Metc. 525; Pease v. Pease, 8 Metc. 395; Wilson v. Leishman, 12 Metc. 316; Woodman v. Saltonstall, 7 Cush. 181.

MERRICK, J. The defendants contend that upon the facts stated in the bill the plaintiffs have a plain, adequate and complete remedy at law, and therefore that their demurrer must be sustained. It is true that if the defendants were in possession of the premises described in the bill, claiming title thereto, and a right to exclude the plaintiffs therefrom, under and by virtue of the deed from John Sparhawk to Sarah Graves, and that the validity of this deed constituted the only matter in controversy between the parties, the plaintiffs would be afforded in proceedings at law an ample and perfect remedy. If they could successfully contest the validity of that deed by showing that it was obtained by fraud and imposition practised upon the grantor, they could recover judgment for possession of their respective shares of the estate either in a writ of entry or under a petition for partition. And the rendition of a final judgment in their favor upon either of those processes would effectually protect them against any alienation which might be made after the commencement and during the pendency of such proceedings. Thayer v. Smith, 9 Metc. 469; Woodman v. Saltonstall, 7 Cush. 181; Pratt v. Pond, 5 Allen, 59; Clark v. Jones, 5 Allen, 379.

But it appears from the allegations in the bill that in fact the defendants are not in possession of the premises. In the deed of John

Sparhawk to Sarah Graves he expressly reserved to himself and to his wife the right to live upon and occupy the same during their joint lives, and the life of the survivor of them. And the plaintiffs aver that they have requested the said Sarah and Samuel to give up and cancel said deed, and to convey the premises to them, but that the defendants refuse to do so, and claim title thereto, subject to the life estate of the widow of John Sparhawk. From these averments it appears that the defendants claim only a reversionary interest in the estate, that they are not in the occupation, and have no right to the present possession of it. Under such circumstances, the plaintiffs cannot maintain against them either a writ of entry, or a process under the statute for partition. Their only effectual remedy, therefore, must at this time be by a bill in equity; and otherwise they might be without adequate relief. Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties may require. 2 Story on Eq. § 694.

It is therefore clear that the objection taken by the defendants to the maintenance of the bill cannot be sustained, and that their demurrer must be overruled.[1]

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## BISHOP v. MOORMAN et al.

**(Supreme Court of Indiana, 1884. 98 Ind. 1, 49 Am. Rep. 731.)**

ELLIOTT, C. J. The complaint of the appellant alleges that the sheriff is about to levy upon lands owned by him an execution issued upon a judgment rendered against other persons, and in an action to which he was not a party. The prayer is for an injunction restraining the sheriff, one of the appellees, from selling the land.

[1] See 6 Pomeroy's Equity Jurisprudence, § 725: "The distinction between these (suits in chancery to quiet title in the nature of bills of peace) and suits to remove a cloud is not always observed. The equitable relief to remove a cloud from title is 'granted on the principle quia timet,' that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title"—citing Hager v. Shindler, 29 Cal. 55, as follows: "A bill quia timet or to remove a cloud from the title of real estate differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property, as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests. To maintain a suit of that character it was generally necessary that the plaintiff should be in possession, and except where the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long continued possession."

The appellant contends that his land can not be sold upon a judgment and execution against other persons, and that he is entitled to an injunction restraining the sheriff from selling, for the reason that the sale would cast a cloud upon his title. The appellees' position is that no case for injunction is made because the sale would be void, and a void sale would not cloud the title.

It is perfectly clear that the appellant's land can not be sold to pay somebody else's debt, but it does not follow from this that he has no right to enjoin the sheriff from selling his land. There can be but little, if indeed any, doubt at all, that under our decisions a case is made for an injunction, for they uniformly hold that a land-owner may restrain an officer from doing, under color of official authority, an act that may injure the marketable value of his title by clouding it. This principle has found most frequent application in cases of threatened sales for taxes, and the uniform ruling in such cases has been that a sale for a tax absolutely void will be enjoined. Greencastle Tp. v. Black, 5 Ind. 557; Riley v. Western Union Tel. Co., 47 Ind. 511; Abbott v. Edgerton, 53 Ind. 196; City of Delphi v. Bowen, 61 Ind. 29; Morrison v. Bank of Commerce, 81 Ind. 335; Toledo, etc., R. R. Co. v. City of Lafayette, 22 Ind. 262; Hamilton v. Amsden, 88 Ind. 304; Eversole v. Cook, 92 Ind. 222; Goring v. McTaggart, 92 Ind. 200. We have a great number of cases holding that void assessments for ditches, gravel roads, and the like, may be enjoined, and there are many cases holding that the enforcement of a void judgment may be prevented by injunction. It is impossible to distinguish in principle between cases of the character to which we have referred and such a case as the present, and they should be regarded as decisive of the question here at issue, but we have cases even more closely resembling the present. In Shaw v. Williams, 87 Ind. 158, 44 Am. Rep. 756, it was held that a sale upon an illegal notice might be enjoined, and in Dyer v. Armstrong, 5 Ind. 437, it was said: "Sales may be restrained in all cases, where they are inequitable." An injunction will lie to restrain the collection of a judgment obtained without notice. Grass v. Hess, 37 Ind. 193.

The sale of land under color of judicial process is more than a mere fugitive trespass; it is the assertion of a permanent right to the land and a full denial of the owner's title, and the rule is, that where there is an assertion of a permanent right to land the owner may maintain injunction if the right asserted is unfounded. Erwin v. Fulk, 94 Ind. 235; Kyle v. Board, etc., 94 Ind. 115. An assertion of a right to seize land, when made under color of official authority, clouds title, and it has always been a well recognized equity doctrine that injunction will lie to prevent clouds from being cast upon an owner's title. It is true that there are decisions of other courts holding that where the act, though done under color of authority is void, no cloud is created, and, therefore, injunction will not lie; but the theory of our cases has always been that a void act, when done under apparent legal authority,

does cloud title. This rule is supported by weighty authority, and is a reasonable one. It can not be doubted that a man's title is, as to its marketable value, injured by the deed of a sheriff conveying it to some one else, and a man having a title is entitled to it in all its vigor and value. No reason in law or morals can be found that will justly support the position of one who resists an injunction, where he concedes he is acting under color of authority, but in fact has none, and is using that authority to seize and sell without right, or the semblance of justification, the land of another. No one, we suppose, doubts that a property owner may quiet his title against an apparent claim, though it be never so empty, and if he may do this, surely he may by injunction prevent that apparent claim from clouding his title, without delaying until it has assumed that shape.

An able author has given this subject careful consideration, and he fully sustains the doctrine which has found favor from this court. In speaking of the opposite view, he says:

"While this doctrine may be settled by the weight of authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily, in courts, of defendants urging that the instruments under which they claim are void, and therefore that they ought to be permitted to stand unmolested; and of judges deciding that the court can not interfere because the deed or other instrument is void; while from a business point of view, every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value; and the judge himself, who repeats the rule, would neither buy the property while thus affected, nor loan a dollar upon its security. This doctrine is, in truth, based upon a mere verbal logic, rather than upon considerations of justice and expediency." 3 Pomeroy, Eq. § 1399.

It is argued that the appellant's legal remedy is perfect and complete, and therefore he has no right to ask the assistance of a court of equity. This entire argument rests on an undue assumption. The law, using that term in a limited sense and as opposed to equity, furnishes no remedy for quieting title. One in possession could secure a decree quieting title only from a court of chancery, and never from a court of law; in such cases no remedy at all was obtainable from the common law courts. An action of trespass might give damages, but it could not clear title. There is, therefore, no adequate legal remedy. The rule upon this subject is thus stated by the Supreme Court of the United States:

"It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580.

In many cases this rule has been adopted and enforced by this court. English v. Smock, 34 Ind. 115, 7 Am. Rep. 215, vide opinion page 124; Elson v. O'Dowd, 40 Ind. 300, vide opinion page 302; Clark v. Jeffersonville, etc., R. R. Co., 44 Ind. 248; Thatcher v. Humble, 67 Ind. 444; Spicer v. Hoop, 51 Ind. 365, see page 370; Bonnell v. Allen, 53 Ind. 130. The principle involved in the rule stated has been carried much further than it is necessary for us to carry it in this case. Thus,

it has been held that an injunction will lie to restrain the enforcement of a judgment shown by the record to have been annulled. Rickets v. Hitchens, 34 Ind. 348. So, it has been held that a sale upon a judgment satisfied of record will be enjoined. Bowen v. Clark, 46 Ind. 405. A tenant by entirety may enjoin sale upon a judgment against his cotenant of the land owned jointly, although the record discloses the character of the title and the nature of the judgment. Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471.

The sale of property not subject to execution, as, for instance, the property of a municipal corporation, may be enjoined. President, etc., v. City of Indianapolis, 12 Ind. 620; Lucas v. Board, etc., 44 Ind. 524, 553. Of the class of cases just mentioned it may be said that the record much more clearly discloses the fact that no title can pass than in such a case as this, for, in the first named class of cases, a public law notifies the world that no title can pass by the sale, and there is, therefore, a much stronger application of the rule in such cases than is required in this. In the case of First Nat. Bank v. Deitch, 83 Ind. 131, the court quoted, with approval from a work on Injunctions, the following:

"And it may be asserted as a general proposition, that a sale of lands under execution, which would confer no title upon the purchaser, and whose only effect would be to cloud the title of others, will be enjoined." 1 High, Inj. 242.

In view of the cases we have cited, we can not perceive that there can be any doubt that the controlling question in this case has been set at rest in this State.

Looking to the decisions of other courts, we shall find that our cases are not without firm support. In Key City, etc., Co. v. Munsell, 19 Iowa, 305, the case was in all material respects precisely like that under discussion, and it was held that injunction was the appropriate remedy. The opinion in that case was written by Judge Dillon, and makes clear the right there adjudged the plaintiff. The Supreme Court of California, in Hickman v. O'Neal, 10 Cal. 292, said:

"The right of a party to enjoin a sale of his property for another's debt is not denied, and is supported by several decisions of this court."

We refer, without comment, to the following cases as sustaining our views. Bank v. Schultz, 2 Ohio, 471; Norton v. Beaver, 5 Ohio, 178; Bennett v. McFadden, 61 Ill. 334; Vogler v. Montgomery, 54 Mo. 577; Uhl v. May, 5 Neb. 157.

The case of Cartright v. Briggs, 41 Ind. 184, is not in point, for the facts are essentially different from those before us. In that case the main point of the decision is that the plaintiff had no title to the land which he sought to prevent the auditor from selling. The decision in Trueblood v. Hollingsworth, 48 Ind. 537, in so far as it is in point at all, is against rather than for the appellees; for the clear implication from it is, that a sale in such a case as this may be enjoined; but the point really decided in that case was, that the complaint was insufficient

because it did not state such facts as gave color of authority to make the sale, and only alleged "empty threats." When the case cited was again before this court, it was expressly held that injunction would lie. Hollingsworth v. Trueblood, 59 Ind. 542. The decision in Mead v. McFadden, 68 Ind. 340, is that a widow can not enjoin the sale of lands of the husband upon executions received by the sheriff during the lifetime of the husband, and is not in point. What is there decided is that executions bound the husband's interest, whatsoever it was, and did not affect the widow's rights, and that the lien of the judgments was paramount to the widow's claim to the $500 allowed by law. No one of these cases is in conflict with those heretofore cited; nor can either of them exert any influence upon the decision of the present case.

The execution plaintiffs were proper, if not necessary, parties to this action, for they were the real parties in interest, and it was proper to bring them into court for the purpose of finally determining the controversy.

Judgment reversed, with instructions to overrule the demurrers to the complaint.

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## SCOTT v. ONDERDONK et al.

(Court of Appeals of New York, 1856. 14 N. Y. 9, 67 Am. Dec. 106.)

Appeal from a judgment of the supreme court affirming a judgment of the city court of Brooklyn in favor of the plaintiff on a demurrer to the complaint. The action was brought in March, 1852, against Onderdonk and the city of Brooklyn. The complaint stated that the plaintiff was the owner of two lots of land situate in the city of Brooklyn; that in November, 1848, the city sold the lots at auction to pay an alleged assessment thereon for constructing a well and pump in one of the streets, and that Onderdonk became the purchaser for the term of a thousand years at the price of $23.28; and that the common council of the city executed and delivered to him a certificate of the sale. This certificate was set out in the complaint. It recited the making of the assessment, the proceedings to collect the same, and the advertisement and sale of the lots to Onderdonk, and certified that at the expiration of two years from the sale he would be entitled to a conveyance of the premises for the term for which they were sold. The complaint stated that a copy of the certificate was in March, 1849, filed in the clerk's office of Kings county, and entered in a book kept by the clerk where certificates of sales of land for taxes were entered; and then alleged:

"That no such assessment or tax as was mentioned in the certificate had ever been made and confirmed; that the proceedings had and taken by the city and its officers in respect to laying and imposing the assessment, the confirmation thereof and sale were irregular, illegal, defective and void; that the resolutions of the common council passed in respect to the assessment and sale were not presented to the mayor for his approval, and that the mayor did not approve thereof as required by the statute."

It was further stated in the complaint that Onderdonk claimed that by virtue of the certificate he was entitled to receive from the city a lease of the premises for the period mentioned therein, but that as yet no lease had been executed to him; that as the plaintiff was advised the certificate by reason of the filing and entry of a copy thereof in the clerk's office was presumptively a lien upon the premises or showed presumptively a power in some one other than the plaintiff to create an estate therein, whereas in fact no such power or lien existed, and the certificate was a cloud upon his title, diminishing the value of the property and preventing its sale. It was averred that the defendant Onderdonk, on request to do so, had refused to cancel the certificate or release his pretended rights under it. The defendant Onderdonk appeared and demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The city court overruled the demurrer and gave judgment for the plaintiff, setting aside the certificate of sale and directing it to be canceled, declaring the proceedings and sale void, requiring Onderdonk to release to the plaintiff his pretended claim to the land, and perpetually enjoining the city from executing any conveyance pursuant to the sale. On appeal the judgment was affirmed by the supreme court in the second district. The defendant Onderdonk appealed to this court.

DENIO, C. J.[2] The substance of the complaint is, that without having laid an assessment affecting the plaintiff's lots, the corporation proceeded to sell them as though they had been legally assessed; that the defendant Onderdonk became the purchaser at the sale, receiving a certificate of the purchase, and is seeking to consummate the transaction by obtaining a conveyance of the property from the corporation for a long term of years. Though it is improbable that the sale was made without the pretense of a valid assessment, the defendants have chosen to put themselves upon the naked case that there was no assessment; and the question to be determined is whether, conceding such a state of things to exist, the plaintiff, before he has been actually disturbed, is entitled to maintain this action and to have a judgment arresting the proceeding and setting aside what has been done. Ordinarily a party must wait until his rights have been actually interfered with before he can implead another from whom he anticipates an injury. But there are several exceptions to this rule; and when the jurisdiction in law and equity was administered in different courts and by different forms of proceeding, it was a common case for a party to appeal to a court of equity for relief against an apprehended injury to be effected by his adversary by some act in pais or by some legal proceeding which he could not defend himself against upon the principles of the common law. This class of cases has been narrowed by the law abolishing the distinction between the two jurisdictions; and now, as a general rule, if the party claiming relief has a good defense, wheth-

[2] Part of the opinion is omitted.

er it be of a legal or equitable nature, and if he can only be divested of his rights by some suit in court instituted by his adversary, he must wait until he is thus challenged, when he will be in time to bring forward his defense. * * *

There is a principle of equity which remains in force notwithstanding the confusion of remedies, by which a person may in certain cases institute a suit to remove a claim which is a cloud upon the title to his property. Hamilton v. Cummings, 1 Johns. Ch. 517; Story's Eq. § 700 et seq. If, however, the claim is based upon a written instrument which is void upon its face, or which does not in its terms apply to the property it is claimed to affect, there seems to be no reason for entertaining a litigation respecting it, before it is attempted to be enforced; for the party apprehending danger has his defense always at hand. In such a case this court has determined that no action at the suit of the party apprehending injury will lie. Cox v. Clift, 2 N. Y. 118. The same reason applies to cases where the claim requires the existence of a series of facts or the performance of a succession of legal acts, and there is a defect as to one or more of the links. The party must in general wait until the pretended title is asserted. This principle is also very well settled by authority. Van Doren v. Mayor, etc., of New York, 9 Paige, 388; Mayor, etc., of Brooklyn v. Meserole, 26 Wend. 132. In both these classes of cases the party whose estate is questioned may naturally wish to have the matter speedily determined, as he may in the mean time suffer inconveniences and even actual damage on account of the discredit attaching to his title by reason of the unfounded claim. But unless the circumstances are such as to sustain an action for slander of title, the law regards the injury too speculative to warrant its interference. I am able, therefore, to concur in the views of the City Court of Brooklyn, contained in the opinion which has been laid before us, to the effect that in every case where an instrument in the hands of another person is calculated to induce the belief that the title of the plaintiff is invalid, an action will lie to set it aside. In this case, therefore, if Onderdonk, the purchaser at the corporation sale, in asserting his title after he had perfected his purchase, would be obliged to prove the laying of the assessment as well as the other proceedings anterior to the conveyance, I should be of opinion that the complainant had not established a case for relief. Neither the proceedings of the corporation, nor the conveyance to Onderdonk when obtained, would constitue such a cloud upon the plaintiff's title as is contemplated by the rule. It would be impossible for Onderdonk to recover the possession of the lots, for he could not establish the existence of the assessment, and the plaintiff might rest in perfect safety. But the 45th section of the charter of the city of Brooklyn provides that the conveyance under such a sale as was made in this case, which is to be executed under the corporate seal, shall briefly set forth the proceedings had for the sale of the premises, and that by force thereof the purchaser shall be entitled to the possession and to the same remedy to

recover such possession as is provided by law for the removal of tenants who hold over after the expiration of their terms, and that such "conveyance shall, in any such proceeding, be deemed prima facie evidence of the facts therein recited and set forth." Laws 1834, p. 108. A conveyance properly prepared under this provision would recite the ordinance or resolution of the common council imposing the assessment, and such recital would be presumptive evidence of the existence of that ordinance. It is true the owner of the land would be at liberty to disprove it if he could obtain the evidence; but the statute contemplates that the purchaser shall be furnished with a document bearing on its face prima facie evidence of a title in him, and can only be impeached by proof aliunde of the falsity of its recital. The authorities to which I have referred admit that in such cases the party is not compelled to take the hazard of the loss of his evidence, but may, while it is attainable, call the party holding such a document into court and have the matter determined at once, so that the cloud upon his title may be dispelled. If the plaintiff would be entitled to set aside a conveyance upon the facts stated in the complaint, if one had been obtained, then, inasmuch as the purchaser is seeking to obtain such a conveyance and the corporation of Brooklyn is ready to execute one, as is apparent from the terms of the certificate of sale, it is right that they should be enjoined from proceeding further toward that object.

For the single reason, therefore, that the statute gives to the conveyance the effect which has been mentioned, I am of opinion that the City Court was right in overruling the demurrer and giving the plaintiff the relief which he sought. Judgment affirmed.

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## WATERBURY SAVINGS BANK v. LAWLER, Tax Collector.

(Supreme Court of Errors of Connecticut, 1878. 46 Conn. 243.)

Bill in equity for an injunction; brought to the City Court of the city of Waterbury, and heard before Cowell, J. Facts found and injunction granted, and motion in error by the respondent.

LOOMIS, J.[3] The City Court of Waterbury passed a decree enjoining the respondent as tax collector from levying his tax warrant on certain land of the petitioner, and from selling the same to collect sundry taxes assessed on the land against Richard Vicars while he owned an equity of redemption in the same subject to a mortgage to the petitioner, and the respondent seeks by motion in error to reverse this decree for several reasons mentioned in his assignment of errors, which may be reduced substantially to two:

(1) That the facts found by the court show that the taxes in question became a lien on the lien on the land which continued more than

[3] Parts of the opinion are omitted.

a year after the taxes had become due, notwithstanding the petitioner had foreclosed the mortgage, and the title to the premises had become absolute by failure of the respondent to redeem.

(2) That the remedy by injunction will not lie to arrest the collection of public taxes.

The essential facts relative to the first point are as follows: The taxes in controversy were laid on the annual town lists during four successive years, from 1872 to 1875, inclusive, and were duly assessed upon the land against Vicars, while he was the owner of the equity of redemption subject to a mortgage to the petitioner, and was in possession of the premises.

As Vicars had no other property the taxes were legally collectible out of this land unless the facts hereafter mentioned show a transfer of the land more than one year after the taxes had become due. The petitioner, in March, 1877, obtained a decree of foreclosure, and in April of the same year, more than a year after all the taxes in question had become due, the title to the premises became absolute in the petitioner. And after this, in the month of August, 1877, the respondent first undertook to collect the taxes by levying his tax warrant on the land.

The precise legal question which arises on the facts just stated is, whether the foreclosure of a mortgage, and the title becoming absolute in the mortgagee by neglect of the owner of the equity to redeem, constitute a transfer of the land mortgaged within the meaning of the General Statutes of 1875. * * *

We conclude therefore that the respondent had no right to collect the taxes in question out of the land described, and that there was no error in the decision of the court below in this regard.

And this brings us to the second question—whether the threatened wrong can be prevented by injunction.

This extraordinary preventive remedy of a court of equity is here invoked upon the ground, mainly that the proceedings already commenced by the levy of the tax warrant, if allowed to be completed, would embarrass and becloud the petitioner's title in the land described and diminished its value.

A cloud upon one's title is something which shows prima facie some right of a third person to it. And in this case, as the illegality of collecting the taxes out of the identical property assessed would not appear on the face of the record of the proceedings relative to the laying and collecting of the taxes, a prima facie right in a third person who should receive a deed of the land from the tax collector would thereby be created, which would bring the case apparently within an extensive branch of equity jurisdiction. "But," as Ellsworth, J., remarked in giving the opinion in Munson v. Munson, 28 Conn. 586, 73 Am. Dec. 693, "the power is not exercised as a matter of course, nor under any universal rule or principle of law requiring its exercise. It is preventive, as we have said, and very much must depend upon the extent and

imminence of the danger threatened, and the view which will be taken of the case by a discreet judge."

Although, as suggested, the facts of this case may bring it within the ordinary definition of a threatened cloud upon the plaintiff's title, by creating a prima facie right which must be overcome by evidence aliunde, yet there is one element wanting, which in this class of cases always calls most imperatively for equitable interference. I refer to the fact that the evidence to rebut the prima facie title is not in this case liable to be lost by the unavoidable death of witnesses, or any other cause likely to happen; for the rebutting facts relied upon, to wit, the mortgage, the foreclosure, and the date when the plaintiff's title became absolute, are all matters of record and easily obtained. So that ultimately the petitioner will be sure to vindicate his title in a court of law and successfully defend his possession. The injury to be apprehended therefore is by no means irreparable, and the court might well act upon its discretion and deny the injunction. * * *

We therefore advise the Superior Court that there was error in the City Court in deciding that an injunction would lie, and that the decree of that court be reversed.

In this opinion the other Judges concurred.[4]

[4] See Whitney v. City of Port Huron, (1891), 88 Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291, when Morse, J., speaking for the court, said, in part: "The plaintiff sues to recover taxes paid by her under protest on a special assessment levied for the paving of Pine Grove avenue, in the city of Port Huron. She had judgment in the court below, the verdict of the jury being directed by the circuit judge in her favor. * * *"

It is also claimed that her payment of the tax was voluntary. The tax was paid April 2, 1886, and across the face of the receipt was written as follows: "Paid under protest, to protect the property from being sold, and on account of taxes being illegal." The city treasurer had advertised the plaintiff's property for sale, and she had the right to presume that he would proceed with the sale. The fact that the sale would have conveyed no title to the purchaser on account of the illegality of the tax, or that she could have removed the cloud upon her title caused by such sale by legal proceedings, had no bearing upon her right to pay the tax under protest, and thereby stop the sale. Nor was it any the less an involuntary payment under the law. * * * If the citizen's property is threatened with seizure under a tax-warrant, or his real estate is advertised for sale to collect delinquent taxes, he is, equally in both cases, entitled to free his property by a payment of the tax under protest, and such payment will not be considered voluntary. It was held in Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512, that one who has full knowledge of all facts, being conclusively presumed to know the law, is presumed to know that an assessment, laid under a statute which is unconstitutional and void, cannot be made the basis of a sale that could constitute any cloud upon his title, and therefore to know that he could not be injured by it; and that a payment of a tax under protest, in such a case, where no seizure of goods or of the person had been made or threatened, and where the officer had no authority to compel payment otherwise than by a sale of land, which could injure no one, would not be other than a voluntary payment, as a protest would not change the character of the payment. It was held also that a sale of the land under such circumstances would not create a cloud upon the owner's title. This may be good law when applied to proceedings under an unconstitutional enactment, which is no law, and is held to confer no rights upon any one, as all must be presumed to know that it is unconstitutional and void; but it cannot be applied to cases where the statute under which the proceedings to levy the tax are

## THOMPSON et al. v. ETOWAH IRON CO.

(Supreme Court of Georgia, 1893. 91 Ga. 538, 17 S. E. 663.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Action by Milton Thompson and others against the Etowah Iron Company and others to remove a cloud from title. Defendants had judgment, and plaintiffs bring error.

LUMPKIN, J. 1. The principle upon which equity will lend its aid to remove a cloud upon title is that one in the rightful possession of property is entitled to the full, quiet, and peaceful enjoyment of the same, without present annoyance and harassment, or threatened molestation. That timely and adequate protection in this respect should ever be afforded, the authorities all agree. It is only as to what state of facts and circumstances will present a case for equitable interference that there seems to be any contrariety of opinion. The granting of the relief sought has uniformly been regarded as discretionary, and thus it is that the vast majority of the earlier decisions stand alone upon the individual merits of the cases in which they were rendered, and in consequence are of but little value as establishing any general rule which may be universally followed. For a discussion of the doctrine, and a review of the cases in which it has been invoked, see 2 Amer. & Eng. Enc. Law, 298 et seq.; 3 Pom. Eq. Jur. §§ 1397–1399; 2 Estee, Pl. & Pr. (3d Ed.) § 2510; 11 Cent. Law J. 261. But, despite the want of harmony among the decisions, the judiciary both of England and of this country acquiesce in the view that one seeking

taken, is constitutional, and where the illegality of the tax is claimed from irregularities or defects in the statutory proceedings. If it were so, it would require of the land-owner a greater knowledge of the law than attorneys, or even courts, possess. For instance, in the present case, able attorneys for the defendant are claiming that the tax paid by plaintiff was a legal one, and that all the proceedings in assessing it were lawful; yet at the same time they argue that, if it should be determined by this court to be illegal for any reason, then the plaintiff's payment must be considered a voluntary one, and she cannot recover what she has paid, because she and every one else are presumed to know that the tax is void, and that a sale under it could convey no title, and therefore cast no cloud over her title. But the fact remains, as every one knows, that a tax-deed or any other purported conveyance of land does cloud the title, and that it can never be sold or exchanged as readily, and seldom for as great a price, as when unincumbered, although it may be patent to the courts that such deed or conveyance is void and of no consequence, as far as the holding of the title is concerned; and, in my opinion, the owner of the land had the right, in law and equity, to treat every such tax-deed or other conveyance as a cloud upon his title, and to take such steps to get rid of it, or to prevent its issue or record, as the law authorizes, when the title is actually clouded, as defined by some of the authorities. A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title which the law should recognize and remove. * * * The judgment is affirmed, with costs. The other justices concurred.

such aid of a court of equity should affirmatively show (1) that he cannot immediately or effectually maintain or protect his rights by any other course of proceedings open to him; (2) that the instrument sought to be canceled is such as would operate to throw a cloud or suspicion upon his title, and might be vexatiously or injuriously used against him; and (3) that he either suffers some present injury by reason of a hostile claim of right, or, though such claim be not asserted adversely or aggressively, he has reason to apprehend that the evidence upon which he relies to impeach or invalidate the same as a cloud upon his title may be lost or impaired by lapse of time.

What is a "cloud," such as equity will undertake to remove, has been the subject of much difference of opinion, and is a question upon which many of the courts seem to have agreed to disagree. It is not many years since Mr. Justice Selden, in dealing with the question as presented in the case of Ward v. Dewey, 16 N. Y. 519, commented upon the fact that:

**"None of the cases define what is meant by a cloud upon title, nor attempt to lay down any general rules by which what will constitute such a cloud may be ascertained."**

Some of the later American cases have endeavored to formulate rules which would relieve the matter of difficulty; but to Mr. Justice Field, now on the supreme bench of the United States, is probably due the credit of first defining, accurately and precisely, the correct test which should govern in all cases. Discussing at length this question in Pixley v. Huggins, 15 Cal. 133, he, being then chief justice of California, said:

**"The true test, as we conceive, by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist. If the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the court, as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions resting upon instruments of that character must necessarily fail."**

It is from this opinion that the rule stated in 2 Estee, Pl. & Pr. (3d Ed.) § 2510, is taken. In the subsequent case of Lick v. Ray, 43 Cal. 83, Wallace, J., employs much the same language as that used by Chief Justice Field, and says the rule stated is supported by a long line of decisions by that court. Such is the test which has long been recognized by the supreme court of Alabama. Rea v. Longstreet, 54 Ala. 291; Lytle v. Sandefur, 93 Ala. 396, 9 South. 260, and cases cited. In Florida it was first adopted in Davidson v. Seegar, 15 Fla. 671, and has since been recognized and followed by the supreme court of that state. Barnes v. Mayo, 19 Fla. 542; Shalley v. Spillman, 19 Fla. 500; Benner v. Kendall, 21 Fla. 584. Employing language used in the case last cited, Beach, in his recent work on Modern Equity Jurisprudence,

(volume 2, § 558,) gives the following abbreviated statement of the rule which now obtains:

"If it is insufficient to make a prima facie case in an action of ejectment, and would fall of its own weight, without proof in rebuttal, it does not amount to a cloud, and equitable interference is unnecessary."

The reasoning employed in the cases cited cannot but prove convincing that the test announced is the correct solution of the difficulty presented; and in its practical application, we apprehend, little or no serious trouble or embarrassment can arise.

In view of the above-cited authorities, there can scarcely be a doubt that under the terms of our ruling, as announced in the first headnote, no instrument which may properly be regarded as a cloud upon title can ever be treated as insufficient in this respect, because we somewhat extend the general rule above stated by holding that a conveyance, in itself not enough to constitute a cloud, may, in connection with alleged extrinsic facts, become a cloud. By such extrinsic facts we mean possession by a former occupant, or anything else which, taken to be true, would, in connection with the paper in question, give to the holder of the paper an apparent legal title, upon which a recovery could be had. No such extrinsic facts appeared on the trial of the present case. It was shown that Green L. Thompson died seised of land lot No. 257, in Bartow county, which he held by virtue of a grant from the state made in the year 1836. Petitioners derive title through him, as his only surviving children. The premises in question are wild and unimproved lands, unoccupied, and in the actual possession of no one. The instruments which are sought to be canceled, as constituting a cloud upon petitioners' title, consist of certain deeds and mortgages appearing of record in the office of the clerk of the superior court of Bartow county, the first of which is a deed dated April 13, 1883. So far as appears, all these conveyances were executed by entire strangers to the original and paramount title. It was neither alleged nor proved that any of the parties named therein ever had possession of the premises, or claimed the same by virtue of any conveyance or color of title from the state, or from any one connected with the true title, or from any one who ever had actual possession, or any better right than they. Nor were any special facts and circumstances alleged or shown upon the trial establishing any present or prospective injury to the true owners.

Petitioners, by reason of the fact that they have the legal title, now hold constructive possession of the premises. Rogers v. Hoskins, 15 Ga. 276; Royall v. Lisle's Lessee, 15 Ga. 545, 60 Am. Dec. 712; Morrison v. Hays, 19 Ga. 294; Stamper v. Griffin, 20 Ga. 312, 65 Am. Dec. 628. That possession has never, so far as they alleged or proved, in any manner been interfered with, nor are the conveyances in question being used vexatiously to deprive them of the full, peaceable, and uninterrupted enjoyment of their rights. Should any of the defendants

subsequently unlawfully enter upon the land, no reason appears why they may not be summarily expelled by a proceeding in ejectment. If, at any future time, petitioners themselves desire to enter into actual possession, they may do so without the fear of being successfully resisted or disturbed; for it is clear that, in any action of ejectment brought against them by the defendant, such proceeding would "fall of its own weight," without any proof being offered in rebuttal. It is not shown that petitioners desire to part with their interest in the lands, or that even the most timorous of purchasers have been, or would have reason to be, frightened away by reason of the alleged cloud. If any cloud at all exists, it is but the translucent mist which adorns a summer's sky, not one which wears upon its face the menace of a threatened storm. There is a vast distinction between a deed which purports to have derived its existence through the true owner of the original and paramount title, and a deed executed by one unconnected with, and an entire stranger to, such title. There would be abundant reason to regard with apprehension a conveyance which, though really void because of some latent infirmity, bears apparently the stamp of force and validity, and assumes to trace its way through connecting links back to the fountain head from which flowed the original title. On the other hand, an instrument which springs from no definite source of right whatsoever can never properly be considered a cloud upon title. In announcing the test quoted from Pixley v. Huggins, supra, Chief Justice Field seems to have had in mind just such a case as the present. As an illustration of the application of the rule, he says:

"Every deed from the same source through which the plaintiff derives his real property must, if valid on its face, necessarily have the effect of casting such a cloud upon the title;" but "a conveyance not falling in the chain of title, as from one who never had any connection with the property, would not constitute a cloud upon the title. No action could be supported upon such a conveyance, even in the absence of rebutting proof, any more than upon so much waste paper."

In Rea v. Longstreet, 54 Ala. 291, Chief Justice Brickell says:

"A court of equity will not interfere to prevent or remove a cloud which can only be shown to be prima facie a good title by leaving the plaintiff's title entirely out of view. * * * A sale of the land of the true owner as the property of a mere stranger, with whom he is not connected, from whom he does not mediately or immediately trace title, cannot cast a cloud on his title."

And, quoting this language approvingly, it was accordingly held by the same court in the later case of Lytle v. Sandefur, 93 Ala. 396, 9 South. 260, already cited, that where the grantor of a deed included therein, by mistake, lands to which she had no title, and over which she never exercised any acts of ownership, such instrument would constitute no cloud upon the title of the true owners, such as a court of equity would undertake to remove. In the above-cited case of Ward v. Dewey, 16 N. Y., on page 529, we find:

"If an entire stranger assumes to convey the premises, to which he has no shadow of title, and of which another is in possession, no real cloud is thereby

created. There is nothing to give such a deed even the semblance of force. It can never be used to the serious annoyance or injury of the owner. A word of explanation would dissipate the apparent cloud."

Similar expressions might be quoted from others of the earlier decisions. Defining the powers of a court of equitable jurisdiction to cause to be delivered up and canceled such instruments in writing as operate injuriously to the rights of persons other than the holders thereof, the statute of this state which authorizes the proceeding quia timet expressly enumerates:

"Any instrument which has answered the object of its creation, or any forged or other iniquitous deed, or other writing which, though not enforced at the time, either casts a cloud over complainant's title, or otherwise subjects him to future liability or present annoyance, and the cancellation of which is necessary to his perfect protection." Code, § 3232.

In none of the essential particulars thus designated do the present complainants make out a case for equitable interference. The conveyances sought to be delivered up and canceled are not shown to be either "forged" or "iniquitous," nor, as has been seen, do they cast "a cloud over complainants' title." It is not shown that complainants are subjected to any "future liability, or present annoyance," nor that the cancellation of the instruments in question is necessary to their perfect protection.[5]

[5] In Pixley v. Huggins et al. (1860) 15 Cal. 128, at 132, 133, 134, Field, C. J., delivering the opinion of the court, said: "The jurisdiction of the Court to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be cancelled a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncancelled, to pass the title, or that the defence to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. It is sufficient to call into exercise the jurisdiction of the Court, that the deed casts a cloud over the title of the plaintiff. As in such case the Court will remove the cloud, by directing a cancellation of the deed, so it will interfere to prevent a sale, from which a conveyance creating such cloud must result. Pettit v. Shepherd, 5 Paige (N. Y.) 501, 28 Am. Dec. 437. And every deed from the same source through which the plaintiff derives his real property must, if valid on its face, necessarily have the effect of casting such cloud upon the title. Such deed is calculated to create uneasiness in the owner, and to awaken suspicions in others of the existence of concealed defects in the title, which may, at some day, be developed, and must thus tend to depreciate the value of the property in the market, and to embarrass the owner in its sale or use as security. * * * The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist: if the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the Court; as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions resting upon instruments of that character must necessarily fail. 'That can never be considered a legal cloud,' says Chancellor Walworth, in Van Doren v. Mayor, etc., of New York, 9 Paige (N. Y.) 388, 'which cannot for a moment obstruct the unaided rays of legal science, when they are brought to bear upon the supposed obscurity. But where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings

## PARKER et al. v. SHANNON.

(Supreme Court of Illinois, 1887. 121 Ill. 452, 13 N. E. 155.)

Error to circuit court, Du Page county; C. W. Upton, Judge.

This suit was originated by a bill in chancery by James S. Shannon against John Parker and Caroline M. B. Parker, his wife, setting forth that Shannon was the owner and entitled to the exclusive possession of certain lots; that said Parker was the former owner of the lots, and they were sold under execution upon a judgment against him, and, no redemption having been made, that a sheriff's deed for the lots was duly executed to one Dunne, the purchaser at the execution sale, and, through mesne conveyances, the title to the lots became vested in complainant, subject to a possible right of dower in Parker's wife in two of the lots; that Parker and his wife conveyed to one Munson their right to two of the lots, subject to said execution sale, and that Munson conveyed his interest in these two lots to the complainant; that in this mode the complainant derived his title to the four lots. The bill alleges that Parker claims to be the owner of or interested in the premises, claims that he has the right of possession, and has attempted to exercise acts of ownership, and to take possession of the premises; that Parker is pecuniarily irresponsible, and that the injuries about to be committed by him to the premises will be irreparable; and prays for an injunction, and that complainant may be decreed to be the owner in fee-simple of the premises, and that the defendants be perpetually enjoined from exercising any acts of ownership over the premises, etc. A temporary injunction was awarded. Defendants demurred to the bill. The court overruled the demurrer, and ordered the defendant to plead or answer instanter, and, no plea or answer being filed, the defendants were defaulted, and the court entered a decree finding that the complainant was the owner of the premises, and ordering that he have exclusive possession of the premises, and perpetually enjoining the defendants from exercising any acts of ownership over the premises. Defendants sued out a writ of error. The supreme court reversed the decree of the circuit court. The case was reinstated in the lower court, and there was a second decree for defendant in error, and a second writ of error was sued out by plaintiffs in error.

sought to be set aside, as where the defendant has procured, and put upon record a deed obtained from the complainant by fraud, or upon an usurious consideration, which requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void—a Court of equity may interfere, and set it aside as a cloud upon the real title to the land.' Wiggin v. Mayor, etc., of New York, 9 Paige (N. Y.) 23; Livingston v. Hollenbeck, 4 Barb. (N. Y.) 16. So, too, a conveyance not falling in the chain of title, as from one who never had any connection with the property, would not constitute a cloud upon such title. No action could be supported upon such a conveyance, even in the absence of rebutting proof, any more than upon so much waste paper."

MAGRUDER, J.[6] This case is now before us for the second time. The former opinion in it is reported in 114 Ill. 192, 28 N. E. 1099. We there held that the circuit court should not have passed upon the legal title, and should have gone no further than to stay temporarily the doing of any irreparable injury, until a trial and determination of the question of title could be had in a court of law; and the cause was remanded for further proceedings consistent with that opinion. * * *

After the remanding order was filed in the circuit court an amended bill was filed, which omitted any statement as to the mode in which complainant derived his title, or as to the character of the claim set up by defendants. The amended bill simply alleged that complainant was the owner in fee of the premises, and in the possession thereof, and that defendants were giving out and pretending that John Parker was "the owner of, or in some manner interested in, or entitled to the possession of, the said premises, or some part thereof," and that, under such pretended claim, defendants were committing trespasses, etc. It also alleged that said pretended claims of the defendants operated as a cloud upon the title of complainant, and prayed that said cloud might be removed. The decree, besides the findings already mentioned, found that the claims in question did operate as a cloud, and decreed that such cloud be removed. It was rendered after default taken against the defendants below, who did not plead, answer, or demur to the amended bill, nor in any way enter their appearance, after it was filed.

The amended bill sets up no other or different claim, on the part of the defendant Parker, than that which is alleged in the original bill, referred to in our former opinion. A bill will not lie to remove a mere verbal claim or oral assertion of ownership in property as a cloud upon the title. Such clouds upon title as may be removed by courts of equity are instruments or other proceedings in writing which appear upon the records, and thereby cast doubt upon the validity of the record title. * * *

The second decree entered by the circuit court is reversed, and the cause is remanded, with directions to proceed as indicated in Parker v. Shannon, 114 Ill. 192, 28 N. E. 1099.

[6] Parts of the opinion are omitted.

## WOOD v. NICOLSON.

(Supreme Court of Kansas, 1890. 43 Kan. 461, 23 Pac. 587.)

HORTON, C. J. On the 19th day of August, 1887, Malcolm Nicolson procured from the county clerk of Wabaunsee county the assignment of three tax certificates held by the county. One of the certificates covered the N. E. ¼ of section 31, township 13, range 10; one the N. W. ¼ of section 32, township 12, range 10; and one the S. E. ¼ of section 32, township 12, range 10. These certificates were for the sale of 1873, for the tax of 1872. Nicolson took out a tax-deed to the land described, based upon the tax certificates, the consideration for the deed being $145.65. He commenced this action to quiet title against Harriet H. Wood on September 7, 1887. The service obtained was by publication, and by the terms of the publication notice the defendant was required to answer the petition on or before October 28, 1887. On the 27th day of October, 1887, Nicholson obtained leave to file a supplemental or amended petition to his original petition. On the 29th day of October, 1887, he took judgment quieting his title. Harriet H. Wood brings the case here, and alleges that the petition did not state facts sufficient to constitute a cause of action against her, therefore that the judgment rendered is erroneous.

Any material error apparent in the final judgment of a district court may be corrected by proceedings in error in this court, although no exception was taken by the party complaining, and no appearance by him at the trial and judgment, and no motion made to set aside the judgment. Koehler v. Ball, 2 Kan. 160, 83 Am. Dec. 451; Lender v. Caldwell, 4 Kan. 339. It seems to be conceded that the original petition was fatally defective. The amendment was intended to cure the defect, but as the defendant was served by publication only, and had never appeared or answered in the case, and was not present at the time the amendment was asked for, allowed, or filed, the action of the trial court in permitting an amendment so material to the petition to be filed, and in rendering judgment thereon, in the absence of the defendant, was error. Haight v. Schuck, 6 Kan. 192; Alvey v. Wilson, 9 Kan. 401; Railroad Co. v. Van Riper, 19 Kan. 317. The petition alleges that the lands described are "wild, open, uncultivated, and unoccupied," and sets forth that the plaintiff's title is based upon a tax-deed, referred to and made a part of the petition as "Exhibit A." The granting clause of the deed is as follows: "Now therefore, I, G. W. French, county clerk of the county aforesaid, for and in consideration of the sum of one hundred and forty-five dollars and sixty-five cents, ($145.65,) taxes, costs, and interest due on said land for the year A. D. 1872, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the

said Malcolm Nicolson, his heirs and assigns forever, subject, however, to all the rights of redemption provided by law." The statutory form of a tax-deed has not been followed, nor is the deed in substantial compliance with the statute. Section 138, c. 107, Gen. St. 1889. In the granting clause of the deed there is nothing sold or conveyed, no property described. The deed is therefore void upon its face.

Before an action to quiet title can be maintained, the plaintiff must have either the actual possession or the legal title. Eaton v. Giles, 5 Kan. 24; O'Brien v. Creitz, 10 Kan. 202; Douglass v. Nuzum, 16 Kan. 515. The petition shows that Nicolson did not have actual possession of the land, and, as the tax-deed upon which his title is based is void, he has no legal title. The purpose of the amendment, which was allowed without notice and in the absence of the defendant, was to attach to the petition a tax-deed which had been issued after the commencement of the action, and in this way to cure the defective tax-deed originally attached to the petition. There is, however, but one tax-deed in the record, and this tax-deed is the one referred to as fatally defective. This tax-deed was not issued until the 26th day of October, 1887, nearly two months after the action was commenced. It is possible that there was some mistake in the preparation of the record, and that a valid tax-deed was filed with the supplemental or amended petition, but the transcript purports to be a full and complete one, and only one tax-deed is embraced therein; that is a void one.

On account of the errors referred to, we cannot sustain the judgment of the trial court. The judgment must be reversed. All the Justices concurring.[7]

[7] In Teal v. Collins (1881) 9 Or. 89, the opinion of the court, by Lord, C. J., was as follows: "This is a suit to quiet title. The complaint alleges that the plaintiff is the owner in fee and in possession of certain lands therein particularly described, situated in Polk county, Oregon, and their proceeds. 'That the defendant claims to be the owner of said premises by a chain of conveyances from the U. S. Government. That said claim of said defendant is wrongful and untrue, and a cloud on plaintiff's title. That plaintiff is the owner in fee of said premises by a good and sufficient chain of conveyances from the U. S. Government, which are prior in their execution and record to the pretended conveyances under which said defendant claims title thereto adverse to the plaintiff.' To this complaint the defendant demurred on the following grounds: (1) That the complaint does not state facts sufficient to constitute a cause of suit. (2) That the complaint does not show that the plaintiff is entitled to any equitable relief. The circuit court overruled the demurrer, and the defendant appeals to this court. This suit is brought to quiet title under section 500 of the civil code, which provides that 'any person in possession by himself, or his tenant, may maintain a suit in equity against another, who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest.' This section confers a jurisdiction beyond that ordinarily exercised by courts of equity to afford relief in quieting title and possession of real property. It recognizes not only a well established principle of equity practice to remove clouds upon title—which courts of equity had exercised long prior to this section—but also provides a remedy where a party out of possession claims an estate or interest adverse to the party in possession, and injurious to his rights, for determining the same. In such case it seems it is sufficient that the party in possession is incommoded or damnified by the assertion of some claim or interest in the

## WEHRMAN v. CONKLIN.

(Supreme Court of the United States, 1894. 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167.)

This was a bill in equity brought by the appellees, Conklin and wife, to enjoin the appellant, Wehrman, from prosecuting an action of ejectment in the court below, against the appellees, to recover possession of the lands in controversy. * * *

MR. JUSTICE BROWN,[8] after stating the facts in the foregoing language, delivered the opinion of the court.

This is a bill in equity, not only to stay an action in ejectment at law, but to remove a cloud cast upon the Conklins' title to the lands in question, created by a deed from Adolph Wehrman to Frederick Wehrman, appellant and defendant in the bill, and to quiet their own title thereto.

1. Defendant's principal contention is that equity has no jurisdiction of the case, for the reason that the contest concerns the legal title only, and that plaintiffs have a plain, adequate, and complete remedy at law. It is undisputed that Carlos S. Greeley, a member of the firm of Greeley, Gale & Co., bought the lands in question at a sheriff's sale which took place on July 31, 1862, and that for about 20 years thereafter, when the lands were sold to Conklin, he paid the taxes upon the land. That the Conklins, upon their purchase of the several parcels, took immediate possession, and that they have since been in full, open,

property adverse to him. He may not know the nature or ground upon which such adverse claim or interest is asserted—only that such claim to an estate or interest adverse to him is made, whereby the value of his property is depreciated, or its sale injured or prevented. He can then commence his suit, and require the nature and character of such adverse estate or interest to be set forth and judicially determined. But when the suit is brought to remove a cloud upon the title—which is an old and recognized head of equity jurisprudence—the cause of the suit consists in the invalidity of the defendant's claim, which is not apparent on its face. A cloud upon title is a title, or incumbrance, apparently valid, but, in fact, invalid. Bissell v. Kellogg, 60 Barb. (N. Y.) 629. In such suits it has been held that there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. Hibernia S. & L. v. Ordway, 38 Cal. 681. It is an elementary rule that 'every fact essential to the plaintiff's title, to maintain the bill and obtain relief, ought to be stated in the bill, otherwise the defect will be fatal.' Story's Eq. Pl. § 257. In declaring the requisites of a complaint to remove cloud upon title under a statute somewhat similar to our own, it is said, in Wals v. Grosvenor, 31 Wis. 684, that 'the complaint ought to disclose the nature of the defendant's claim which has a tendency to throw a cloud over the title, and state such facts and circumstances in respect to such claim as show its invalidity, before a court of equity will interfere and direct it to be released and canceled.' Collart v. Fisk, 38 Wis. 243. Before suit is brought to remove a cloud upon the title, the plaintiff ought to know there is one, and in what it consists, and state the facts. For these reasons we think the complaint is fatally defective in not stating the nature of the defendant's claim, or chain of conveyances, showing in what their invalidity consists. The judgment of the court below is reversed."

[8] The statement of facts is abridged and part of the opinion is omitted.

and adverse possession and occupancy of the same; have made large and valuable improvements thereon by putting some 600 acres under cultivation, and by erecting substantial buildings and fences, digging wells, and otherwise improving the premises, making the same more valuable, and have expended $1,000 in such improvements, in good faith and full reliance upon such title being good and valid. That the defendant during such time, and for more than 27 years, has never done any act or taken any step to have the records corrected, or to assert any claim on his part to such lands, or to notify purchasers of his interest in the same, until he began his action of ejectment.

The general principles of equity jurisprudence, as administered both in this country and in England, permit a bill to quiet title to be filed only by a party in possession against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment, and as a prerequisite to such bill it was necessary that the title of the plaintiff should have been established by at least one successful trial at law. Pom. Eq. Jur. §§ 253, 1394, 1396. At common law a party might by successive fictitious demises bring as many actions of ejectment as he chose, and a bill to quiet title was only permitted for the purpose of preventing the party in possession being annoyed by repeated and vexatious actions. The jurisdiction was, in fact, only another exercise of the familiar power of a court of equity to prevent a multiplicity of suits by bills of peace. A statement of the underlying principles of such bills is found in the opinion of this court in Holland v. Challen, 110 U. S. 15, 19, 3 Sup. Ct. 495, 28 L. Ed. 52, in which it is said:

"To entitle the plaintiff to relief in such cases, the concurrence of three particulars was essential: He must have been in possession of the property; he must have been disturbed in its possession by repeated actions at law; and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed."

This method of adjusting titles by bill in equity proved so convenient that in many of the states statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases.

The statute of Iowa, upon which this bill is based, is an example of this legislation, and provides (Code, § 3273) that "an action to determine and quiet title to real property may be brought by any one having, or claiming an interest therein, whether in or out of possession of the

same, against any person claiming title thereto, though not in possession."

It will be observed that this statute enlarges the jurisdiction of courts of equity in the following particulars:

(1) It does not require that plaintiff should have been annoyed or threatened by repeated actions of ejectment.

(2) It dispenses with the necessity of his title having been previously established at law.

(3) The bill may be filed by a party having an equitable as well as a legal title. Grissom v. Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; Stanley v. Holliday, 130 Ind. 464, 30 N. E. 634; Echols v. Hubbard, 90 Ala. 309, 7 South. 817.

(4) In some states it is not even necessary that plaintiff should be in possession of the land at the time of filing the bill.

These statutes have generally been held to be within the constitutional power of the legislature; but the question still remains, to what extent will they be enforced in the federal courts, and how far are they subservient to the constitutional provision entitling parties to a trial by jury, and to the express provision of Rev. St. § 723, inhibiting suits in equity in any case where a plain, complete, and adequate remedy may be had at law? These provisions are obligatory at all times, and under all circumstances, and are applicable to every form of action, the laws of the several states to the contrary notwithstanding. Section 723 has never been regarded, however, as anything more than declaratory of the existing law (Boyce's Ex'rs v. Grundy, 3 Pet. 210, 7 L. Ed. 655), and, as was said in New York Guaranty & Indemnity Co. v. Memphis Water Co., 107 U. S. 205, 210, 2 Sup. Ct. 279, 27 L. Ed. 484, "was intended to emphasize the rule, and to impress it upon the attention of the courts." It was not intended to restrict the ancient jurisdiction of courts of equity, or to prohibit their exercise of a concurrent jurisdiction with courts of law in cases where such concurrent jurisdiction had been previously upheld.

The question of enforcing these state statutes was first considered in Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123, in which a bill was filed by a party in possession to compel the defendant to release a pretended title to certain lands claimed by him under patents from the state of Kentucky. The conveyance asked by the bill was sought to be in conformity with the provisions of an act of the assembly of Kentucky giving jurisdiction to courts of equity in such cases. It was held that, the legislature "having created a right, and having at the same time prescribed the remedy to enforce it, if the remedy prescribed is consistent with the ordinary modes of procedure on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts. On the contrary, propriety and convenience suggest that the practice should not materially differ where titles to land are the subjects of investigation." This case was cited and approved in Parker v. Overman, 18 How. 137, 15 L. Ed. 318,

where a proceeding under a statute of Arkansas prescribing a special remedy for the confirmation of sales of land by a sheriff was held to be enforceable in the federal courts.

In Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, the principle of this case was extended to one of wild land, of which neither plaintiff nor defendant was in possession. Plaintiff claimed under a tax title, and the property was described in the bill as unoccupied, wild, and uncultivated land. The question was elaborately examined, and the jurisdiction sustained upon the ground that an enlargement of equitable rights by state statutes may be administered in the federal courts as well as in the courts of the state; citing Clark v. Smith, and the case of Broderick's Will, 21 Wall. 520, 22 L. Ed. 599. The case was treated as one where the plaintiff had no remedy at law against the defendant, who claimed an adverse interest in the premises. In delivering the opinion, however, it was intimated (page 25, 110 U. S., and page 495, 3 Sup. Ct. [28 L. Ed. 52]) that if a suit were brought in the federal court, under the Nebraska statute, against a party in possession, "there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking." Another step in the same direction was taken in Reynolds v. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733, in which a bill was sustained upon an equitable title, although it would appear from the report of the case that such title was not fortified by an actual possession; and in Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83, a similar suit was upheld under a statute of Michigan permitting bills to quiet title to be filed by any person in possession.

Subsequent cases, however, denied the power of the federal courts to afford relief under such statutes where the complainant was not in possession of the land, and in Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873, particularly, it was held that where the proceeding is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. "The right which in this case the plaintiff wishes to assert is his title to certain real property; and the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury." The case of Holland v. Challen was distinguished as one where neither party was in possession of the property, and it was further said that in the case of Reynolds v. Bank the question did not arise as to whether the plaintiff had a remedy at law, but whether a suit to remove the cloud mentioned would lie in a federal court. The case of U. S. v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110, was really to the same effect, though not cited in Whitehead v. Shattuck. See, also, Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010. But nothing was said in either of these to disturb the harmony of the previous cases.

The real question, then, to be determined in this case, is whether the plaintiffs have an adequate remedy at law. If they have, then section 723 is controlling, and, notwithstanding a local practice under the Code, where no discrimination is made between actions at law in equity, may authorize such suit, the federal courts will not entertain the bill, but will remit the parties to their remedy at law. The bill under consideration alleges the plaintiffs to be the "absolute owners" of the premises, and then sets forth certain proceedings by which it is alleged they became such; but it is claimed and substantially admitted in the bill that, by reason of certain irregularities in these proceedings, it is doubtful whether the legal title ever became vested in the plaintiffs. The bill then sets up the long possession of the plaintiffs and their grantors, large outlays by them in improvements upon the land, and the practical abandonment of the same by the defendant, all of which, it is claimed, constitute an estoppel in pais. Plaintiffs also rely upon the laches of Wehrman in bringing the action in ejectment, and allege a failure to bring his suit within the period prescribed by the statute of limitations. It is entirely clear that, if no action in ejectment had been begun at law, the long-continued adverse possession of the plaintiffs, and the equitable title set up in the bill, would have been a sufficient basis for the maintenance of the suit; and it is not easy to see why the commencement of such action should place them in a worse position than they were in before, or oust them of their remedy in equity.

If the only contest in this case were as to whether the legal title to these lands was in the plaintiffs or defendant, it may be that a court of law would be the only proper forum for the settlement of this dispute; but the plaintiffs further claim that, by reason of certain defects in the proceedings by which they acquired title, such title is doubtful at law, but that the long delay of the plaintiff at law in the assertion of his rights establishes a defense of laches, and his failure to set up his title, and his long acquiescence in the Conklins' possession of the lands, estop him from proceeding either at law or in equity to oust them. * * *

Considering all the facts of this case, it is not a matter of surprise that, when charged in this bill with having received his deed without consideration, and with intent to defraud the creditors of his brother Adolph, the defendant should not have been called to testify in relation to the transaction. In short, it would be difficult to conceive of a clearer case of estoppel in pais.

The decree of the court is therefore affirmed.

## DAY LAND & CATTLE CO. v. STATE.

(Supreme Court of Texas, 1887. 68 Tex. 526, 4 S. W. 863.)

STAYTON, J.[9] This action was brought by the state of Texas, through the attorney general and the district attorney of the judicial district in which Greer county is embraced. The purpose of the suit is to establish the right of the state to 144,640 acres of land, situated in Greer county, and to cancel the patents under which the appellant asserts title to the land. The land was located and patented by virtue of land certificates issued under the act of March 15, 1881, (Gen. Laws, 35,) which provided for the issuance of land certificates in favor of the surviving soldiers of the Texas revolution and others. It is claimed by the state that the several grants under which the appellant claims are invalid because all the land within the limits of Greer county was appropriated by the act of February 25, 1879, (Gen. Laws, 16,) to other purposes, and was therefore not subject to location by virtue of the certificates under which the appellant claims or any other. * * *

It is urged that the general and special demurrers to the petition should have been sustained, and that the petition does not state a cause of action. The main objections raised by the assignments relating to this matter are that the petition does not allege that the state was in possession of the land, and ousted by the defendant, nor that the state is entitled to the possession of the land, and the defendant a trespasser, and that the petition is not indorsed as the statute requires a petition in trespass to try title to be. There was no exception based on the fact that the petition was not indorsed as the statute requires petitions to be in actions of trespass to try title; and the answer of the defendant presents defenses applicable to that character of action, thus evidencing that the defendant was not misled as to the character of the action by the want of such an indorsement. Such an objection cannot be raised by a general demurrer, and, when presented here for the first time, cannot be considered. Bone v. Walters, 14 Tex. 567; Shannon v. Taylor, 16 Tex. 423; Wade v. Converse, 18 Tex. 234.

The petitioner alleges that the lands belong to the state; that they are claimed by the defendant, and gives the origin and nature of the claim thus asserted. It prays for general relief, and that the patents under which the defendant claims be canceled, and the cloud thereby placed on the state's title it asks to have removed. The first, second, and third requirements in a petition in trespass to try title are fully complied with. The petition states facts which, if the grants through which the defendant claims are invalid, entitles the state to the possession, and that there was not an averment in terms that the state was so entitled is a matter of no importance. The petition does not state that the defendant unlawfully entered upon and dispossessed the state

[9] Parts of the opinion are omitted.

of the premises, and that the defendant withholds the possession; but there is no exception which questions the sufficiency of the petition on the ground that no such averments are made. The eighth and ninth exceptions reach no such question. While the statute seems to contemplate that in an action of trespass to try title such averments must be made, it is certainly true that it is not necessary to allege any fact which it is not necessary to prove. It is not necessary to prove that the owner of land ever was in actual possession of it, or that the defendant was in possession, in order to sustain even an action of trespass to try title; and it is therefore unnecessary to allege these things unless some relief be sought against the defendant based on the fact that he has been in possession. Under the former law it was held that a plaintiff in an action of trespass to try title must show that the defendant was in possession; but under the present law the action may be maintained against a defendant who never has occupied the premises, if he claims title thereto. Rev. St. art. 4790.

Whether, as the petition in this case was framed, the action is to be deemed technically an action of trespass to try title, in which the respective parties would be entitled to all the statutory rights to which parties to such actions are entitled, we need not determine, for it is too clear that the petition states facts which empowered the court to inquire and determine whether the state was the owner of the land as it claimed to be.

It is urged, if this be treated as a suit to remove cloud, that the petition is not sufficient, in that there is no averment that the state was in possession of the lands. The rule here invoked has doubtless been recognized by many courts exercising only an equitable jurisdiction; but it may be doubted if it can be said ever to have been a rule well established even in such tribunals. When recognized, it was upon the ground that a court of equity would refuse to act when the party seeking equitable relief had a full and adequate remedy at law. Whatever the rule may be elsewhere, the rule invoked can have no application in the courts of this state, which are not only empowered, but required, in every case, to give such relief as the facts presented may authorize or require, without reference to whether the relief be such as a court of equity or a court of law may give. In the same case legal and equitable relief may be given. Allen v. Stephanus, 18 Tex. 659; Magee v. Chadoin, 44 Tex. 488; Grimes v. Hobson, 46 Tex. 416; Dangerfield v. Paschal, 20 Tex. 537; State v. Snyder, 66 Tex. 687, 18 S. W. 106; Thomson v. Locke, 66 Tex. 383, 1 S. W. 112. * * *

There is no error in the judgment of the district court, and it will be affirmed.

## PERKINS v. WAKEHAM et al.

(Supreme Court of California, 1890. 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67.)

Department 1. Appeal from superior court, Los Angeles county; W. P. Gardiner, Judge.

PATERSON, J. The appeal from the order denying the motion for a new trial, so far as it affects the respondent, town of Santa Ana, must be dismissed. The notice of intention to move for a new trial was not served on said respondent. There was an attempt to serve the statement, but the attorney upon whom it was served had no authority to accept service, which fact was known to appellant at the time of service. The motion of respondent, the town of Santa Ana, to dismiss the appeal from the order denying a new trial is granted, and said appeal, in so far as it affects said respondent, is dismissed. A motion was made on various grounds, also, to dismiss the appeal from the judgment, but as the findings support the judgment, and no error appears on the face of the roll, we deem it best not to pass on the motion to dismiss, but to affirm the judgment. The court found that in a former action, brought by Wakeham against Perkins and others to determine all adverse claims to the property described in the complaint herein, judgment was entered in favor of said Wakeham, defendant herein, adjudging him to be the owner of the property. It is claimed by appellant that the decree in the former action to quiet title is in personam, and not in rem, and that as the service of summons was by publication while he was absent from the state, and as he did not answer or appear, the judgment is void. If it be true that a state has no power by statute to provide for the determination of adverse claims to real estate lying within its limits, as against non-resident claimants, who can be brought into court only by publication; if the state in her sovereignty is impotent to protect the title of citizens to her soil against the asserted claims of non-residents, who will not voluntarily submit their claims to her courts for adjudication,—great evil must result. Certainty and security in the titles of real estate, and convenient and effective procedure for the determination of individual rights in such property, are essential to the prosperity of the community. If those who cannot be reached by the process of the courts may assert adverse claims to real estate, and hold unlawful clouds over the title of the owner, every homestead and lot in the state may have a cloud cast upon it for all time. We do not think that a sovereign state is so limited in its power. The state is paramount in power over all things real within its territorial boundaries, except so far as its authority is limited by the constitution and laws of the United States; and the courts of the state, acting within that limitation, have and may exercise all the jurisdiction over all persons and things which the constitution and laws of the state confer upon them. The man-

ner of obtaining such jurisdiction, and the procedure for its exercise, are matters of state legislation. The legislature of this state has provided that:

"An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Section 738, Code Civil Proc.

It has also provided:

"Where the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or is a foreign corporation, having no managing or business agent, cashier, or secretary within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order that the service be made by the publication of the summons. The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable,—at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months." Sections 412, 413, Id.

Unless the method of giving notice above prescribed is unreasonable, or is in conflict with some provision of the constitution or principle of natural justice, it cannot be held invalid. In determining the question of its validity, the nature of the action and the effect of the judgment must be considered. While it is true, as a general proposition, that an action to quiet title is an action in equity, which acts upon the person, it is also true that the state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger. U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192. While a decree quieting title is not in rem, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment in rem. But it is not necessary, in support of a judgment in such an action, where service has been had by publication, to determine the question whether it is a judgment in personam or one in rem. This precise point has recently been decided by the supreme court of the United States. Mr. Justice Brewer, speaking for the court, said:

"The question is not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do, but it is what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate?" Arndt v. Griggs, 134 U. S. 320, 10 Sup. Ct. 557, 33 L. Ed. 918.

There the power of the state to quiet title as against non-residents by constructive service is upheld, and the cases upon which appellant herein chiefly relies are fully considered and elaborately reviewed. In that case, it is true, the statute of the state of Nebraska, which was under consideration, expressly provided for service by publication "in

actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state or foreign corporation," but the authority conferred by the legislature of this state in section 412, supra, is as great as that given by the Nebraska statute. While our statute is general, and in terms applies to all actions, it is not invalid because it includes in its provisions proceedings purely in personam. If the judgment in the action of Wakeham is valid and binding,—and we hold that it is,—other questions raised by appellant need not be noticed. The judgment and order are affirmed.

We concur: FOX, J.; WORKS, J.

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## SCOTT v. TOWN OF MENASHA.

**(Supreme Court of Wisconsin, 1893. 84 Wis. 73, 54 N. W. 263.)**

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by Libbie A. Scott, as administratrix of Reuben M. Scott, deceased, against the town of Menasha, to recover on certain coupons alleged to have been attached to certain municipal bonds issued by defendant. From an order sustaining plaintiff's demurrer to the answer, defendant appeals. Reversed.

WINSLOW, J. The action was brought by Reuben M. Scott to recover upon certain coupons alleged to have been attached to certain municipal bonds issued by defendant town. The complaint set forth the issuance and delivery by the town to the Wisconsin Central Railroad Company of a number of municipal negotiable bonds to which the coupons in suit were attached, and alleged ownership of the coupons before maturity, demand, and nonpayment. The complaint did not allege ownership of the bonds. The answer alleged, by way of counterclaim, a large number of facts tending to show that the bonds in question were issued without legal authority, and, though apparently valid, were void in their inception, because of failure by the railroad company to perform the conditions upon which their validity depended; that all such facts were well known to Reuben M. Scott, and to all parties who ever owned or held said bonds; and that Scott is the owner and holder of all said bonds and their coupons, and threatens to dispose of the same to innocent purchasers,—and prays that the same be adjudged void and canceled, and that Scott be enjoined from transferring the same. Scott died pendente lite, and the action was revived in the name of his administratrix. The bonds had more than a year to run before maturity when the answer was served. To this counterclaim plaintiff demurred (1) because it does not state facts sufficient to constitute a cause of action; (2) because it is not plead-

able as a counterclaim. From an order sustaining this demurrer, defendant appeals.

It seems apparent that the counterclaim states a cause of action in equity. The jurisdiction of courts of equity to entertain an action to compel cancellation and delivery of negotiable instruments apparently valid, but in fact invalid, while in the hands of holders with notice before maturity, is well settled. 3 Pom. Eq. Jur. § 1377. In fact, it was not contended, either in the brief or upon the oral argument, that the first ground of demurrer was well taken. We shall, therefore, spend no time on that point.

The question whether the facts are pleadable as a counterclaim presents more difficulty, but we think it must be answered in the affirmative. It being established that the facts stated would show a cause of action in equity for the cancellation of the void bonds in plaintiff's hands, the principal question under this head is whether this cause of action comes within the provisions of subdivision 1, § 2656, Rev. St., i. e. whether it is "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." It may well be urged that the bond itself is the contract which is the foundation of plaintiff's claim; but whether it be held that the bond or the coupon alone is the foundation of his claim, within the meaning of the law, it would seem quite evident that a cause of action which attacks both the bond and coupons as void because of fraud, and total want of consideration, in their issuance, must be a cause of action arising out of the contract which is the foundation of plaintiff's claim. The bond and coupons are simultaneously executed, the coupon being simply an incident to the bond, and are based upon the same consideration, and are the result of the same negotiations.

It seems to us that this cause of action fulfills both clauses of the section under consideration. It arises out of the contract which is the foundation of the plaintiff's claim, and it is connected with the subject of the action. It was argued that this counterclaim does not come within the rule stated in Dietrich v. Koch, 35 Wis. 618, viz. "a claim which, if established, will defeat, or in some way qualify, the judgment to which a plaintiff is otherwise entitled." This is untenable, because, if the bonds are invalid by reason of the facts stated in the counterclaim, the coupons sued on are also invalid, and both bonds and coupons are alleged to be held by the plaintiff with notice of their invalidity. So if defendants prove their counterclaim, as alleged, they will defeat the judgment to which plaintiff is otherwise entitled. Because they propose to go further, and obtain some affirmative relief, is no objection to the counterclaim. Wilson v. Hooser, 76 Wis. 387, 45 N. W. 316.

Order reversed, and cause remanded for further proceedings according to law.

## FULLER v. PERCIVAL et al. (two cases).

(Supreme Judicial Court of Massachusetts, 1879. 126 Mass. 381.)

COLT, J. These are two bills in equity, originally brought by Henry D. Fuller. On his death his administrator was admitted to prosecute them. In both of the bills it is alleged that the notes to which they relate were given by the defendant Gustavus Percival, who with Henry D. Fuller composed the firm of Percival, Fuller & Company; that they were given in the name of the firm, by Gustavus, without the knowledge of his copartner, in fraud of the firm; and that this fraud was known to and participated in by the defendant John P. T. Percival. The two notes for $2500 each, for relief against which the first suit is brought, were notes payable on demand, and are still retained by John. The note for $5000, to which the second suit relates, was payable in ninety days, and was passed by John to third parties, who claim to be, and upon the allegations in the bill must be taken to be, innocent holders. The latter have brought an action at law upon the note against the firm, which is now pending, but they are not made parties to the bill.

The oath of the defendants in each case is waived. The prayer in the first case is, that John may be ordered to produce and cancel the two first-named notes, and may be restrained from enforcing them; and in the second, that he may be ordered to pay, take up and cancel the larger note, and be restrained from enforcing it. In each case, a demurrer for want of equity was overruled, and the order appealed from, and a decree for the plaintiff on the final hearing was also appealed from.

The weight of modern authority supports the jurisdiction in equity of suits for the cancellation of written instruments obtained by fraud. It is exercised for the purpose of affording relief against invalid executory contracts in the possession of another, where the invalidity is not apparent on the instrument itself, and where the defence may be nullified by intentional delay to sue until the evidence in support of it is lost. Adams, Eq. 174. In Hamilton v. Cummings, 1 Johns. Ch. (N. Y.) 517, Chancellor Kent, after a full and critical examination of the English cases, declares that he is inclined to the opinion, that the jurisdiction is to be upheld whether the instrument is or is not void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause. But further on he adds that:

**"Perhaps the cases may all be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence not arising on its face may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation."**

This doctrine was recognized by this court in Commercial Ins. Co. v. McLoon, 14 Allen, 351, where a bill alleging that the defendant had obtained a policy of insurance by fraud, which gave him an apparent cause of action, from which the plaintiff was in danger, and praying that the policy might be given up and cancelled, was sustained. See, also, Martin v. Graves, 5 Allen, 601; Peirsoll v. Elliott, 6 Pet. 95, 8 L. Ed. 332; Story, Eq. Jur. §§ 694, 700.

As to the first case, the plaintiff upon the allegations in the bill comes within the recognized jurisdiction of the court. The notes are in the possession of a fraudulent holder, who has demanded payment of the plaintiff; they are negotiable, and although overdue may be sued by such holder, or by others to whom he may hereafter transfer them, to the embarrassment of the plaintiff, and no suit at law has yet been commenced upon them. The partnership is dissolved and its affairs are in course of settlement in this court, its effects being in the hands of a receiver. The plaintiff cannot try the question of the partnership liability at law until such time as John P. T. Percival may see fit to bring his action. The settlement of the affairs of the firm must be delayed until the question is settled. And, upon the whole, we are of opinion that the plaintiff is entitled to the relief he seeks. It is more effectual than it can be at law, because it is more speedily afforded, and enables the plaintiff to protect himself before the evidence is lost.

In this case the entry must be: Decree affirmed.

But different considerations apply to the second suit. An action at law is now pending against the firm upon the note to which the second suit relates, in favor of the present holders of that note. It is not alleged in this bill that the plaintiff has any defence which can be availed of against the holders of that note. The allegation is that John P. T. Percival fraudulently negotiated it to the present holders for the purpose of enabling them to collect it out of the property of the firm. The plaintiff cannot escape his liability to the holders. Upon the payment of the note he may at once commence an action at law in his own name alone to recover for the fraud alleged to have been practised upon him, and in that action his remedy is full, adequate and complete against the parties to the fraud. Longman v. Pole, Mood & Malk. 223; Story, Part. § 256. The remedy at law would be as speedy and as effectual as a remedy by decree in this suit requiring the defendant John P. T. Percival to give bond for the payment of the judgment to be recovered in the pending action at law, or to pay the note and surrender it for cancellation.

And in this second case the entry must be: Bill dismissed.

# CHAPTER VII

# INTERPLEADER

## WING v. SPAULDING et al.

(Supreme Court of Vermont, 1891. 64 Vt. 83, 23 Atl. 615.)

This was a bill of interpleader and was heard upon the pleadings and a master's report at the March term, 1891, Washington county. Munson, Chancellor, decreed pro forma, that the orator be discharged upon payment of the fund into court, and that the fund belonged to Mrs. Robinson. The defendants Spaulding appeal.

The orator was the administrator of Mary A. Spaulding, and as such had collected $472, which was the fund in question, upon a non-negotiable instrument payable to his intestate. This fund was claimed by the defendant, Mrs. Robinson, for the reason that Mrs. Spaulding had given the instrument to her in her lifetime, and by the other defendants as the heirs of Mrs. Spaulding, who claimed that, if the gift was ever made, it was void by reason of the mental incapacity of the donor.

All the defendants, except the Robinsons, joined in an answer denying the gift, and setting forth that Mrs. Robinson was indebted to the orator, and had put this instrument into his hands to collect with the understanding that whatever was realized should be applied on that indebtedness, wherefore this bill of interpleader would not lie.

The case was referred to a master and a full hearing was had upon all the issues of the fact involved. The master found, among other things, that the orator received the instrument from Mrs. Robinson upon the understanding that he should apply whatever he collected upon her indebtedness.

ROWELL, J.[1] This is a bill of interpleader brought to compel the defendants to interplead in respect of money collected by the orator on behalf of the defendant Mrs. Robinson on a non-negotiable obligation given to her mother, the intestate, by her brothers, Christopher C. Spaulding and Nathan R. Spaulding, who are defendants, and who claim that the money belongs to their mother's estate and not to Mrs. Robinson, who claims it by gift from her mother in her lifetime. The bill does not allege that the orator has no interest in the money, nor was there annexed to it an affidavit that the orator was not in collusion with any of the defendants; but no demurrer was filed. Interpleader was not decreed, but the bill was answered, and all the

[1] Part of the opinion is omitted.

defendants except Mrs. Robinson and her husband alleged interest in the orator, and collusion by him with the Robinsons. The case was referred to a special master to ascertain and report the facts on the issues raised by the answers, and on the coming in of the report the case was set down for hearing on bill, answers, and the master's report, and a decree was entered that the orator pay the money into court, and thereupon be discharged from further liability in respect thereof, with costs to be paid out of the fund, and that the fund belonged to Mrs. Robinson, and be paid to her. The master finds that, when the orator took said obligation from Mrs. Robinson to collect, she verbally turned it out to him to apply, when collected, on her indebtedness to him; and it is objected that the bill cannot be maintained because of such interest in the orator.

The remedy of interpleader is intended for the relief of those only who occupy the position of mere stakeholders, and are in danger of being drawn into a controversy in which they have no concern. It is, therefore, of the essence of an interpleader suit that the orator should be entirely indifferent between the conflicting claims; having no interest himself in the fund or other thing in dispute. Story, Eq. Pl. § 297; 3 Daniell, Ch. Pr. & Pl. *1754. The attitude of the orator in such a bill is thus defined by Lord Chancellor Cottenham in Hoggart v. Cutts, Craig & P. 197:

"The definition of 'interpleader' is not, and cannot be, disputed. It is where the plaintiff says, 'I have a fund in my possession in which I claim no personal interest, and to which you, the defendants, set up conflicting claims. Pay me my costs, and I will bring the money into court, and you shall contest it between yourselves.'"

His relation to the controversy must be such that on interpleader decreed, he can step out of the case altogether. When, therefore, the orator has a personal interest in the fund, his position is not one of indifference, and he cannot maintain his bill. And not only must he be disinterested when he brings his bill, but he must continue to be disinterested. His position must be one of "continuous impartiality."

But it is claimed that the objection of interest in the orator cannot be made now, but should have been made at an earlier stage of the case, before answer and trial on the merits. But, in the absence of a decree of interpleader, we think the objection can be taken at the hearing. How it would be if such a decree had been made, we have no occasion to determine. In this connection it must be remembered that interest or want of interest is not mere formal matter, but goes to the very right of maintaining the bill. * * *

We hold, therefore, that in the case before us the orator cannot maintain his bill, because of his interest in the money in controversy. No costs in this court will be allowed the defendants Robinson, because they knew of the orator's interest, but did not disclose it. Decree reversed and cause remanded, with directions to dismiss the bill, with costs in this court to all the defendants except the Robinsons. Costs in the court below to be determined by that court.

## BRAINE v. HUNT et al.

(Court of Exchequer, 1834. 2 Dowl. 391.)

This was a motion made by Cooper, under the Interpleader Act, on behalf of the sheriff of Oxford. The writ was delivered to the sheriff on the 12th of December. The goods were seized on the 26th. On the 28th, a notice was sent of a claim under a bill of sale. On the 1st of January, the sheriff was ruled to return the writ. On shewing cause, it appeared that all the property seized, except a fly, had been since delivered up by the sheriff to the claimant.

BAYLEY, B. The sheriff says he has the goods in his possession, and now it appears that part have been given up. I think he does not act fairly if he gives up part of the goods; in fact, he colludes with the party to whom he delivers them up. The object of the act was, by means of a suit and one suit only, and that between the parties really interested, the question of right should be tried, and the sheriff exonerated. Here the claimant might try his right in an action against the execution creditor, but he would have a right to sue the sheriff for the goods delivered up, and for returning nulla bona as to part. I therefore think that the sheriff is not entitled to the protection of the act, and that the rule should be discharged.

VAUGHAN, B. The sheriff ought to have a control over the goods the whole time. The costs will fall on the officer.

Rule discharged with costs, and ten days allowed to return writ.

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## ANONYMOUS.

(In Chancery, 1685. 1 Vern. 351, 23 E. R. 516.)

Upon a motion it was declared by the court that a cause having been heard upon a bill of interpleader, and a trial at law directed to settle the right between the defendants, there is an end of the suit as to the plaintiff; so that if he afterwards dies, the cause shall still proceed, and there needs no revivor, each defendant being in the nature of a plaintiff.

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## CRAWSHAY v. THORNTON.

(In Chancery before Lord Cottenham, 1836. 2 Mylne & C. 1.)

This was a bill of interpleader. The plaintiffs were the persons who, for some years previously to the month of August, 1834, constituted, together with William Crawshay, since deceased, the firm of Richard & William Crawshay & Co., but who now constituted the firm of Richard, William & George Crawshay & Co. The defendants were Henry Sykes Thornton and Pavel Daniloff Daniloff. The bill

stated, that the plaintiffs had for some years carried on business as iron merchants in London, in partnership, and that they had and have a bonded yard for foreign iron, and have also acted as wharfingers; and that in and prior to the year 1831, the persons constituting the firm of W. & T. Raikes & Co., of London, were in the habit of depositing foreign iron in the plaintiffs' yard for safe custody, the bill then stated, that, in the year 1832, certain specified parcels of iron were deposited with the plaintiffs by W. & T. Raikes & Co., and that, in the early part of the year 1833, an order in writing was brought to the plaintiffs, signed by W. & T. Raikes & Co., requiring the plaintiffs to weigh and deliver the iron; that the order did not specify the name of the person to whom the iron was to be delivered, but that a verbal message was left that the same "was for Mr. Thornton." The bill then stated, that no application having been made for the delivery of the iron, one of the plaintiffs wrote, in pencil, in the book of his firm which contained an account of the iron, the name "Thornton" against each of the parcels mentioned in the order. The bill further stated, that, in March, 1834, application was made to the plaintiffs by Henry Sykes Thornton, to know the particulars of the iron which the plaintiffs held on his account; and that one of the plaintiffs having thereupon ascertained from Richard Mee Raikes, who then carried on the business of the firm of W. & T. Raikes & Co., that H. S. Thornton was the person in whose favor the order for delivery had been given, wrote in the book of the plaintiffs' firm, which contained the particulars of the iron, against the entry of each of the parcels, the following words and figures, viz. "8th March, 1834, transferred to H. S. Thornton;" and that the plaintiffs, at the same time, wrote or caused to be written to Thornton a letter in the following words:

"George Yard, 8th March, 1834.

"Sir: In compliance with your request, we annex a note of the landing weights of the various parcels of CC ND iron, transferred into your name by Messrs. W. & T. Raikes & Co., and now held by us at your disposal.

"We are, &c., Richard & W. Crawshay & Co.

"H. S. Thornton, Esq."

The bill then stated that R. M. Raikes became bankrupt in October, 1834, but that neither he nor his assignees claimed any interest in the matters in question. The bill then stated, that on the 8th of October, 1834, the plaintiffs received from Messrs. Lemme & Co., merchants, a letter in the following words:

"Messrs. R. & W. Crawshay & Co.

"1 Finsbury Circus, 1834.

"Gentlemen: You will please to take notice that the whole of the CC ND iron, lying at your wharf, is the property of Messrs. P. Daniloff and A. Lubinoff, of St. Petersburgh, and that Messrs. W. & T. Raikes & Co. were agents to them for the sale thereof, and had no power to pledge the same. Learning however that Messrs. W. & T. Raikes have pledged certain part of the above iron to Messrs. Williams, Deacon, Labouchere & Co. [H. S. Thornton was a partner in this firm], and that you have the authority of the latter to hold such iron at their disposal, we beg to inform you that the authority is nugatory, and you are hereby required to treat it as a nullity, and not to part with the

possession of any part of such CC ND iron, but hold the whole thereof at the disposal of Messrs. P. Daniloff & A. Lubinoff, for whose house we have the honor to be, &c. John Louis Lemme & Co."

The bill then alleged, that Pavel Daniloff Daniloff, being the P. Daniloff mentioned in the letter of Lemme & Co., carries on business at St. Petersburg under the firm of P. Daniloff & A. Lubinoff, and claims the said iron, and is now resident out of the jurisdiction of the court. The bill went on to state that, in the month of December, 1834, Thornton attended at the plaintiff's counting house, and tendered to the plaintiffs their charges in respect of the iron, and demanded the delivery of it; and that, on the 22d of January, 1835, Lemme, as the agent on behalf of Daniloff, attended at the plaintiffs' counting house, and delivered to the plaintiffs the following notice in writing:

"To Messrs. R. & W. Crawshay & Co.

"Gentlemen: As the agent for and on the behalf of Pavel Daniloff, of St. Petersburgh, in the empire of Russia, trading under the style or firm of P. Daniloff & A. Lubinoff, I hereby demand of you the delivery of the under mentioned goods, the property of the said Pavel Daniloff Daniloff, viz." [here followed the particulars of the iron] "and I hereby tender you, as such agent of the said Pavel Daniloff Daniloff, the sum of £200, and such other sum or sums of money as may be due or owing to you in respect of the said goods; and in the event of your refusing to deliver the same to me as such agent as aforesaid, I hereby give you notice that I shall forthwith cause an action of trover to be commenced against you for the conversion of the said goods, and shall hold you responsible in respect thereof. Dated this 22d day of January, 1835.

"Yours, &c. John Louis Lemme."

The bill stated that Lemme at the time of the demand, tendered and offered to pay any further amount of charges of the plaintiffs in respect of the iron, if the same should exceed £200. The bill further stated that on the 1st of January, 1835, Thornton commenced an action of trover against the plaintiffs, to recover the iron, in which action a declaration was delivered on the 24th January, 1835, and that an action of trover against the plaintiffs for the recovery of the iron was also commenced by Daniloff, on the 23d of January, 1835.

The bill alleged that the warehouse rent, charges, and expenses on the iron due to the plaintiffs, amount to the sum of £160 15s. 6d., and that the plaintiffs claim no interest or right in or to the iron, except in respect of their charges, their right to which is admitted by the defendants; and that in manner aforesaid the iron is claimed by Thornton and Daniloff. The bill charged that the plaintiffs do not collude with Daniloff and Thornton or either of them, but are ready to dispose of the iron as the court may direct; that Daniloff alleges and insists that he claims the iron by a title paramount to the title of Thornton, or the persons under whom Thornton claims the same.

The prayer of the bill was, that Thornton and Daniloff might be decreed to interplead together, and that it might be ascertained to which of them the iron belongs and ought to be delivered over; and that whatever order the court might make respecting the iron, proper directions might be given with respect to the lien which the plaintiffs have upon the same, and as to preserving such lien for the plaintiffs;

and that in the mean time Thornton and Daniloff might be restrained from prosecuting their actions at law so commenced as aforesaid, and from commencing any other actions or proceedings at law or in equity against the plaintiffs touching the matters aforesaid.

The bill was accompanied by the usual affidavit negativing fraud or collusion, or any other intent than to avoid being molested by the defendants' proceedings at law.

To this bill the defendant Thornton put in a general demurrer, which was allowed by the Vice-Chancellor on the 11th of May, 1835. The plaintiffs now appealed from his Honor's decision.

1837, January 3.—THE LORD CHANCELLOR.[2] This was an appeal from an order of the Vice-Chancellor, allowing a demurrer of the defendant, Henry Sykes Thornton, to the bill, which is a bill of interpleader against this defendant so demurring, and one Pavel Daniloff.

The question, therefore, turns entirely upon this, whether the statement in the bill constitutes such a case against the defendant Thornton as entitles the plaintiffs to the ordinary protection afforded by a bill of interpleader. [His Lordship then stated the allegations and the prayer of the bill.]

The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest; because, if the plaintiffs have come under any personal obligation, independently of the question of property, so that either of the defendants may recover against them at law, without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs; and the injunction, which is of course if the case be a proper subject for interpleader, would deprive a defendant, having such a case beyond the question of property, of part of his legal remedy, with the possibility at least of failing in the contest with his co-defendant; in which case the injunction would deprive him of a legal right, without affording him any equivalent or compensation. Such a case, undoubtedly, would not be a case for interpleader. A party may be induced by the misrepresentation of the apparent owner of property, to enter into personal obligations with respect to it, from which he may be entitled to be released by a court of equity; but such a case could not be a subject for interpleader between the real and pretended owners. In such a case, the plaintiff would be asserting an equity for relief from a personal contract against one of the defendants, with which the other would have nothing to do.

It is familiarly said that there is no interpleader between landlord and tenant, or principal and agent; but it will be found that the reason for this lies deeper than might be inferred from the statement of

[2] Parts of the opinion are omitted.

this rule; and that it is to be considered not so much as an independent rule, as a necessary consequence of the principle of all interpleading. In both these cases, rights and liabilities exist between the parties, independent of the title to the property, or to the debt or duty in question, and which may not depend upon the decision of the question of title. It is true that in this case both the actions are actions of trover; but it was most properly admitted by the counsel for the plaintiffs, that the dealings of the plaintiffs with Mr. Thornton would be evidence for him in his action. Suppose then, that those acts, the transferring the iron into his name in the plaintiffs' books, and the letter of the 8th of March, 1834, should be held sufficient to procure for Mr. Thornton a judgment in his action, without inquiring whether Messrs. Raikes had or had not a legal right to exercise dominion over the property as they did, by ordering the transfer of it to Mr. Thornton, how could such a right be the subject of interpleader between Mr. Thornton and Mr. Daniloff? In such a case there would be no question in common, and therefore nothing to be tried between them; Mr. Daniloff might obtain a verdict upon showing his title to the iron; and Mr. Thornton, upon showing that Messrs. Crawshay had come under a personal liability by their dealings with him, independently of the question of title. This court cannot take from Mr. Thornton a right he may have obtained against Messrs. Crawshay, without substituting some mode of litigation by which he may enforce all his rights. In the case supposed, this could not be done in any litigation with Mr. Daniloff. * * *

The interpleader at law was where there was a joint bailment by both claimants.

In equity, it is defined to be where two or more persons claim the same debt or duty.

It is no exception to the rule that a tenant or an agent cannot file a bill of interpleader against his landlord or his principal, that where the landlord or the principal has created a subsequent interest in some other person, the tenant or agent may maintain such a bill; because, in such case, the same debt or duty is claimed, and it is the act of the person entitled to such debt or duty which creates the equity of the party owing it. * * *

The appeal must be dismissed with costs.

## ST. LOUIS LIFE INS. CO. v. ALLIANCE MUT. LIFE INS. CO. et al.

(Supreme Court of Minnesota, 1876. 23 Minn. 7.)

The St. Louis Mutual Life Insurance Company (to whose business and liabilities the plaintiff has succeeded) issued a policy of insurance for $2,000, on the life of Henry Young, payable to the defendant Magdalena Young. Upon the death of Henry Young, the Alliance Company, defendant, claimed the insurance money, as assignee of Magdalena Young. The plaintiff thereupon brought this action in the district court for Ramsey county, alleging that it was ready to pay the money to the party rightfully entitled; that the alleged assignment was obtained by the Alliance Company by fraudulent practices, and was void, and praying that that company and Magdalena Young be compelled to interplead concerning their claims to the fund in dispute. The defendants separately answered, asserting their respective claims, and the action was referred, by consent, to Geo. L. Otis, Esq., upon whose report judgment was entered for the Alliance Company, and against the plaintiff, for the amount of the policy, with interest and costs. A new trial was refused by Wilkin, J., and the plaintiff appealed.

CORNELL, J. The complaint in this action is in the nature of a bill of interpleader in equity, as known and understood prior to the adoption of the code practice. To determine, therefore, the status and rights of plaintiff in this action, it is necessary to refer to the nature of a suit in equity under the former practice, commenced by such a bill, and the rules and principles governing it.

As to the complainant, the sole office and purpose of such a bill was to relieve him from the risk, uncertainty, and expense of determining, by litigation or otherwise, as to which of several conflicting complainants he was owing and ought to pay an acknowledged debt or duty, his obligation and readiness to pay or discharge the same, upon the settlement of such question, being fully conceded. Hence, in a bill of this character, it was necessary for it to appear that the complainant had no personal interest in such debt or duty, or the fund in his possession. He could not claim any relief against any of the claimant defendants, but could only ask leave of the court to pay the money or deliver the property to the one to whom it rightfully belonged, in order that he might thereafter be protected against the claims of all. The only decree the complainant was entitled to was one of interpleader, and that the bill was properly filed. This being obtained, he was thenceforth altogether out of the suit, the defendants alone being left to contest their conflicting claims, without any aid or interference on his part. 2 Daniel Ch. Pr. 1659, 1660, 1675, 1680, and notes; 2 Barb. Ch. Pr. 117, and cases cited in notes.

It is apparent from these considerations that, with the exception of the question of costs, none of the questions sought to be raised and discussed by plaintiff on this appeal are properly before us for consideration. They all relate solely to matters in controversy between the defendants, and which they alone are interested in litigating and settling. The decision of the referee in favor of the assurance company against the other defendant, acquiesced in, as it seems, by her, entitles it to the money paid into court by the plaintiff, under its order, for the benefit of the successful litigant defendant, and constitutes full protection to plaintiff against any claim on her part. Plaintiff has no interest, and is under no duty or obligation to prosecute an appeal in her sole interest and behalf, and will not be heard in the assertion of any of her rights.

In the matter of costs, there was sufficient in the evidence, and the conduct of the plaintiff during the trial, to justify the referee in arriving at the conclusion that the controversy nominally litigated between the defendants had its origin and support with the plaintiff, and that the action was instituted in bad faith, with the view of hindering and delaying the defendant company in the collection of its claim, and not for the sole purpose of self-protection. Under these circumstances it cannot be said that the referee erred in awarding costs against the plaintiff.

Order affirmed.

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## MURIETTA et al. v. SOUTH AMERICAN, ETC., CO., Limited (DEVER et al., Claimants).

(Court of Appeal, 1893. 62 Law J. Q. B. [N. S.] 396.)

This was an appeal from an order of Bruce, J., at Chambers directing an interpleader issue.

The action out of which these proceedings arose had been brought by the plaintiffs as individuals upon an agreement between the plaintiffs and the defendants, dated the 18th of March, 1892, to recover a first instalment of £10,000. Negotiations were at that time already on foot with the view to effect an amalgamation between the company of Messrs. Murietta & Co. and the South American Company, which would be at an end if the company of Murietta & Co. went into liquidation. One of the terms of the agreement of the 18th of March was, in effect, that if the defendants would pay certain unsecured creditors of the plaintiffs some £100,000, the plaintiffs would influence their firm to release the defendants from any liabilities they might have incurred in the course of the negotiations for amalgamation. Soon after this the plaintiffs' company went into liquidation. A subsequent agreement was arrived at in January, 1893, by which the original £100,000 was to be reduced by £20,000 if the claims of the receivers in the

liquidation could be resisted, and the defendants agreed to join the plaintiffs in opposing their claims.

The claimants, the receivers, gave notice that they should dispute the validity of the agreement, upon the grounds that it amounted to a fraudulent preference. Upon this the defendants obtained, under the provisions of Order LVII, the interpleader issue, the subject of the present appeal.

Order LVII, rule 2, is as follows:

"The applicant must satisfy the Court or a Judge by affidavit or otherwise—(a) That the applicant claims no interest in the subject-matter in dispute other than for charges or costs; and (b) That the applicant does not collude with any of the claimants."

WILLS, J.[a] I am of opinion that the claimant is entitled to an order dismissing the application for an interpleader, upon the short ground that the applicants have disentitled themselves to an interpleader order by their own conduct. The rule provides that the applicant must satisfy the Court that he has no claim or no interest in the subject-matter in dispute, and that he does not collude with any of the claimants. In one sense it may be said that here the applicant has no interest in the subject-matter in dispute, because he lays no claim to any specific portion of it; but he does possess this very substantial interest in it, that if one party succeed, he will have to pay £10,000, and ultimately nearly £100,000; whilst if the other party succeed, he will have to pay very much less, perhaps £8,000 and £80,000. Therefore, to the extent of the difference between these two larger sums, he is very much interested in the subject-matter, because in the event of one party succeeding he is entitled to a large amount which he may keep for himself.

But perhaps the stronger ground is that there has been collusion within the meaning of the rule. The applicant has made an agreement with one of the parties, by which he has bound himself to do everything he legally can to defeat the claim of the receiver. Can it be said under those circumstances that he does not collude with the Muriettas? Colluding may be said to be an equivalent for playing the same game. That is the literal meaning of the word. Here the applicant has identified himself in interest—he has a strong interest that one side should succeed rather than the other. In my opinion one of the things intended when these rules were drawn was that the stakeholder who claimed the benefit of the Act should be in a real position of impartiality between the parties. It is impossible, of course, to control human nature and the natural affinities of men for people they know, and whom they make like or dislike; but in the present case there is something very tangible to lay hold of, which does not depend upon any consideration of that kind, and which, in my opinion, the rule intended to exclude. Where the applicant for relief has bound himself to the other party by an agreement, for which the consideration is very large

[a] The concurring opinion of Charles, J., is omitted.

in point of money—amongst other things, to do whatever he properly can to defeat the claim of the receivers, he is, under the express words of the rule, colluding with one of the parties, and fails to bring himself under the condition by which alone he can have relief.

I am, therefore, of opinion that the proper order is that the application for interpleader be dismissed simpliciter.

Appeal allowed. Order discharged.

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## ALECK v. JACKSON et al.

(Court of Chancery of New Jersey, 1892. 49 N. J. Eq. 507, 23 Atl. 760.)

GREEN, V. C.[4] This bill is filed by Theresa Aleck, and alleges that on February 25, 1890, she made an agreement in writing with one Joseph S. Jackson, whereby Jackson agreed to build for her, in the city of Camden, five brick buildings on the south side of Spruce street, east of Broadway, and two brick buildings on the east side of Broadway, south of Spruce street. A copy of the contract is annexed to the bill. The contract was filed in the clerk's office of Camden county, February 25, 1890. The bill alleges that notices have been served on the complainant by 12 creditors of Jackson for materials, etc., furnished for the houses, whose claims aggregate $4,597.06. Complainant alleges that there was due from her to Jackson on account of the agreement the sum of $3,593.83; that certain of the creditors of Jackson intend to sue her, and some have already commenced legal proceedings against her, claiming certain amounts due to them, respectively; that she is ready and willing to pay, but cannot safely do so; and she seeks, therefore, to have the defendants interplead. On filing the bill and affidavits, it was ordered that, on complainant's paying the money stated to be due into court, an injunction issue restraining the prosecution of suits against her by the defendant Jackson or the lien claimants. Such deposit was made, and the injunction issued. The contractor Jackson has answered, and denies that the complainant has correctly stated the amount due from her to him. He claims that he has completed his contract according to its terms, and that there is due to him the whole of the last payment of $4,500, as well as the sum of $393.06 for extra work; making the sum of $4,893.06. He has filed a mechanic's lien, and commenced suit in the Camden county circuit court to recover that amount, and claims that he should not be restrained from prosecuting it.

The dispute as to the amount due from the complainant to the defendant Jackson on the contract destroys the character of the bill as one of strict interpleader. It is claimed that the question should be decided in this court on the ground that the bill is one in the nature of a bill of interpleader. Bills of strict interpleader are those filed by

[4] The statement of facts is omitted.

a mere stakeholder, who claims no interest in the subject-matter over which there are conflicting demands; he asks no relief, and seeks only to be relieved from loss by the decree of the court determining which claimant is entitled to receive the matter in dispute. In a bill in the nature of a bill of interpleader the complainant seeks some relief for himself, but the facts on which he relies for such relief must be such as to entitle him to it in a court of equity; the case, as made, must be one of equity jurisdiction. This is evident from the illustrations in Story, Eq. Pl. § 297; Bedell v. Hoffman, 2 Paige (N. Y.) 199; Wakeman v. Kingsland, 46 N. J. Eq. 113, 117, 18 Atl. 680.

In this case the complainant insists that the amount of the final payment named in the contract should be reduced by the amount she alleges she was forced to expend, after she took possession, in the completion of the houses, so as to make them conform to what she claims the contract required. Jackson demands the whole amount of the final payment, and also $393 for extra work. He says he completed the houses according to contract, plans, and specifications, and that her expenditure was not required by the condition she names. She denies that she is liable under the contract for what he claims as extra work. These are not questions of equity cognizance; they raise no issue to be presented to this court for solution; they are properly to be settled by a court of law. The defendant Jackson had submitted them to the proper tribunal for determination, and rightly claims in his answer that he should not be restrained from prosecuting his suit. The complainant, however, was being subjected to numerous lawsuits by those who had furnished materials and labor in the construction of her houses. Her liability to these persons arises under the mechanic's lien law, and is limited in aggregate amount to what may be due from her to Jackson. She could not safely pay these claims until that amount was ascertained, and her bill, as filed, presented a clear case of interpleader. Its character as such is changed by the position of Jackson.

I think she is entitled to have the case retained until the amount of her indebtedness to Jackson is ascertained by the trial of his suit at the circuit, and, to that end, that the injunction be dissolved as to Jackson's prosecuting that suit, but retained as to the other defendants. I will advise such an order.

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## HIRSCH et al. v. MILITARY-NAVAL CORPORATION.

(Supreme Court of New York, Appellate Term, First Department, 1913. 138 N. Y. Supp. 1076.)

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Charles S. Hirsch and others, partners as Hirsch, Lilienthal & Co., against the Military-Naval Corporation. From a judgment for plaintiffs, defendant appeals, also bringing up for review an

order denying its motion to interplead Edward Farrow in its place and stead, on its paying into court the amount claimed.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

GERARD, J.[5] This action was brought by plaintiffs, who claimed to be the holders of ten bonds of the defendant corporation, to recover $250, the amount due on coupons detached from said bonds and past due. The defendant also states in its notice of appeal that it intends to bring up for review the denial of a motion, made by defendant, in which defendant asked to be permitted to pay the money into court and to interplead one Farrow in place of defendant. * * *

It was shown on the motion for interpleader that the bonds, the coupons of which were sued on, were originally issued by defendant to one Farrow; that Farrow had made a claim on defendant for the amount of the coupons, Farrow claiming that he had intrusted these bonds to one Novelly, who had agreed to return them in a week; that Novelly put up the bonds with plaintiffs, who were stockbrokers, as margin for a stock speculative account; and that Farrow, learning of this, and before plaintiffs had sold Novelly out, had notified them that there were a number of bonds "out on trust receipts, and such bonds manifestly cannot be sold."

Whether this constituted any notice to plaintiffs of any infirmity in Novelly's apparent title to a negotiable bond is a question that Farrow should be permitted to try out. It may well be that Farrow cannot succeed on such issue; but, at any rate, defendant should have been permitted to pay the amount of the coupons into court, and Farrow and plaintiffs could have then tried the title to the bonds.

Judgment reversed, and new trial ordered, with costs to appellant. Order denying motion for interpleader reversed, and Edward S. Farrow interpleaded in place of the defendant, on defendant's paying the amount of the coupons into court. All concur.

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## KEUPLER et al. v. EISELE et al.

**(Court of Errors and Appeals of New Jersey, 1912. 79 N. J. Eq. 651, 83 Atl. 999.)**

Appeal from Court of Chancery.

Bill of interpleader by Stephen Keupler and another against Andrew Eisele and others. From an order of the Court of Chancery denying a motion to dismiss the bill and overruling a demurrer thereto, defendants appeal.

[5] Part of the opinion is omitted.

The following is the opinion of Vice Chancellor Leaming:

* * * * * * * * *

"On Motion to Dismiss Bill of Interpleader.

"As the present motion is, in effect, a demurrer to the bill, the single question here presented is whether the bill on its face discloses facts sufficient to sustain a bill of interpleader.

"On August 12, 1910, the day the building was completed, complainants were, by the terms of the contract, required to be in possession of the final installment of the contract price, the amount of which was $1,616. Complainants were on that day entitled to pay that money to the contractor, except as against such rights in that fund as had at that time arisen in behalf of others. An advance payment made by complainants, as owners, to the contractor or to his order prior to that date is necessarily treated as made on that date and will discharge the owners to the amount of such advance payment, except as against rights of others which, prior to that date, have arisen in the fund. A stop notice served subsequent to the time the last installment became due is operative only against such part of the last installment as remains unpaid or unappropriated at the time such subsequent stop notice is served. Taylor v. Reed, 68 N. J. Law, 178, 52 Atl. 579. There can be no doubt, therefore, touching the right of complainants to interplead so far as the objection is concerned, that they should pay into court the full amount of the last installment without first deducting the sum of $496 which was paid on contractor's order May 25, 1910, for the stop notices served have no rights as against that payment.

"Complainants also deduct from the amount of the last contract installment $53 which was paid by complainants December 23, 1910, to the Haney-White Company by virtue of a guarantee made by complainants to that company May 21, 1910, wherein complainants guaranteed the payment of an order issued to that company by the contractor on that date against complainants for money due that company under that contract. With such an accepted or guaranteed order outstanding at the time the last installment fell due, the order clearly at this time became fully operative in favor of the person holding the order as an equitable assignment of the fund to the amount of the order, as against all persons who at that time had no prior rights. It therefore becomes immaterial as to such subsequent claims whether that order was paid by complainant on the day the installment fell due or at a subsequent day, for the holder of the order was entitled to the money on that day.

"I am also satisfied that the bill discloses sufficient uncertainty as to the rights of the several claimants to entitle complainants to file the bill. The bill alleges that the several claimants to the fund have made claims on complainants to the exclusion of other claimants, and sets forth the substance of the stop notices in a manner which may be said to create substantial doubts as to the sufficiency of some of the notices. These averments I think sufficient to sustain the bill."

PER CURIAM.[6] The order appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

[6] The opinion of Vice Chancellor Leaming on demurrer to bill of interpleader is omitted.

## THIRD NAT. BANK OF BOSTON v. SKILLINGS, WHITNEYS & BARNES LUMBER CO. et al.

(Supreme Judicial Court of Massachusetts, 1882. 132 Mass. 410.)

MORTON, C. J. This is a bill of interpleader, the substantial allegations of which are that Edward Babson, Jr., delivered a draft upon New York to the plaintiff bank for collection; that it collected the draft and placed the amount to the credit of said Babson, who had an open account with the bank; that the Skillings, Whitneys & Barnes Lumber Company contends that said draft was held by Babson as its agent, and was its property, and that the proceeds belong to it; and that the executrix of said Babson, who has deceased, contends that the proceeds belong to his estate.

We are of opinion that this does not present a proper case for a bill of interpleader.

There is no privity between the plaintiff and the Skillings, Whitneys & Barnes Lumber Company. That corporation does not claim the fund in the hands of the plaintiff through any privity with Babson, but by a title paramount and adverse to his. The bank is not a mere stakeholder, but is the debtor of Babson, standing in privity with him alone. Carr v. National Security Bank, 107 Mass. 45, 9 Am. Rep. 6.

The authorities support the rule that in such a case a bill of interpleader will not lie, but the remedy of the parties is at law. Such bill will lie only when two parties claim of a third the same duty or debt by virtue of some privity existing between them.

Thus, if a person deposit property or money in the hands of another, not as a stakeholder for both parties, but as his agent or bailee, and the property is claimed by a third person under an independent title, the agent or bailee cannot maintain a bill of interpleader. 2 Story, Eq. Jur. §§ 816, 817, and cases cited.

So where a tenant is liable to pay rent, and a third person claims it by a title independent of the landlord, the tenant cannot maintain a bill of interpleader. But if the third person claims under the landlord, so that the question arises from the act of the landlord, this creates a privity with the tenant, and the bill will lie. Dungey v. Angove, 2 Ves. Jr. 304; Cowtan v. Williams, 9 Ves. 107; Clarke v. Byne, 13 Ves. 383.

So a sheriff, who has seized property upon execution, cannot maintain a bill of interpleader to determine whether the execution debtor or a third person claiming it is entitled to the property, as their claims against him are not of the same character or in the same right. Shaw v. Coster, 8 Paige (N. Y.) 339, 35 Am. Dec. 690.

Mr. Justice Story, in his Commentaries on Equity Jurisprudence, after reviewing the authorities, says:

"The true doctrine, supported by the authorities, would seem to be, that, in cases of adverse independent titles, the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance

of a court of equity; for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person who calls for an interpleader." 2 Story, Eq. Jur. § 820.

This rule is applicable in the case at bar. The only relation of the plaintiff to the defendants is that it is the debtor of one of them. A debtor cannot deprive his creditor of his remedies at law, and force him into equity, merely because a third person claims the fund or debt by a title not derived from the creditor. His remedy is at law, and it would seem that, if either of the claimants should sue him, he could protect himself by notifying the other claimant to come in and defend the suit; and that he, being the real party in interest, would be bound by the judgment.

The plaintiff contends that this bill may be maintained under Gen. Sts. c. 113, § 2, cl. 6. But this statute does not apply. It was not intended to enlarge the right to bring a bill of interpleader strictly so called, but to enable a party to a controversy to bring a bill in the nature of a bill of interpleader, to adjust the whole matter in controversy in a case where a judgment at law between two of the parties would leave open to one or both a controversy with a third party. Angell v. Stone, 110 Mass. 54; McNeil v. Ames, 120 Mass. 481.

Bill dismissed.

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## MACY v. INHABITANTS OF NANTUCKET et al.

(Supreme Judicial Court of Massachusetts, 1876. 121 Mass. 351.)

Bill in equity, in the nature of a bill of interpleader, against the town of Nantucket and the city of Boston alleging that the plaintiff was, on May 1, 1875, trustee under the will of Selina Herring, late of Boston, deceased, to hold the estate as an accumulating fund until the decease of Thomas J. Herring, son of the testatrix, and upon his decease to divide the same among the grandchildren of the testatrix; that the plaintiff was a resident of Nantucket on that day, and that Thomas J. Herring was a resident of Boston; and that taxes had been assessed upon the personal estate of the trust fund, and were about to be collected both in Nantucket and in Boston; and praying that the two defendants might interplead together touching their right to the said taxes, and that it might be ascertained to which of them the taxes ought to be paid, and that the plaintiff might pay the same into court, and for further relief.

The city of Boston filed a demurrer to the bill, on the ground that the plaintiff had a plain, adequate and complete remedy at law. Ames, J., sustained the demurrer; and the plaintiff appealed.

GRAY, C. J. By the law of this Commonwealth, the prompt and unembarrassed collection of taxes is deemed to be so necessary for the support of the government, that the collection of taxes on personal property is enforced by distress or imprisonment, and in no other

manner, except in the peculiar cases in which the collector is allowed to maintain an action for them, such as where the person taxed removes from the town, or dies, or being an unmarried woman, marries, after the assessment of the tax, or where the tax is upon the personal estate of a deceased person. Gen. Sts. c. 12, §§ 3, 4, 7, 13, 18–20; Crapo v. Stetson, 8 Metc. 393. The remedy of a person illegally taxed is by paying the amount, and suing the town or city to recover it back; and this court, sitting in equity, has no jurisdiction to determine whether or to whom it is due, or to restrain its collection. Loud v. Charlestown, 99 Mass. 208; Norton v. Boston, 119 Mass. 194. This bill cannot therefore be maintained.

In Hardy v. Yarmouth, 6 Allen, 277, in which the court, on a similar bill, expressed an opinion upon the merits of the case, no question of jurisdiction was raised or considered.

Bill dismissed.

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## DORN v. FOX et al.

(Commission of Appeals of New York, 1874. 61 N. Y. 264.)

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiff entered on the report of a referee. Reported below, 6 Lans. 162.

This action was brought to compel the collectors of the towns of Ava and Boonville, in Oneida county, to interplead, each of said collectors having a tax on his tax list, and a warrant against the plaintiff, who owned a farm lying partly in each of said towns.

The complaint stated, in substance, that, prior to and during the year 1869, the plaintiff was the owner and occupant of 400 acres of land, occupied by him as an entire farm, which was partly situated in Ava and partly in Boonville, no portion of it being unoccupied. Prior to April 30, 1863, he resided on that part of the farm lying in Ava; since that time he has resided on that portion of his land situated in Boonville. In the year 1869, the assessors of the town of Ava assessed the plaintiff for the whole value of his farm, though he presented the requisite affidavit that his residence was not in the town. This assessment was delivered to the board of supervisors of the county, who issued a warrant for the collection of his tax, amounting to forty-one dollars and eighty-five cents. The warrant was thereupon delivered to the defendant, Fox, collector of the town of Ava, who, in that character, claims payment of such tax and his fees, and is about to proceed to enforce such payment by levy and sale of the plaintiff's property. In the same year the assessors of the town of Boonville assessed the plaintiff for the same property, on the ground that his residence was in that town, whereupon similar proceedings on the part of the officers took place as in the town of Ava, for the collection of a tax amounting

to the sum of sixty-one dollars. Each of these are the annual tax for the farm of the plaintiff for the year 1869. The complaint further set forth that the plaintiff was ignorant of the respective rights of the defendants as collectors, and that he was willing to pay the tax to either of the defendants, as the court might direct, and offered to pay the money into court. There was also an allegation that the action was not brought by collusion with either of the defendants.

On this state of facts the plaintiff prayed for an injunction restraining the defendants from taking any proceedings in relation to the tax or its collection, and for a direction that the defendants should interplead.

The referee found the facts substantially as set forth in the complaint, except as to the plaintiff's ignorance of the rights of the collectors, as to which there was no finding, and decided, as matter of law, that the plaintiff has no cause of action against the defendant Graff, collector of the town of Boonville, but that the defendant Fox, collector of the town of Ava, should be restrained from enforcing the collection of the tax under his warrant.

Judgment was entered on the report of the referee accordingly, awarding a perpetual injunction, and declaring the said tax and the warrant last mentioned void and of no effect against the plaintiff or his property.

DWIGHT, Com.[1] The defendant claims that a bill of interpleader will not lie in the present case, on two grounds. One is, that the plaintiff was not ignorant of his rights; and another, that on the merits of his case, he has no right of action.

It is only necessary to consider whether a bill of interpleader will lie as against the two collectors, to establish his rights. That the assessors of the town of Ava have violated them has already been affirmed in a case decided at the present term of this court. Dorn v. Backer, 61 N. Y. 261. It is now settled law that assessors act at their peril in determining a jurisdictional fact. By finding that the plaintiff resides in Ava they gain no control over the subject, unless he does, in fact, reside there. When that point is in dispute, it must ultimately be decided by the courts. The referee has found, as a fact, in the present case, on undisputed evidence, that the plaintiff, when the tax was levied, resided in Boonville. The assessors of the town of Ava therefore had no power to assess a tax over the plaintiff's farm, and their proceeding was wholly void.

The action of interpleader was well brought. The authorities upon this subject distinguish between a strict bill of interpleader and a bill in the nature of an interpleader. These are governed by rules differing to some extent. In a strict bill of interpleader the following ingredients are necessary: 1. Two or more persons must have preferred a claim against the plaintiff. 2. They must claim the same thing,

[1] Part of the opinion is omitted.

whether it be a debt or duty. 3. The plaintiff must have no beneficial interest in the thing claimed. 4. It must appear that he cannot determine, without hazard to himself, to which of the defendants the thing, of right, belongs. There must also be an offer to bring the money or thing in dispute into court.

In the bill, "in the nature of an interpleader," the same strictness is not required. Other elements of an equitable nature may enter into the case, and the jurisdiction of the court may be derived from these. The distinction is well pointed out in Mohawk & Hudson R. R. Co. v. Clute, 4 Paige, 385, 392, 393. The present action was brought upon the theory of a strict bill of interpleader. There was an allegation in the complaint that the plaintiff was ignorant of the respective rights of the collectors. This statement was denied in the answer, and the referee made no finding upon the subject. Such ignorance must be shown, or, at least, it must appear that there is some doubt to which of such claimants the debt or duty belongs, so that he cannot safely pay or render it to one without some risk of subsequently being made liable for the same debt or duty to the other. Mohawk & Hudson R. R. Co. v. Clute, supra.

I think that as matter of law there was sufficient doubt upon this question, when the action was commenced, to bring it within the rule. At that time, according to the test suggested in Mohawk & Hudson R. R. Co. v. Clute, supra, 392, the plaintiff could not have safely rendered the tax to one of the collectors without some risk of subsequently being made liable to pay the tax to the other. It is true that the amount of the tax was not the same in the two towns. In one of them it was $41.85, and in the other $61. The duty is however the same, as it grows out of the statutory power of assessors to levy taxes. The same fact existed in the case just cited; and the court presumed that the plaintiff had paid into court the largest sum assessed upon him, so as not to violate the settled rule in this class of cases, that he cannot litigate any part of the claim of either defendant. Page 391. To show that the authority of assessors to decide a jurisdictional fact was not fully settled when this action was brought, reference may be had to the following cases: Weaver v. Devendorf, 3 Denio, 117; Brown v. Smith, 24 Barb. 419; Barhyte v. Shepherd, 35 N. Y. 238, and Dorn v. Backer, supra.

In this last case the General Term of the fourth department—Justice Johnson delivering an elaborate opinion—held, in 1872, upon this very question now under consideration, that the action of the assessors of the town of Ava was final. He distinguished the case from that of People v. Supervisors of Chenango, 11 N. Y. 563, and Mygatt v. Washburn, 15 N. Y. 316. His view was, that as the assessors had jurisdiction over the subject-matter (a large portion of the farm lying in that town), and that as they were called in the discharge of their duty to decide the fact of Dorn's residence, they were not liable to an action for a redress of any injury occasioned by their error of judgment. On

the other hand he claimed that in Mygatt v. Washburn the person who was assessed was in fact a non-resident, and therefore the assessors acted wholly without jurisdiction. Though this distinction is now untenable, it could not be considered as clearly so when this action was brought in 1870, since it was maintained by persons of so much judicial experience and ability as Judges J. A. Johnson, Talcott and Mullin, and had not then been passed upon and discarded by the appellate court. The rule requiring that in actions of interpleader the plaintiff should be in doubt as to which of the claimants is in the right, must be construed in a reasonable manner. It of course excludes all cases where the rights of parties are clearly settled. On the other hand, so long as a principle is still under discussion, and the appellate branch of the Supreme Court has reached conflicting opinions, it would seem fair to hold that there was sufficient doubt and hazard to justify the protection which is afforded by the beneficent action of interpleader.

If however I am wrong in this view of the case, there is sufficient authority for holding that the plaintiff may sustain his action as a "bill in the nature of an interpleader." There are sufficient allegations in the complaint for that purpose. The plaintiff in that action does not simply claim that he is a stockholder, or that he owes a duty to one or two distinct claimants. He may show, in such a case as is now under discussion, that by reason of conflicting claims his property is in danger of being sacrificed. He may insist that he has an equitable right to have relief from the effects on his property of an illegal assessment. If the statute makes the tax a lien on his land, he may urge that it is a cloud on his title. If it be personal property, he may assert that it is in danger from the rival claims of the collectors. Assuming that the warrants are regular in point of form, each collector would be protected as to his acts done under them. Should it be said that the plaintiff may sue the assessor for his wrongful act, the answer is that the law does not confine him to so uncertain a remedy. Complete justice is done by bringing both claimants before the court, ordering the amount of the lawful tax to be paid over to the party who turns out to be in the right, restraining the rival collector from further proceedings, and declaring the unauthorized tax, as well as the warrant for its collection, illegal and void. * * *

On the whole, the result is that the present action may be supported either as a strict action of interpleader or as one in the nature of an interpleader; and the plaintiff, having offered to pay the money into court, was entitled to relief in accordance with his proof. The testimony having clearly shown that his residence was in Boonville, he was rightfully taxed there, and the assessment in Ava was illegal and void.

The regular course in the present case, considered as a strict bill of interpleader, would seem to have been not to have dismissed the action as against the collector of the town of Boonville, but to have entered judgment in his favor for the amount of the tax. The bill should

pray that the defendants may interplead, so that the court may adjudge to whom the money or property belongs. 2 Barb. Ch. Pr. 122; Redfield v. Supervisors, 1 Clarke Ch. 49. All the parties were before the court, and the cause was heard on its merits, and the whole subject should have been disposed of according to the equities of the case. The successful contestant thus has the benefit of a judgment, and may receive his lawful dues by force of it. On any other theory, there appears to be no reason for requiring, on the part of the plaintiff, an offer to pay the money into court. That would indeed be an idle ceremony if the plaintiff is not to pay it over to the party who is found to be entitled to it. And yet it is a condition precedent to relief that the money should be brought in. 2 Barb. Ch. Pr. 122, and cases. This view is not in opposition to the result in Mohawk & Hudson R. R. Co. v. Clute, since in that case there was no decision at the hearing, but only upon an order to show cause. That part of the judgment in the present action which dismissed it as against the collector of Boonville was however not appealed from, and there appears to be nothing to prevent the collector of that town from enforcing the tax in such manner as he may be advised.

The judgment of the General Term should be reversed, and that entered on the report of the referee should be affirmed. All concur.

Judgment accordingly.

# CHAPTER VIII

# BILLS OF ACCOUNT

## EARL OF SALISBURY v. CECIL.

(In Chancery before Lord Thurlow, 1786. 1 Cox, 277, 29 E. R. 1165.)

This bill was filed (amongst other things) for an account from one Wilkinson, who was chief auditor and steward of the late Earl of Salisbury, of all sums of money received by him on account of the said late Earl, and that he might account for the profits made by him of the said Earl's money, which, as was charged by the bill, was from time to time laid out by him in the funds and other securities at interest. Wilkinson, by his answer, admitted that his agents from time to time remitted very large sums of money belonging to the said Earl to his (Wilkinson's) bankers, but said that the same was mixed with his own money, by which means he was unable to set forth what profits had been made of the said Earl's money. Wilkinson afterwards died before the hearing of the cause, which was revived against his representatives. And it was now moved that the defendant, the representatives of Wilkinson, "might produce at the hearing of the cause all books kept by Wilkinson at his banker's during the time he was chief auditor and steward of the said late Earl:" which motion was made with a view of shewing from the banker's books that Wilkinson did from time to time draw out the Earl's money for the purpose suggested by the bill.

LORD CHANCELLOR. From the circumstance of Wilkinson having mixed the money of the late Lord Salisbury with his own, which fact is admitted by his answer, I am of opinion that these books ought to be produced, and such parts selected at the hearing as shall appear to apply to the subject before us. The objection made is that the books are improper to be produced on other accounts, but a man shall never be at liberty so to fence with justice as to shelter himself under a circumstance arising from his own improper behaviour in mixing the money with his own. And his Lordship made the order as prayed.—Reg. Lib. A. 1786, Mich. Term.

## DINWIDDIE v. BAILEY.

(In Chancery before Lord Eldon, 1801. 6 Ves. 137, 31 E. R. 979.)

The bill stated, that the plaintiff carried on the business of insurance broker at Manchester; and was employed by the defendants from time to time to effect insurances upon ships, goods, wares, and merchandize; and paid divers sums of money on account thereof; and became entitled as such insurance broker to divers sums of money for his

commission upon effecting such insurances, and otherwise respecting the same, and the money received on account thereof, and for postage of letters, and upon sums of money paid, laid out, and expended, on account of the defendants in effecting the insurances, &c. and that the defendants were also indebted in divers sums of money upon promissory notes indorsed to the plaintiff in the usual course of business.

The bill further stated, that the plaintiff received some money from the underwriters in respect of losses upon some ships; but that it hath constantly been the universal custom of persons, who carry on the business of insurance brokers at Lloyd's Coffee-House, at Liverpool, and for all other persons, who carry on the trade of insurance brokers, in the business, which they transact for merchants at Liverpool, or in any other part of the county of Lancaster, to be allowed one month from the day, upon which the loss upon ships or goods, which are insured, is ascertained, and the documents respecting such loss found to be satisfactory, to obtain the signatures of the underwriters to the adjustment of the policy, and to apply to such underwriters for payment of their proportions; and at the end of that month, and not before, to accept bills, drawn upon them by the persons, for whom they effected such insurances, for the amount of such loss, until the end of four months from the day, upon which the loss was ascertained, and the documents found satisfactory; and such custom has been always adopted, and acted upon, by the plaintiff in all his dealings with the defendants; and they have constantly allowed the plaintiff the said space of four months for the payment of the amount of the losses until the commencement of the action.

The bill then stated losses upon ships under insurances effected by the plaintiff for the defendants: one settled upon the 7th, another upon the 11th of October, 1800; which according to the said custom would be payable three months from the 7th and 11th of November; that no account of the said dealing was stated between the plaintiff and defendants; but an action was brought by the defendants in December; in which they held the plaintiff to bail for £1192. 5s. 11d. though the money due in respect of the said losses was not due until February; and the defendants had not drawn upon the plaintiff; and the defendants at the time of the action brought were, and now are, indebted to the plaintiff in a much larger sum on the accounts before mentioned, and also by virtue of three promissory notes; one dated the 19th of October, 1799, at 12 months after date, for £600, another of the same date and for the same time for £650, another, dated the 18th of November, 1799, at 15 months after date, for £1440. 16s. all indorsed to the plaintiff; and on account a large balance would be found due to the plaintiff. The bill then stated applications for the sums paid for premiums, commission, &c. that the defendants threaten to proceed to trial; well knowing, that the plaintiff cannot obtain adequate justice in the said action without an account, and cannot recover therein the balance due to him from them, as aforesaid; and prayed an account

of the sums of money paid by the plaintiff for and on account of the defendants in respect of the insurances effected, also the money due to him for commission, and otherwise, respecting the same, and the money received on account thereof, postage of letters, and the other sums of money, paid, laid out and expended, by him on their account about the same, and also an account of the money due to him in respect of the promissory notes, of the several sums of money he received from the underwriters or others on account of the losses; and all other sums due to them from him; and a decree for payment; offering to pay what shall be due from him; and an injunction to restrain proceedings at law.

The defendants put in a general demurrer to the discovery and relief.

LORD CHANCELLOR. I should feel infinite reluctance in supporting such a bill. It contains rather a statement of facts, the effect of which it is a little difficult to collect. With regard to all these allegations, some of which import, that he has received, some, that he has paid, money, he does not go on to allege, that upon the effect of the whole, taken together, they are indebted to him. The only allegation of debt, that I can find, is with regard to the money due upon the promissory notes. With respect to the allegation of a universal custom, if the fact is true, there can be no manner of difficulty in the proof: so that, if an action was brought before the end of the four months, it would be a complete defence to say, according to this general, notorious, custom, very capable of proof, that it was brought too soon. With respect to this particular fact, it does not proceed upon any alleged special agreement, the proof, and therefore the discovery, of which might be necessary to sustain the defence to an action. The bill applies itself, not to a special agreement, but to a fact, capable of proof; out of which it might be for a jury to infer, that there was a special agreement conformable to the custom. The allegation is, that, taking the whole together, this custom does exist at Lloyd's Coffee-House, at Liverpool, and in every part of Lancashire; and that conformably to that custom the plaintiff was constantly allowed four months credit; which is a fact to be evidenced by some transaction; and the gravamen of the bill is, that the action was brought too soon; the four months not being expired. He alleges further, that these promissory notes form a counter-demand; and upon the whole alleges, that a considerable sum of money is due to him; and in the sense, in which such words are used, the bill must be taken to be true.

It is clear, this case might be disposed of altogether at law. It is another question, whether the jurisdiction of this Court might not attach upon it: but it is beyond all doubt, it might be disposed of at law; for every fact alleged is a fact, with regard to which it is impossible, that the plaintiff must not be in possession of proof. He must know, what he paid for premiums of insurance; for postage; what was due to him for commission; which is settled by the law and usage of mer-

chants; unless there is a special agreement; which is not alleged. All these particulars are known to himself. If an action was brought therefore, he would have had only to prove what is here stated; which would be easy. He has a set-off; the ordinary case of set-off, of a sum of money, which he says is not only equal to their demand, but gives him a right to sustain himself as a plaintiff for the balance due to him. It is not to be said, that in every case, where the defendant owes more to the plaintiff, that is a ground for a bill. There must be mutual demands, forming the ground. The case of dower is always considered a case standing upon its own specialties. So is the case of the steward. The nature of his dealing is, that money is paid in confidence, without vouchers; embracing a great variety of accounts with the tenants; and nine times in ten it is impossible that justice can be done to the steward. If I sustain this bill, there never would be an action in the city against a broker without a bill in equity. I hesitate excessively in permitting such a bill; and the strong inclination of my opinion is, that the demurrer ought to be allowed. I feel great sanction for the doubt I entertained, from the opinion of Lord Chief Justice Eyre in the case cited: a Judge, whose habit was not to express doubts, where he had a clear opinion. That case is very different, as being the case of an executor upon payments made to his testator, not of the party himself coming for relief. The executor can only go upon conjecture as to the amount of the money paid; and therefore would go to law completely at his peril. There is hardly a case of set-off, in which a bill might not be sustained, if this may.

The cause having stood over for the purpose of searching for precedents, Mr. Agar said, there were numerous cases of accounts sought by a principal against a factor, and one upon the bill of a factor against the principal, Chapman v. Derby, 2 Vern. 117, which was disposed of upon another point: but he could not find any case of an insurance broker.

LORD CHANCELLOR said, it was impossible to sustain the bill, without laying down, that wherever a person is entitled to a set-off, he may come into this Court.

The demurrer was afterwards allowed.

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## CORPORATION OF CARLISLE v. WILSON.

(In Chancery before Lord Erskine, 1807. 13 Ves. 276, 33 E. R. 297.)

The bill stating the right of the Corporation of Carlisle to toll-thorough for all merchandise carried through that city, originally levied upon goods, carried on the backs of men and horses, afterwards in waggons and carts; that great quantities of merchandise are conveyed through the kingdom in stage-coaches; that the defendant has refused

to pay the toll accrued due to the plaintiffs for goods conveyed by the stage-coaches, of which they are proprietors; that in consequence of an agreement to try the right, an action was brought in the year 1802; which was tried in August, 1804, and a verdict was found for the plaintiffs with nominal damages. The bill prayed an account of the tolls, confining it to six years.

To this bill a general demurrer was put in.

THE LORD CHANCELLOR. The question is, whether upon the facts stated by this bill, this Court ought to decree an account. The objection is, that the right to take these tolls is undoubtedly a merely legal right; that the plaintiffs therefore may have a discovery, and having obtained that, cannot also have relief; but should use the discovery in an action, which undoubtedly might be brought. The principle upon which Courts of Equity originally entertained suits for an account, where the party had a legal title, is, that though he might support a suit at law, a Court of Law either cannot give a remedy, or cannot give so complete a remedy, as a Court of Equity; and by degrees Courts of Equity assumed a concurrent jurisdiction in cases of account; for it cannot be maintained, that this Court interferes only when no remedy can be had at law. The contrary is notorious. The same species of relief is given at law in the action of account as under a bill in this Court, but the great advantage of the latter, and the difficulty and delay when the account comes before auditors, has brought that action into disuse, as is observed by Lord Hardwicke in Ex parte Bax, 2 Ves. 388.

The proposition asserted against this bill, is, that this Court ought to refuse to interfere by directing an account; if an action for money had and received, or indebitatus assumpsit can be maintained. That proposition cannot be supported. In Lewes v. Sutton, 5 Ves. 683, the Chancellor's doubt was, not whether an account could be decreed; but whether the plaintiff could recover at law. The proposition is, not that an account may be decreed in every case, where an action for money had and received, or indebitatus assumpsit may be brought, and certainly indebitatus assumpsit lies for tolls; but, that where the subject cannot be so well investigated in those actions, this Court exercises a sound discretion in decreeing an account. It is true, in Milbourn v. Fisher, 5 Ves. 685, note, there was no demurrer; but, if the proposition that an account cannot be decreed upon such a subject, is so clear, I cannot think the Court would have done what was done in that instance, and in the case before the House of Lords (The City of London v. Perkins, 4 Bro. P. C. 157); where no question was made as to the jurisdiction of a Court of Equity, which upon those cases must be considered established; a concurrent jurisdiction with a Court of Law upon the subject of account; that therefore, though an action might be maintained, yet, if it appears, it would not be tried without great difficulty, and the verdict could not, from the nature of the case,

be equally satisfactory with the proceedings under a decree, an account shall be decreed.

The objection, that these plaintiffs omitted to exert their right to take a distress, is answered by the circumstances. These tolls were originally levied upon goods, carried by men and horses; afterwards upon the owners of waggons and carts; and since, in consequence of the improvement of the roads, the claim is made upon the proprietors of stage-coaches; but, the right being disputed, it was fairly considered, that to enforce the payment by distress, would have been too strong a measure. That led to the agreement to try the right, and, in the mean time, to forbear to exercise it. That suit being merely to try the right, nominal damages were taken. How can a case of this kind be tried at the assises; an account, to be surcharged, upon which every inhabitant of Carlisle might be examined?

Overrule the demurrer.

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## O'CONNOR v. SPAIGHT.

(In Chancery in Ireland before Lord Redesdale, 1804. 1 Sch. & L. 305.)

The Defendant by indenture bearing date 31st March, 1780, demised certain premises to the Plaintiff for three lives, at a rent of 20s. per acre for every acre the demised premises should or might contain, under which demise the Plaintiff entered into possession; the number of acres was not ascertained, nor did Plaintiff appear to have made any regular payments of rent eo nomine, nor had Defendant given him any receipts in full or for precise gales; but from 1780 down to 1796, the Plaintiff had been in the constant habit of accepting Defendant's bills, of paying money on his order, of selling him goods on credit, and supplying him and his family with money, the particulars of which several sums were set out in a schedule annexed to the Bill, and for which the Plaintiff insisted that if credit were given, a balance would appear due to him. The Defendant brought his Ejectment for non-payment of rent, as of Michaelmas Term, 1796; in April, 1797, Plaintiff filed his Bill, setting forth the particulars of the various dealings between the parties, and praying an account on the foot thereof, and that Defendant should pay Plaintiff the balance due to him after deducting such sum as might appear due to the Defendant on account of rent; and praying an Injunction against the Ejectment. On 29th May, 1797, consent for judgment was given, and on 1st July, the Landlord, by his affidavit according to the statute, claimed a sum of £216:8:0, due to him for rent above all just allowances.

The Defendant's answer submitted to the account, but refused credit for most of the items set forth by the Bill, denying the facts as to some, and alleging that as to others there were double charges; and insisted, that so far from there being a balance due to Plaintiff, a sum

of £216 (which was considerably more than a year's rent) was due by him at the time of the Ejectment brought, after making all just allowances. An Injunction had been obtained for want of an answer, and upon the coming in of the answer, an order was made to continue the Injunction till the hearing, on Plaintiff's bringing in the sum sworn due within 40 days from the day of filing the answer (see 11 Anne, c. 2, § 4); this order not having been complied with, the Injunction was dissolved, and the Defendant executed his habere: the Plaintiff proceeded to examine witnesses, and proved several items in his account which had been denied by the answer. * * *

Upon the opening of the case the Lord Chancellor put the Plaintiff on shewing that there was a complicated account depending between him and the Defendant; and to falsify Defendant's answer as to some material items in the account as sworn to by him. This having been done, his Lordship directed the account, observing as follows:

LORD CHANCELLOR.[1] * * * The ground on which I think that this is a proper case for Equity, is, that the account has become so complicated that a Court of Law would be incompetent to examine it upon a trial at Nisi Prius, with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which Courts of Equity constantly act by taking cognizance of matters, which, though cognizable at Law, are yet so involved with a complex account that it cannot properly be taken at Law, and until the result of the account, the justice of the case cannot appear. Matter of account may indeed be made the subject of an action, but an account of this sort is not a proper subject for this mode of proceeding: the old mode of proceeding upon the writ of accounts shews it: the only judgment was that the party "should account," and then the account was taken by the auditor: the Court never went into it.

The Decree directed:

"That it be referred to the Master to take an account of the rent of the premises, and for that purpose that a survey should be made of said premises according to the terms of the lease, by such proper Surveyor as the Master should appoint, and that it be referred to said Master to approve a proper person for that purpose: And that the Master should take an account on the foot of all dealings and transactions between the Plaintiff and the Defendant, including the rents of said premises as they should be ascertained by said Surveyor; and that in taking such account, the Master should report particularly the balance due at the time of bringing the said Ejectment; and also the balance appearing due at the time of making his report: And reserved all further consideration of costs, and ordered that the Plaintiff should speed his cause and proceed on the account, &c."

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[1] The statement of facts is abridged and part of the opinion is omitted.

## HEMINGS v. PUGH.

**(In Chancery before Sir John Stuart, 1863. 4 Giff. 456, 66 E. R. 785.)**

This was a demurrer.

The bill prayed for an account of all moneys received by the Defendant on behalf of the Plaintiff.

That the Defendant might make a full discovery of all sums received by the Defendant for or on account of the Plaintiff, and might produce and leave with the Clerk of Records and Writs all books, papers, accounts and other documents containing any entries of any sums charged by the Defendant to any persons as paid to the Plaintiff, and wholly or partially paid to the Defendant by any such persons, or otherwise received by the Defendant for or on account of the Plaintiff; and that the Defendant might pay to the Plaintiff what on taking such account might be found due to the Plaintiff from the Defendant in respect of the receipts by the Defendant for or on account of the Plaintiff: the Plaintiff being ready and willing to make all just allowances.

The bill, as amended, alleged that the Defendant had received on the Plaintiff's account numerous sums of money of which the amounts and particulars were unknown to the Plaintiff. The bill charged that it was the duty of the Defendant to have accounted for and paid such sums received by him as aforesaid to the Plaintiff; that the Defendant had neglected to pay such sums to the Plaintiff or to render any account for the same, though the Plaintiff had made numerous applications for an account and payment. The bill charged that the Defendant, being pressed to examine his books and documents on the 9th November, 1862, did pay to the Plaintiff the sum of £9. 3s. on account of the sums which Defendant stated he had discovered that he had received on account of the Plaintiff. The bill charged that the Defendant on that occasion told the Plaintiff that he would make further search among his books and documents, but the Defendant had neglected to do so; but sometimes alleged he had not time, and at other times that he had put the books and papers away, and he would not have put them away if they had been required for any purpose, and that therefore nothing would be found due to the Plaintiff.

The bill also alleged that the Defendant, on the 8th May, 1863, on being informed that the Plaintiff had filed this bill, paid to the Plaintiff a further sum of £20. 15s. 6d., which the Defendant on that occasion stated to the Plaintiff he had on a further search (which the bill alleged to be a partial search) ascertained to be due. The bill alleged that the Defendant had neglected to make further searches, or he would have ascertained that he had received other sums on account of the Plaintiff.

The bill charged that, if the Defendant would produce such books, papers, accounts and other documents, and discover the truth, it

would appear that a considerable amount had been received by the Defendant on the Plaintiff's account, which he had failed to pay to the Plaintiff, as he ought to have done. The bill alleged that such sum was unknown to the Plaintiff and could only be discovered by the evidence of the Defendant, by the production of the accounts and papers.

THE VICE-CHANCELLOR. This demurrer must be allowed. The bill contains a mere averment of the receipt of money by an agent, but that has never been held enough to sustain a bill. There is also a simple bald statement that without the evidence of the Defendant and the production of the books the Plaintiff is unable to obtain an account. Why the Plaintiff cannot obtain that evidence in an action is not stated.

In the case of Smith v. Leveaux Vice-Chancellor Wood, in noticing the cases of Dinwiddie v. Baily, 6 Ves. 136, and Phillips v. Phillips, 9 Hare, 471, appears to have treated them as authorities to shew that this Court will not interfere when the receipts and payments are all on one side. But I doubt whether that be the law of this Court. There are many cases between principal and agent, where the receipts and payments are wholly on one side, in which, however, this Court has exercised its jurisdiction. In the case of a steward or land agent the receipts and payments are almost necessarily on one side; that is, no mutual payments and receipts. Yet that is a case in which this Court from the most ancient times (and more recently during the times of Lord Rosslyn, Lord Thurlow and Lord Eldon) has exercised this jurisdiction. That jurisdiction still remains, and wherever an agency partakes of a fiduciary character this Court has jurisdiction, and will direct an account, although the receipts and payments are all on one side, and there are no mutual payments between the parties.

That rule has not been shaken by the decision in Phillips v. Phillips, though there are passages in the judgment in that case which may seem at first to be inconsistent with the principle to which I have adverted.

Here there is no allegation of any mutual dealings, or of anything fiduciary in the relation of the parties, who on the bill are stated as mere principal and agent. The demurrer must be allowed with costs.

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## KING v. ROSSETT et al.

(Court of Exchequer in Equity, 1827. 2 Younge & J. 32.)

The bill in this case, which was filed by the plaintiff, as principal, against the defendants, his agents, in the character of stock-brokers, stated that the plaintiff had employed the defendants in the sale, and afterwards in the repurchase of the sum of £40,000 three per cent. Consolidated Annuities, leaving the entire matter in their hands, and

to their discretion. That in consequence of such employment, they had sold and afterwards re-purchased the said sum of £40,000 in several parcels, to and from various persons, and had employed the proceeds of the sale in the re-purchase of stock. That the defendants afterwards had sent to the plaintiff an account in writing of such sales and purchases, in which the prices at which the same were respectively effected, were stated, and by which the plaintiff was made a debtor to the defendants in the sum of £625; upon the faith of which, and believing the same to be just and true in every particular, the plaintiff wrote to the defendants, enclosing a check for £50, and promising to pay the balance of £575, which he owed by instalments of £60, before the 6th of each successive month, until the whole sum was liquidated. The plaintiff subsequently discovered the account to be very erroneous and inaccurate, the sales having been effected at a much higher, and the purchases at a much lower rate than were represented by the account, the result of which was, that the plaintiff was a creditor of the defendants to the amount of £1000; notwithstanding which the defendants commenced an action at law against the plaintiff for the recovery of the balance of £575. It charged, amongst other things, that the defendants had not delivered to the plaintiff the bank receipts upon the several purchases, which were still in their possession; and prayed a discovery; an account of the true and real prices at which the stock was sold and purchased, the plaintiff offering to pay what should be found to be legally due to the defendants; an injunction to restrain the proceedings at law, and such further and other relief as the circumstances of the case might require.

The defendants put in a general demurrer for want of equity.

ALEXANDER, L. C. B. I can entertain no doubt whatever as to the course which ought to be pursued in this case, and am clearly of opinion that the demurrer should be allowed. The bill is filed by a principal against his agents, and it is said that that fact alone is sufficient to sustain the bill. Undoubtedly, a principal is entitled to an account from his agent, and may apply to a Court of Equity for that purpose; but, as I conceive, before that Court will interfere, a ground for its interposition must be laid, by showing an account which cannot fairly be investigated by a Court of Law. Unless Courts of Equity were to put that limit to their interference, no case of this description would ever be tried in a Court of Law, and wherever a person was entitled to a set-off, a bill might be sustained. But it is objected that the demurrer is too extensive, and covers too much. If a plaintiff asks for relief, and for discovery as ancillary only to that relief, where the Court is of opinion that the ground for the relief fails, he is not entitled to the discovery, and must file another bill for that purpose. Although, under a prayer for general relief, if the specific relief prayed cannot be given, the Court will assist the party, yet the facts, to warrant that assistance, should be clearly and fully stated, so that the defendant may know what is sought by the bill. That is not the case here, for

the statement respecting the stock receipts is evidently a mere pretence. I feel no doubt that the demurrer in this particular also should be allowed.

Demurrer allowed with costs, according to the practice of the Court.

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## FOWLE v. LAWRASON.

(Supreme Court of the United States, 1831. 30 U. S. [5 Pet.] 495, 8 L. Ed. 204.)

MARSHALL, C. J.,[2] delivered the opinion of the court.

James Lawrason, in his lifetime, filed his bill in the circuit court of the United States, sitting in chancery for the county of Alexandria, stating that being seised of a warehouse and one moiety of a wharf in the town of Alexandria, of which his son, Thomas Lawrason was seised of the other moiety, he agreed to rent the premises to Lawrason and Fowle, a commercial house in the said town, of which the defendant, William Fowle, is the surviving partner; the said Lawrason and Fowle entered into the premises under the contract, and retained possession thereof several years. The plaintiff says, he understood and supposed that he was to receive $1,600 each year for the property, and that it was reasonably worth that sum, but that no express stipulation was entered into fixing the amount of rent. The plaintiff also had other dealings with Lawrason and Fowle, and the account remained unsettled until the death of Lawrason, who was the son of the plaintiff.

The bill states that the parties agreed to leave the whole subject to arbitration, and that the arbitrators reported a large sum in his favor. A suit was instituted on this award, and the court being of opinion that it was void in law, for informality, gave judgment for the defendant. This suit is brought to establish the settlement of the accounts between the parties which was made by the arbitrators, or, if that cannot be done, for a settlement of them under the authority of a court of chancery.

The suit abated by the death of the plaintiff, and was revived in the name of his executor. It appearing that the representatives of Thomas Lawrason, the son, who owned a moiety of the wharf occupied by Lawrason and Fowle, were interested in the controversy, they were made parties. The answers were then filed. The defendant, Fowle, admits the occupation of the premises without any specific agreement as to the amount of rent, and admits the reference to arbitrators after the death of his partner.

He understood that the whole rent, payable for both warehouse and wharf, was claimed by James Lawrason, until after the award

[2] The statement of facts is omitted.

was made; and the arbitrators, he is satisfied, made the award under this impression. On understanding that Thomas Lawrason's executors asserted a right to so much of the rent as was equivalent to his interest in the wharf, the defendant requested that it might be apportioned between them, and then discovered that James Lawrason claimed the whole rent awarded as being for his interest, leaving the defendant liable to the executors of Thomas Lawrason. Every effort to adjust this difference having proved unavailing, the defendant refused to perform the award, and the suit instituted thereon by James Lawrason was decided against the plaintiff.

The answer of Thomas Lawrason's administrators asserts the right of their intestate to so much of the rent as will be a just compensation for his interest in the wharf.

The accounts were referred to a commissioner, who reported the sum of $2,638.83, with interest from the 26th day of August, 1819, to be due to the executors of James Lawrason, should he be entitled to the whole rent accruing on the demised premises; should the rent on the moiety of the wharf owned by Thomas Lawrason be deducted, the plaintiffs were entitled to nothing.

The court decreed the sum reported by the commissioner, without prejudice to any claim which the representatives of Thomas Lawrason, deceased, may make upon the estate of James Lawrason, deceased, for any portion of the rents decreed to be paid by the defendant, Fowle.

From this decree the defendants appealed to this court. Two errors have been assigned.

1. The party complaining had a plain and adequate remedy at law.

2. The decree ought to have settled finally the rights of Thomas Lawrason's executor.

That a court of chancery has jurisdiction in matters of account cannot be questioned, nor can it be doubted that this jurisdiction is often beneficially exercised; but it cannot be admitted that a court of equity may take cognizance of every action for goods, wares, and merchandise sold and delivered, or of money advanced, where partial payments have been made; or of every contract, express or implied, consisting of various items, on which different sums of money have become due, and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction. Brookes v. Lord

Whitworth, 1 Mad. Chan. 86; Hodson v. ———, 6 Ves. 136; Powers v. Burdett, 9 Ves. 437. In the case at bar these difficulties do not occur. The plaintiff sues on a contract by which real property is leased to the defendant, and admits himself to be in full possession of all the testimony he requires to support his action. The defendant opposes to this claim as an offset, a sum of money due to him for goods sold and delivered, and for money advanced, no item of which is alleged to be contested. We cannot think such a case proper for a court of chancery. We are, therefore, of opinion that the decree of the circuit court ought to be reversed, and the cause remanded with directions to dismiss the bill, the court having no jurisdiction.[3]

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## ALMY et al. v. DANIELS.

**(Supreme Court of Rhode Island, 1887. 15 R. I. 312, 10 Atl. 654.)**

PER CURIAM.[4] When this case was before the court upon petition for new trial, the court held that the plaintiff's intestate had the right to use the entire strip in common with the defendant, and that the defendant's exclusive possession and ouster of his co-tenant of any portion was, ipso facto, a use of a greater portion than his interest therein, which entitled the plaintiff to an account. That decision did not depend upon the use which it was claimed had been made of the balance of the land in connection with the plaintiff's estate, because the defendant's occupancy of the half covered by his building was such an ouster of the plaintiff as to interfere with his rights as a tenant in common, and thus to entitle him to an account.

The question now comes upon the right to charge the plaintiff with the use which he had made of the other half of the land. The land in question is 40 feet on Custom-House street and 36 feet deep. A strip 20 feet wide on Custom-House street is covered by the defendant's building, and the remaining 20 feet is and has been used as a gangway. On the plaintiff's side is a sidewalk four feet wide, and on the defendant's side one which is two and a half feet wide. Each of these has been used from time to time by the tenants of the adjoining buildings for storing oil barrels. We are now asked to instruct the auditor whether he is to consider such use in making up the account. We think

[3] See New Federal Equity Rule (1913) 33 Sup. Ct. xxxvii:

*Rule 63. Form of Accounts before Master*

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party viva voce, or upon interrogatories, as the master shall direct.

[4] Part of the opinion is omitted.

the following rules, derived from decided cases, will sufficiently answer the question:

1. When a tenant in common has the entire and exclusive occupation of the whole or any part of the common estate, he is liable to account therefor.

2. When he has the income or profit of more than his share, he is liable to account for the excess.

3. When he uses the estate only to an extent less than his share, and not to the extent of an ouster or denial of right of his co-tenant, he is not liable to account; and therefore such use cannot be offset against the excessive use by his co-tenant. A charge for such use would be a charge for the use of one's own property, and for the exercise of his legal right. See Almy v. Daniels, Index Y, 15, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654; Knowles' Adm'r v. Harris, 5 R. I. 402, 73 Am. Dec. 77; Hayden v. Merrill, 44 Vt. 336, 8 Am. Rep. 372; Edsall v. Merrill, 37 N. J. Eq. 114; Colburn v. Mason, 25 Me. 434, 43 Am. Dec. 292. The question of exclusive occupation calls for a finding of fact, in regard to which it is not the province of the court to instruct the auditor. * * *

We therefore think the plaintiff is entitled to an account, under the rules we have laid down, for the period of six years prior to the date of his action, but not beyond that. We see no other conclusion that is consistent with the record, as it stands, upon this somewhat extraordinary state of pleadings and finding.

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## GARR v. REDMAN.

**(Supreme Court of California, 1856. 6 Cal. 574.)**

Appeal from the District Court of the Third Judicial District, County of Santa Clara.

The plaintiff filed his bill for a settlement and account against J. W. Redman and G. E. Brittain, setting forth in his complaint a contract of partnership, made between the parties in the State of Missouri, to the performance of the conditions of which the parties bind themselves in the penal sum of $50,000, and which recites that the plaintiff had made a certain advance of money for the outfit of defendants to enable them to come to California, in consideration of which the plaintiff was to have one-third of the profits arising from all the labors, speculations, and undertakings of the defendants for two years, the defendants agreeing to devote their labor and attention for that time to the co-partnership adventure, and the defendant Redman agreeing to refund one-third of the outfit.

The bill sets forth that the defendants have acquired property, both real and personal, during said partnership, and also since its expiration, by using the proceeds of the property acquired during its existence;

and prays for an account, and for judgment for the amount found due.

Redman demurred to the complaint as not setting forth any cause of action, there not appearing therein that any co-partnership existed between the parties, and also for a misjoinder of cause of action.

The Court below sustained the demurrer, and entered judgment dismissing plaintiff's bill. Plaintiff appealed.

The opinion of the Court was delivered by Mr. Justice HEYDENFELDT. Mr. Chief Justice MURRAY and Mr. Justice TERRY concurred.

The Court erred in sustaining the demurrer to the bill of complaint.

It was properly filed for an account, whether the parties were technically partners or not. The character of the contract set out in the bill made an account necessary to determine their respective rights.

Nor is there any misjoinder of causes of action. The claim which, it is urged, is single against one of the defendants, forms part of the same subject matter, arising as it does out of the joint contract.

The judgment is reversed, and the cause remanded.

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## ESCAMBIA COUNTY v. BLOUNT CONST. CO.

(Supreme Court of Florida, 1913. 66 Fla. 129, 62 South. 650.)

Appeal from Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Bill in equity by the Blount Construction Company against the County of Escambia. From orders overruling demurrers to the bill, defendant appeals.

WHITFIELD, J.[5] This appeal is from orders overruling demurrers to a bill in equity brought by the Blount Construction Company against the county. The bill in substance alleges that pursuant to a contract duly made with the county commissioners of the county, the construction company erected and constructed a jail building for the county, for which an agreed consideration was to be paid; that in the course of such erection and construction of the building a stated large number of changes and alterations agreed on were made in the contract plans and specifications, for which proper amounts were to be paid in addition to the original contract amount; that the building has been completed and accepted by the county, but a large number of the items for alterations and changes agreed on are now disputed by the county, and counterclaims are asserted by the county and a settlement in full has not been made; that many separate and distinct claims for compensation for changes in the contract plans and counterclaims by the county that are given in detail are contested by the county. The prayer is for an accounting and settlement. A general demurrer and also a special demurrer to the bill of complaint were overruled. Under the general

[5] Part of the opinion is omitted.

demurrer the contention is that the bill does not show a right to an accounting in equity.

While courts of law have jurisdiction to enforce contract demands that involve an accounting, yet courts of equity also take cognizance of cases in which contract demands between litigants involve extensive mutual or complicated accounts, where it is not clear from the facts alleged in the particular case, that the remedy at law is as full, adequate, and expeditious as it is in equity.

As it cannot be said with confidence that the allegations of the bill of complaint in this case, considered with the exhibits made a part thereof, show demands and contentions that may be as expeditiously and accurately adjudicated in a court of law as in a court of equity, it should not be held contrary to the ruling of the chancellor that a court of law should have exclusive jurisdiction of the cause. The general demurrer was therefore properly overruled. * * *

The orders overruling the demurrers to the bill of complaint are affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

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## LEE v. WASHBURN et al.

**(Supreme Court of New York, Appellate Division, Second Department, 1903. 80 App. Div. 410, 80 N. Y. Supp. 1040.)**

Appeal from Trial Term, Kings County.

Action by Thomas F. Fitzhugh Lee against Cyrus V. Washburn and another. From an interlocutory judgment in favor of plaintiff, defendants appeal.

Argued before BARTLETT, JENKS, WOODWARD, HIRSCHBERG, and HOOKER, JJ.

WOODWARD, J. The complaint in this action alleges that the plaintiff entered into the employment of the defendants under the terms of a written agreement on or about the 1st day of January, 1900, and that between that date and the 1st day of June, 1901, he procured much valuable business and litigation, and rendered much valuable service and labor for the defendants herein, from which has accrued a large amount of net profits, now in the hands of the defendants, and there is now due and owing this plaintiff from the defendants a large amount of money under the agreement to divide the net profits, entered into on the 29th day of December, 1899. The contract or agreement provides that the plaintiff is to enter the employ of the defendants at a salary of $18 per week, and is to use his best endeavors to bring business and litigation into the office of the defendants, and, in addition to the compensation mentioned, he "is to receive as a further compensation one-third of the net profits of all the litigation that he may bring

into the office." The complaint alleges demand for an accounting, and demands judgment that the defendants render to him an account in full of all the business brought into the office of said defendants by said plaintiff, in pursuance of said agreement, with a statement showing the net profits accrued thereon; and that he have judgment for one-third thereof, with interest from the various dates; and for such other and further relief as may be just, besides the costs of the action. The action was noticed for trial by the plaintiff at the equity term, and upon the case being called for trial, before any witnesses were sworn, the defendants moved that the case be sent to the jury calendar, claiming that a suit in equity did not lie, and that the action is one at law. Decision upon this motion was reserved, and the trial proceeded, resulting in an interlocutory judgment directing an accounting on the part of the defendants, from which the latter appeal.

There is no allegation in the complaint, nor do the facts pleaded show that the plaintiff has not a full and adequate remedy at law under his contract of employment. He is not a partner in the business. He has assumed none of the reciprocal responsibilities which make him a quasi partner, where he would, under the authorities, be entitled to an accounting (Parker v. Pullman & Co., 36 App. Div. 208, 215, 56 N. Y. Supp. 734, and authorities there cited); and, aside from the fact that the plaintiff does not appear to know the amount of the net profits, we discover no reason why a court of equity should have taken jurisdiction of this action. The plaintiff does not allege that the accounts are complicated, or of great length. There is no provision in the contract, as in the case of Parker v. Pullman & Co., supra, for an accounting and an ascertainment of the profits, and it requires a long stretch of the imagination to bring the plaintiff and defendants into a fiduciary relation under the provisions of a contract of employment such as is set forth in the pleadings. In speaking of an equitable jurisdiction to grant an accounting, the Court of Appeals, in Marvin v. Brooks, 94 N. Y. 71, 80, say that:

"The best-considered review of the authorities puts the equitable jurisdiction upon three grounds, viz., the complicated character of the accounts, the need of a discovery, and the existence of a fiduciary or trust relation. The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity."

Uhlman v. New York Life Ins. Co., 109 N. Y. 421, 433, 17 N. E. 363, 4 Am. St. Rep. 482. The same case says:

"Judges in the English equity courts have been somewhat slow to maintain jurisdiction in a case where the ground thereof was solely that the account was complicated, and, although there are very many cases in which the statement has been made that equity would sometimes take jurisdiction on that account, yet in most of them it is seen that there were added to that other grounds making it proper for equity to assume cognizance of the cases." Page 433, 109 N. Y., and page 367, 17 N. E. (4 Am. St. Rep. 482).

This, it will be observed, was the situation in the case of Parker v. Pullman & Co., supra, relied upon by the plaintiff. See middle of page 217, 36 App. Div., and pages 739, 740, 56 N. Y. Supp.

To affirm the interlocutory judgment now before us is to extend the jurisdiction of equity beyond the extreme limit marked by the adjudicated cases, and to give the plaintiff a remedy different from that accorded to other litigants in actions of which courts of law have jurisdiction; and the mere fact that the plaintiff does not know the amount of his claim is of no importance, as he may name an arbitrary amount, and recover within the limit thus fixed. Brummer v. Cohen, 47 App. Div. 470, 62 N. Y. Supp. 241. The plaintiff sets forth in his complaint a cause of action at law, and the motion of the defendants to send the case to the jury calendar for trial should have been granted. See Everett v. De Fontaine, 78 App. Div. 219, 79 N. Y. Supp. 692, for a discussion of the general subject.

The interlocutory judgment should be reversed, and the case sent to the jury calendar for trial.

Interlocutory judgment reversed, and case sent to the jury calendar for trial; costs to abide the event. All concur.[6]

[6] In Freeman v. Miller (1913) 157 App. Div. 715, 142 N. Y. Supp. 800, the court said: "The trial court found that the parties were not copartners, but that the defendant employed the plaintiff and agreed to pay him 'as compensation' for his services 'one-quarter of the net profits' of the business for the first period and 'one-third of the net profits' during the remainder of the time. The learned trial justice evidently was of the opinion that this gave the plaintiff an interest in the profits of the business as such, and entitled him to maintain this action for an accounting with respect to the profits, and such an accounting was decreed by the interlocutory judgment. We are of opinion that the evidence upon which this finding is based does not show an agreement between the parties by which the defendant was to have an interest in the business or in the profits as such, but merely that his compensation was to be measured by profits and the findings should be so construed. Unlike the case of Weldon v. Brown, 84 App. Div. 482, 82 N. Y. Supp. 1051, which the majority of this court regarded as a suit in equity, the parties here were not jointly interested in the venture, for there was necessarily risk of loss in the business in question and the plaintiff incurred no liability with respect thereto, and, moreover, in the case at bar, it was evidently understood from the outset that the plaintiff was to have a drawing account, so that compensation for his services did not depend entirely upon whether or not profits were realized, and the percentage of the profits which the defendant agreed to give to the plaintiff merely represented the maximum compensation which the plaintiff should receive. The case fairly falls within the well-established rule that an action for compensation measured by the profits of a business is an action at law and not a suit in equity in which the plaintiff is entitled to an accounting, and, although it becomes necessary to take an account to determine the amount which the plaintiff is entitled to recover, that is incidental and is not an equitable accounting."

## UHLMAN v. NEW YORK LIFE INS. CO.

(Court of Appeals of New York, 1888. 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482.)

Appeal from general term, court of common pleas, city and county of New York.

Action by Frederick Uhlman against the New York Life Insurance Company for an account of the receipts, etc., under the tontine plan, of which plaintiff was a policy-holder. At the special term an interlocutory order was made directing an account. Upon appeal to the general term, this order was set aside, and a new trial awarded, from which judgment of the general term plaintiff has appealed.

PECKHAM, J.[1] The plaintiff commenced this action for the purpose of obtaining an accounting from the defendant in regard to matters stated in the complaint. It was therein alleged that on the 29th of December, 1871, the defendant issued to the plaintiff a certain policy of insurance, and that the plaintiff had duly complied with all the conditions of said policy; that it was a policy known as the "Ten-Year Dividend System Policy," and that the ten years expired in December, 1881; that all the premiums had been paid by the plaintiff during that time, and the policy was in force at the time of the commencement of this action. The plaintiff then alleged, upon information and belief, that the defendant, during this time, had wrongfully appropriated the surplus and profits, or a large portion thereof, belonging to the plaintiff under the policy, and had diverted the same to other purposes than the benefit of the plaintiff, and that it had not kept the fund and its accumulations separate, and that defendant refused, for dishonest and unlawful reasons, to furnish the plaintiff with an account, as demanded. Plaintiff also alleged that defendant became a trustee of the various moneys that were paid to it on account of the policies of the class to which the plaintiff's policy belonged, and that plaintiff, relying upon the terms of said policy and the supposed honesty of the defendant as a trustee of the funds above mentioned, took out the said policy, and paid the premiums required, and assumed the risks and conditions mentioned therein, and that he had in all things duly performed all the conditions of the policy. The plaintiff then prayed judgment that the defendant be compelled to render a true and just account to the plaintiff of the names of the parties insured by it under the system in which the plaintiff had been insured, the amount of each and every policy thus issued, a detailed account of premiums paid into and received by the defendant on account of said policies, the amount of surplus and profits which each of said policies had earned, together with a number of other details in regard to the accumulation

[1] Parts of the opinion are omitted.

and disposition of such fund. Judgment was also demanded that the defendant be compelled to make good and pay all such sums which it had unlawfully misappropriated or expended out of said fund, and that it be compelled to issue to the plaintiff an annuity bond of the amount to which he is entitled, or, at his option, to pay the value in cash to him; and that a receiver of the fund, and all the books and papers connected therewith, be appointed, pending this action, as well as after judgment, if it is deemed advisable and proper. A copy of the policy issued by the defendant to the plaintiff was attached to and formed a part of the complaint, by which it appeared that on the 29th of December, 1871, the defendant insured the life of the plaintiff in the amount of $5,000, for the term of his natural life, commencing at noon on that day; that the policy was issued to and accepted by the assured "(1) on the special agreement and conditions relative to policies on the ten-year dividend system." * * * The defendant answered this complaint, and denied all the allegations of misappropriation or wrong-doing, and alleged the proper and equitable apportionment of the fund, and an offer to give to the plaintiff what he was entitled to therein, either in cash or in shape of an annuity bond.

The issues thus joined came on for trial at a special term, and upon the trial plaintiff abandoned all allegations as to any misappropriation of the fund or any wrong-doing whatever in regard thereto, and based his cause of action upon his right to an accounting from the nature of the transaction, as appearing in the contract evidenced by the policy of insurance issued to him. The plaintiff claimed that, upon the mere proof of the issuing of a policy such as was issued to him, and that it had been kept alive during the 10-year period, and was in full force at the time the dividend was payable, gave him the right to demand from the defendant a full and complete accounting of the debit and credit items of what he terms the "Tontine Account," with a list of the members entitled to participate therein, and also all the details demanded in his prayer for judgment in the complaint. He maintained that it was unnecessary to prove any of the allegations of misappropriation or improper action, or even any mistake in relation to the principles upon which the apportionment had been made; but that, from the mere nature of the transaction itself, he had the right to maintain an action to compel the defendant to make a full accounting in regard to all the matters spoken of. The special term substantially held with the plaintiff, and granted an interlocutory judgment, providing for the taking of an account, and for the entry of a judgment thereon for the amount of cash which should be found to be due the plaintiff, or, at his option, an annuity bond for an equal amount. The defendant, under section 1001 of the Code, upon a case made, moved for a new trial at the general term, and, after argument of that motion, the general term granted the new trial, and vacated the judgment above mentioned.

From the order granting a new trial the plaintiff has appealed here, giving the usual stipulation in such cases. He claims now to maintain the action, and to have the right to an accounting, upon the ground (1) that the relation between the plaintiff and defendant is not one solely of contract, but that, as to the participation in the profits of this tontine system, that relation is similar to one of trustee and cestui que trust; (2) on the ground that the account itself, although there is but one side to it, is of a nature so difficult and complicated that it cannot be properly tried in an action at law, and hence this action is the appropriate remedy. The right to maintain this equitable action, based upon either or both these grounds, will therefore be discussed.

As to the first. We are convinced, after a careful examination of the character of the relations existing between these parties, that it cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts, as to him and in relation to any such fund, in a fiduciary capacity. It has been held that the holder of a policy of insurance, even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that the relation between the policy-holder and the company was one of contract, measured by the terms of the policy. See Cohen v. Insurance Co., 50 N. Y. 610, 10 Am. Rep. 522; People v. Insurance Co., 78 N. Y. 114, 34 Am. Rep. 522. * * *

The second ground upon which an accounting was claimed, was that the account was complicated. There are undoubtedly many expressions in the books stating that, where accounts are so difficult and complicated that it would be impracticable to examine them upon a trial at nisi prius, equity takes jurisdiction of an action, even on that ground alone. To this effect are 1 Story, Eq. Jur. § 445; Will. Eq. Jur. 91; 3 Pom. Eq. Jur. § 1421. In note 4 of the last above cited section, after stating the rule as above mentioned, (that the account should be so complicated that a court of law would be incompetent to examine it at nisi prius with the necessary accuracy,) it is said:

"But, under the present practice in England, matters of account may now be referred to officers or referees, so that the rule, as above stated, can now hardly be followed."

See Railway Co. v. Nixon, 1 H. L. Cas. 119–121.

In speaking of an equitable jurisdiction to grant an accounting, this court, in Marvin v. Brooks, 94 N. Y. 71, stated (per Finch, J.) that:

"The best-considered review of the authorities puts the equitable jurisdiction upon three grounds, viz.: The complicated character of the accounts, the need of a discovery, and the existence of a fiduciary or trust relation. The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes, by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity."

Judges in the English equity courts have been somewhat slow to maintain jurisdiction in a case where the ground thereof was solely

that the account was complicated; and, although there are very many cases in which the statement has been made that equity would sometimes take jurisdiction on that account, yet in most of them it is seen that there were added to that other grounds making it proper for equity to assume cognizance of the cases. However it may be, it has at least been stated that whether or not the court would take jurisdiction upon the sole ground of the account being complicated was a matter largely within the discretion of the court. See Railway Co. v. Martin, 2 Phil. Ch. 758; also Phillips v. Phillips, 9 Hare, 471, and Bliss v. Smith, 34 Beav. 508. We are not inclined to enlarge the principle, or to hold that in all cases the mere fact of a complicated account being at issue will oblige the court to take jurisdiction. Considering the fact as stated by Finch, J., in the case above alluded to, that the plaintiff has now all the facilities for examining a complicated account in an action at law that he would have in equity, if there are other reasons—important and material ones—existing against the assumption of jurisdiction by a court of equity of an action of this nature, those reasons should have their full weight; and if, after giving due effect to all the circumstances, it appears that there would be a balance of very great inconvenience and possible oppression to the defendant, the plaintiff should be remitted to his action at law to recover his damages, in which action, if the taking of an account becomes necessary, it may be easily taken.

In such a case as this, we think there is such balance of inconvenience existing in favor of the defendant. Upon the theory of the plaintiff, every one of the policy-holders of his class has a right of action such as this against the defendant to call it to an account, and to cause it to give, in the trial of the action, a detailed account of every transaction (proved by reference to or the production of its books, and by the oaths of its officers) which took place, from the commencement to the termination of the tontine period, in regard to those matters material to be known upon the question of an equitable apportionment of the fund. There would be no necessity for an allegation, much less the slightest, even prima facie, proof of wrong-doing, or that there had been any mistake made by the company in the apportionment made by it. But the mere fact that an individual was the owner of one of those policies in force at the termination of the tontine period would give him a right of action, and a right to demand this proof from the defendant. The mere statement of such a fact, it seems to us, is conclusive against the existence of any such right. Of course, it is not to be supposed that each individual policy-holder would avail himself of this right; but the fact that each one might would place the company in the power of unscrupulous parties to take advantage of it for the purpose of endeavoring to levy contribution from it, which it might pay in order to secure freedom to itself from troublesome, expensive, unnecessary, and wholly disingenuous investigations (and made in numerous suits) into the affairs of the company, and its accounts, running

through many years. That this should be permitted without an allegation, even on information and belief, that any fraud, mistake, or impropriety in the accounts, or in the manner of their statement, or in the result attained, had been made by the officers or agents of the company, would seem to be intolerable. Our attention has been called to a decision by the Massachusetts court of Pierce v. Society, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. That case was decided under the peculiar wording of a statute of Massachusetts in regard to complicated accounts, and we do not think it should be followed by the courts of this state.

Having examined the two grounds upon which the plaintff based his right to maintain this action, and coming to the conclusion that neither is tenable, it follows that the general term of the common pleas correctly granted a new trial, and that its order to that effect should be affirmed, and judgment absolute given against the plaintiff, with costs. All concur, except RUGER, C. J., not voting.[8]

[8] In Randolph v. Tandy (1900) 98 Fed. 939, at 940, 39 C. C. A. 351, at 352, Shelby, Circuit Judge, said: "This case was determined in the court below on a question of equitable jurisdiction. The case was on trial at law, and the court was of opinion that it 'involved an accounting, and was therefore equitable in its nature, and could not be entertained in a suit at law.' It is true that in the United States courts the distinction between common law and equity is maintained. This distinction must be observed, even if it be abolished by the code procedure of the state in which the federal court is sitting. In re Sawyer, 124 U. S. 200, 209, 8 Sup. Ct. 482, 31 L. Ed. 402; Fenn v. Holme, 21 How. 481, 16 L. Ed. 198. Many cases of accounting arise of which an equity court alone has jurisdiction. But, if the case is one of accounting only, it will be found that the complicated nature of the accounts constitutes the ground for going into equity. Kirby v. Railroad Co., 120 U. S. 130, 184, 7 Sup. Ct. 430, 30 L. Ed. 569. The bill which invokes this jurisdiction is insufficient if it only alleges that the accounts are of an intricate and complicated nature. It must descend to particulars, and state the facts showing the intricate and complex nature of the accounts. 3 Daniell, Ch. Pl. & Prac. (4th Am. Ed.) p. 1929, and note 1. It cannot be maintained that a court of equity has jurisdiction of every action for goods sold or money advanced, where partial payments have been made, or of every contract, express or implied, where different sums of money have become due, and different payments have been made. In Fowle v. Lawrason, 5 Pet. 495, 503, 8 L. Ed. 204, Marshall, C. J., said, 'Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted.' In the absence of other matters of equitable cognizance, the unquestioned rule is that courts of equity will not take jurisdiction unless great complexity exists in the accounts."

## OPPENHEIMER v. VAN RAALTE et al.

(Supreme Court of New York, Appellate Division, First Department, 1912. 151 App. Div. 601, 136 N. Y. Supp. 197.)

Appeal from Special Term, New York County.

Action by Louis Oppenheimer against Emanuel Van Raalte and another, partners as S. Oppenheimer & Levy. From an order vacating an order for examination of defendants before trial, plaintiff appeals.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, MILLER, and DOWLING, JJ.

INGRAHAM, P. J.[9] This action was to recover the balance of salary due to the plaintiff under a written contract by which the plaintiff was employed for the years 1908 and 1909 and was to receive as salary 3 per cent. of the net profits of the business of the defendants for each of said years; the defendant guaranteeing that plaintiff should at least receive $6,000 each year. For the year 1908 the plaintiff was paid $11,847.31, which would show a net profit for that year of nearly $400,000. For the second year, although the plaintiff swears that the business had continued without substantial decrease, the defendants claimed that their profits were not in excess of $200,000, and refused to make any payment above the $6,000, which the plaintiff was paid. The plaintiff alleges that the profits for the year 1909 were in excess of $400,000, and that he was entitled to receive $6,000 in addition to the amount that was paid him as salary for that year.

The mere statement of this cause of action is sufficient to establish that the only method the plaintiff has of proving his cause of action is to examine the defendants before trial. The plaintiff has no records of the defendants' business, and the defendants alone can supply the legal proof to show what their net profits were for the year 1909 to which the plaintiff was entitled to a percentage. The plaintiff cannot maintain an action for an accounting under such a contract, but is required to bring an action at law, and for the court to refuse to allow him to examine the defendants before trial so as to prove his cause of action would be to prevent the plaintiff from having a recovery, although if such testimony had been allowed he would have a good cause of action. It is conceded that upon these papers the materiality of the testimony of the defendants clearly appears, and that the plaintiff would certainly be entitled to subpœna the defendants at the trial and to prove by the testimony of his witnesses or by the enforced production of the defendants' books what the actual net profits of the business for the year 1909 were. Section 870 of the Code of Civil Procedure provides that a deposition of a party to an action pending in a court of record may be taken at his own instance or at the instance of an adverse party at any time before or during the trial as prescribed in this article. Section 872 provides that the person desiring to take a deposition as prescribed in this article may present to a judge of the

[9] Part of the opinion is omitted.

court in which the action is pending an affidavit setting forth, among other things, the name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application or the prosecution or defense of such action. Section 875 provides that the judge to whom such an affidavit is presented must grant an order for the examination if an action is pending. I think the plaintiff in this case has brought himself clearly within these sections of the Code of Civil Procedure and is therefore entitled as a matter of right to examine the defendants before trial. The facts and circumstances showing the materiality of the defendants' evidence are stated, and it is apparent from the nature of the action and the facts stated that the evidence of the defendants upon this examination is necessary to enable plaintiff to prove the amount to which he was entitled. I think the plaintiff was therefore entitled to the order that was granted, and it should not have been vacated. * * *

It follows, therefore, that the order appealed from must be reversed, with $10 costs and disbursements, and the motion to vacate the order for the examination of the defendants denied, with $10 costs.

LAUGHLIN, CLARKE, and MILLER, JJ., concur. DOWLING, J., dissents.

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## INHABITANTS OF CRANFORD TP. v. WATTERS.

(Chancery Court of New Jersey, 1901. 61 N. J. Eq. 284, 48 Atl. 316.)

Heard on bill, answer, and proofs.

The object of the bill is to withdraw from the jurisdiction of the law court, and procure the final determination in this court, of a cause of action which the defendant, Watters, claims to have against the complainant, the township of Cranford, by reason of the performance by him for the complainant of divers works, being part and parcel of a sewer system installed by the complainant within its territorial limits. The work was mainly done under written contract which was entered into in the year 1894. There are also claims on the part of Watters (1) for extra work; (2) for the increased cost of work done under the contract, by reason of failure of the corporation to perform its part of the contract; and (3) for variations made in the specifications of the work to be done as provided in the contract. The defendant's claim is that work was done to the amount of about fifty thousand dollars, and that he had been paid twenty-three thousand and odd dollars, leaving a balance of about twenty-six thousand dollars due. To recover that balance he brought an action against the complainant in the year 1897 in the circuit court of the county of Union. The bill of particulars contained several hundred items. The complainant pleaded to the action, and the court referred it to a referee to hear the cause and state an account between the parties.

Both parties dissented to the reference, thereby reserving to themselves the right, under the statute, to a trial by jury. The cause was tried before the referee, who by his report dealt with all the items in the bill of particulars, and by condensation reduced the number to 88, amounting, as claimed by the defendant herein, to $47,491.12, for which he allowed him a total of $34,159.77, disallowing some of the items altogether, and allowing only a portion of others. After crediting him with payments, he found a balance due of $11,435.54. After the bill was filed, the complainant, by leave of the court, paid $8,000 on account, which the defendant accepted. To this report each party filed divers exceptions. Watters' exceptions were 14 in number. The exceptions of the complainant (the defendant below) were much more numerous, but in the argument they were all considered under 9 heads. Some of the exceptions of complainant referred to the same items excepted to by defendant, leaving about 20 disputed matters, disconnected with each other, and depending for their solution upon different evidence and variant considerations. After these exceptions were taken the complainant filed its bill herein, setting out the facts, and praying for an injunction. It was granted upon the strength of the case of Shove v. Lathrop Co., in which Chancellor Runyon granted an injunction under somewhat similar circumstances, but gave no reasons in writing. The defendant, Watters, answered, but in his answer set up the want of jurisdiction in this court, and claimed the right to a trial by jury. The cause was brought to hearing upon the evidence (which is voluminous) taken and exhibits made before the referee, and with one or two additional exhibits.

PITNEY, V. C.[10] (after stating the facts). The serious question in the cause is whether the court ought to take jurisdiction of it. It is urged—First, that it is not a cause in which the court ought to have assumed jurisdiction if that jurisdiction had been sought before any action at law had been commenced; and, second, granting that the court would ever have taken jurisdiction, it is contended that, having permitted the court of law to proceed and deal with the cause to the extent of a reference, it is now too late for the defendant at law to ask this court to withdraw the cause from the jurisdiction of that court.

Dealing with the second ground first, I come to the conclusion that it is not well taken. Supposing it was a proper case for the jurisdiction of this court under the old practice, and before the legislature had invested the court of law with power to refer causes of this kind to a referee to hear and determine the same, including the taking and stating of accounts, I think that the vesting of the courts of law with that jurisdiction ought to have the effect of making this court more cautious in assuming jurisdiction in such cases when sought before suit at law is commenced. The primary statement of the case, as presented in a bill in chancery, showing a large number of items and a prima facie

[10] Part of the opinion is omitted.

case for the interference of the court, still leaves it practicable for justice to be done in a court of law under the modern practice of a reference. When the matter has been subjected to the examination of a referee, and he has made his report, it may and often does prove that the items actually in dispute are few and easily dealt with by a jury. And I am of the opinion that it is quite proper for this court in a certain class of causes, to refuse to take jurisdiction until at least an attempt has been made to obtain justice by the machinery of a reference in a court of law. The various powers to compel the production of papers and the examination of the parties now possessed by a court of law gives that court facility for dealing with such cases almost if not quite equal to that of the court of chancery. And I think that, if the case as presented by the Watters bill of particulars of his demand against the township had been presented to a court of equity before the suit at law had been commenced, it might well have said—I do not mean to declare that it ought to have said—to the township:

"Let Watters bring his suit. Non constat but that the result of a trial before a referee will be entirely satisfactory to all parties, or reduce the points in dispute to so few in number and such simple dimensions that a jury can deal with it."

This view was taken by Vice Chancellor Reed in Bellingham v. Palmer, 54 N. J. Eq. 136, 33 Atl. 199. And, were it not for the provision in the practice act for the right of each party to dissent from the reference at law and to demand a trial by jury, I should think the remedy at law would be quite equal to that in this court. For if the referee mistook the law, or made a clear error in his deductions of fact, his findings would be open for examination and review by the court. And such I understand to be the English practice, and also that of the state of New York. But the defendant, Watters, still demands a trial by jury; and when the parties appear before the jury the only advantage that either party will have from the report will be that it will be prima facie evidence of the truth of his findings, and all the items that are excepted to will still be open for examination before the jury. Hence the delay in coming to this court does not seem to me to be fatal to the complainant's right.

In the present case, Watters, the party who is objecting to the jurisdiction of this court, makes 14 distinct and separate exceptions to the findings of the referee, and is entitled to have those examined in detail by the jury. To these may be added several of the exceptions taken by the complainant (the defendant below), which are equally separate and distinct, making about 20 different items. And so it seems to me that we come at last to the question whether, with these different items to be examined and determined, the parties can obtain justice in a court of law, or are the items so numerous and difficult, and the evidence which must determine their solution so technical and complicated in its character, as that a jury cannot give it such attention and consideration, with the opportunity afforded them in the consideration of a case in

the jury room, as to enable them to come, with any degree of certainty, to a just conclusion? Or, in other words, if the case is one which, if presented to the court upon the exceptions taken by the several parties to the items, is such that it would have originally withdrawn it from the jurisdiction of the court of law, it seems to me that it ought to do it, even at this late stage of the controversy.

In determining this question I have taken the pains to examine with some care the grounds on which courts of equity proceed in exercising what is called their concurrent jurisdiction with courts of law over matters of this kind. The usual ground stated is that of complicated accounts. But this classification is not confined to those cases of accounts where something more than an account between the immediate parties must be taken, as in the settlement of partnership affairs, trustees' accounts, and the like; but it also includes a large class of cases where the matters of account are between the individual contestants,—the plaintiff and defendant. A consideration of the cases has led me to the conclusion that the true ground of equity jurisdiction in such cases is that the issues necessary to be determined in order to arrive at a just conclusion are so numerous, and dependent upon such a variety of evidence, or of evidence of such technical character, as that it is substantially impossible for a jury, retiring in the ordinary way to a jury room, and obliged to carry all the oral evidence in their memories, to come, at one session, to anything like a just and proper conclusion. Such a state of affairs produces what is meant by the term "complicated" used in this connection.

The leading case on this subject is O'Connor v. Spaight, 1 Schoales & L. 305, decided by Lord Redesdale, in Ireland, in 1804. The case is thus stated by the reporter:

"The defendant, by indenture, bearing date 31st March, 1780, demised certain premises to the plaintiff for three lives, at a rent of 20 shillings per acre for every acre the demised premises should or might contain, under which demise the plaintiff entered into possession. The number of acres was not ascertained, nor did plaintiff appear to have made any regular payments of rent eo nomine, nor had defendant given him any receipts in full or for precise gales; but from 1780 down to 1796 the plaintiff had been in the constant habit of accepting defendant's bills, of paying money to his order, of selling him goods on credit, and supplying him and his family with money, the particulars of which several sums were set out in a schedule annexed to the bill, and for which the plaintiff insisted that, if credit were given, a balance would appear due to him."

At the end of 16 years the landlord claimed that a year's rent was due and unpaid, and brought his action of ejectment, based on such arrearage. The tenant filed his bill to enjoin the ejectment and for an accounting in the court of chancery. There was nothing in the nature of the accounts to make it difficult for a jury to determine each one of the items claimed, and for a great many of them there must have been vouchers. The number of acres for which rent was to be paid was easily ascertained by a survey. So that there was really nothing in the case which a jury might not have dealt with, and the only ground for holding the jurisdiction was the great number of different items which

were to be passed upon. Lord Redesdale, in delivering judgment, used the following language:

"The ground on which I think that this is a proper case for equity is that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at nisi prius with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which courts of equity constantly act, by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law, and until the result of the account the justice of the case cannot appear."

It is manifest that the words "complex" and "complicated" are here used in the sense I have above stated. This meager statement of the rule has been cited with approval in a number of instances by English judges, both in the courts of first instance and in those of appeal. * * *

In Marvin v. Brooks, 94 N. Y. 71, Justice Finch says:

"That the necessity for a resort to equity is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes, by the examination of the adverse witnesses before trial, and the production and deposit of books and papers, almost as complete a means of discovery as can be furnished by a court of equity."

That remark applies with great force to those jurisdictions where, when a cause is once sent by a common-law court to a referee, it is finally taken from the cognizance of a jury. Such is the case in New York, and it may be in other states. It is not applicable in its full force to this state, or to the present situation, where the machinery of a reference has been resorted to and has expended its force, and, after all, has left the cause in such a situation that it must still be sent to a jury by the common-law court. As before remarked, I think that if it were not for the fact that the parties may, under our practice, after the cause has run the gauntlet of the referee, demand a trial by jury, then there would be little or no occasion for the intervention of a court of equity upon the single ground of complexity of accounts. And so it seems to me that the case comes back to where it would have stood if there had been no practice of the common-law court of ordering a reference, and such a reference had not been had. And the question now is whether it is such a one as this court would, in that state of the law, withdraw from the jurisdiction of a court of law; and on that question I think the authorities establish the conclusion above stated, namely, the test is, are the issues so numerous and so distinct, and the evidence to sustain them so variant, technical, and voluminous, that a jury is incompetent to intelligently deal with them and come to a just conclusion? An examination of the several exceptions and the evidence bearing upon them leads me to the conclusion that it is the duty of the court to assume jurisdiction.

[Here follows an elaborate discussion of the facts and the conclusion that the referee had arrived at a just result, which is omitted by direction of the Vice Chancellor.]

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# APPENDIX I

## POSITION OF EQUITY IN THE LEGAL SYSTEM

### JUSTICE STORY'S DEFINITION OF EQUITY

Equity Jurisprudence may therefore properly be said to be that portion of remedial justice which is exclusively administered by a Court of Equity as contradistinguished from that portion of remedial justice which is exclusively administered by a Court of Common Law.

Story's Equity Jurisprudence, vol. 1, p. 20.

### STORY'S ANALYSIS OF JURISDICTION

The next inquiry which will occupy our attention is to ascertain the true boundaries of the jurisdiction at present exercised by Courts of Equity. The subject here naturally divides itself into three heads—the concurrent, the exclusive, and the auxiliary or supplemental jurisdiction. As the concurrent jurisdiction is that which is of the greatest extent and most familiar occurrence in practice, I propose to begin with it.

The concurrent jurisdiction of Courts of Equity may be truly said to embrace, if not all, at least a very large portion of the original jurisdiction inherent in the court from its very nature, or first conferred upon it upon the dissolution or partition of the powers of the Great Council, or Aula Regis, of the king. We have already seen that it did not take its rise from the introduction of technical uses or trusts, as has sometimes been erroneously supposed. Its original foundation then may be more fitly referred to what Lord Coke deemed the true one, fraud, accident, and confidence.

Story's Equity Jurisprudence, vol. 1, p. 82.

### THE RELATION BETWEEN LAW AND EQUITY

The relation between law and equity is found difficult of final statement. Against the theory of Professor Maitland that equity is but a gloss upon the common law without conflict with the law, there is the view recently published by Professor Wesley Newcomb Hohfeld of the Yale Law School, taking strict issue with Professor Maitland. Professor Hohfeld thus presents his thesis:

"* * * Despite what has thus far been said, there would be considerable hesitation in presenting these mere working materials, were it not for those parts relating to 'the conflict between equity and law' and 'the supremacy of equity over law.' It is only in these matters that the writer finds it necessary to take issue with the views expressed by Professor Maitland and other well-known writers. Our distinguished English author, throughout his entertaining series of lectures, maintains, with ever-recurring emphasis, that the relation between the rules of equity and the rules of law, with only one or two possible exceptions, 'was not one of conflict.' * * *

"The same views seem to have been entertained by Professor Langdell, in whose Summary of Equity Pleading, we find the following: 'Indeed, it may be said without impropriety that equity is a great legal system, which has grown

up by the side of the common law, and which, while consistent with the latter, is in a great measure independent of it.' * * *

"So, also, similar ideas seem to have been expressed by Mr. Adams in his treatise on Equity. * * *

"As against the proposition of these various scholars that there is no appreciable conflict between law and equity, the thesis of the present writer is this: While a large part of the rules of equity harmonize with the various rules of law, another large part of the rules of equity—more especially those relating to the so-called exclusive and auxiliary jurisdictions of equity—conflict with legal rules and, as a matter of substance, annul or negative the latter pro tanto. As just indicated, there is, it is believed, a very marked and constantly recurring conflict between equitable and legal rules relating to various jural relations; and whenever such conflict occurs, the equitable rule is, in the last analysis, paramount and determinative. Or, putting the matter in another way, the so-called legal rule in every such case has, to that extent, only an apparent validity and operation as a matter of genuine law. Though it may represent an important stage of thought in the solution of a given problem, and may also connote very important possibilities as to certain other, closely associated (and valid) jural relations, yet as regards the very relation in which it suffers direct competition with a rule of equity, such a conflicting rule of law is, pro tanto, of no greater force than an unconstitutional statute. * * *

"The conflict between the equitable and the legal rule as regards 'equitable waste' is, with some hesitation, conceded by Professor Maitland, at page 157 of his Lectures, this being one of the two or three instances in which alone any opposition between law and equity is admitted by the learned author: 'Was there a conflict about (so-called) equitable waste? Perhaps there was. If a tenant for life, made unimpeachable for waste, cut down ornamental timber, he could not be made to pay damages in an action at law, but equity would prevent him from so doing by injunction, or if he did it would call him to account. So we might here say that equity did consider that he must pay for his act, while law held that he need not. But it is needless to speculate about this matter for the (Judicature) Act specially provided for it.'

"Just why Maitland should have any hesitation as to this case is not clear. Suppose that a statute of yesterday provided that a tenant 'without impeachment' should be privileged to cut ornamental trees; and assume, further, that a statute of to-day were to declare that any tenant 'without impeachment' should be under a duty not to cut ornamental trees. Would any one hesitate to admit that the two statutes would be in conflict with each other, and that the first would be repealed by the second? A similar comparison with inconsistent statutes may be helpful in seeing the conflict of law and equity as regards the various other examples in the text.

"At this point, however, it may be necessary to guard against misunderstanding. When, in example 34, it is said that the legal rule is 'annulled,' pro tanto, by the equitable rule, this refers to the very jural relation under consideration, and to that alone. It is meant simply that, in the last analysis, Y is under a duty not to cut ornamental trees. As said by Lord Justice Turner, in Micklethwait v. Micklethwait, 1 De G. & J. 504, 524: 'This doctrine of equitable waste, although far too well settled in the court to be now in any way disturbed is (it is to be observed) an encroachment upon a legal right'—the learned judge here meaning, of course, what would, with greater discrimination, be expressed as 'a legal privilege.'

"As regards that particular relation, the supposed legal rule asserting the privilege is really invalid. It is, to that extent, only an apparent rule, so far as genuine law is concerned. But such 'legal rule,' though invalid, may have important connotations as to independent (and valid) legal rules governing certain other closely associated jural relations. Thus, e. g., despite the conflict in question and the supremacy of the equitable rule, it would still be the duty of the common law judge, in case an action at law were brought against Y., to sustain a demurrer as against a declaration alleging the true facts of the case.

"Conversely, even though a legal primary right conflicts with an equitable 'no-right,' it would be the duty of the common law judge to overrule a demurrer to a declaration setting forth such supposed legal right and its violation,

and, ultimately, to render judgment for the plaintiff; and, of course, an execution sale based on such judgment would be valid. See example 46, and note 38, infra. These independent (and valid) jural relations, though connoted by the original (invalid) legal right in question, must be carefully distinguished from the latter. * * *"

Story's classification of equity into exclusive jurisdiction, concurrent jurisdiction and auxiliary jurisdiction is modified by Professor Hohfeld, who holds that all rights are either exclusively equitable or concurrently legal and equitable. He thus expresses it:

"No doubt the jural relations which in the text are called 'concurrently legal and equitable' have, according to the more usual, if not invariable, practice, been styled 'exclusively legal,' or simply 'legal'; and it may be conceded that at first glance the latter usage is entirely plausible. It is submitted, however, that, as a matter of analysis, the division of all jural relations into but two classes—those concurrently legal and equitable, and those exclusively equitable—is correct in every fair sense of the terms involved, and that any other division makes for confusion of both thought and language. There is, to be sure, a third group of rules which, being very different from the 'concurrent' rules now under consideration, might, with prima facie correctness, be called 'exclusively legal.' But, as will be more fully urged hereafter, each and every one of the latter being in conflict with some paramount and determinative equitable rule, proves, in the last analysis, to be only apparent, so far as genuine law is concerned. For that reason, in any true classification this third group of so-called rules must be excluded.

"As regards both law and equity, all primary, or antecedent, relations and all secondary, or remedial, relations can, in general, be ascertained only by inference from the purely adjective juridical processes, that is, by inference from either affirmative or negative action regularly to be had from the particular courts from which a judgment or decree may be sought. As said by Maitland, in relation, more particularly, to the early law: 'De Natura Brevium, Of the Nature of Writs,—such is the title of more than one well known textbook of our mediæval law. Legal Remedies, Legal Procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs must be his theme. The scheme of "original writs" is the very skeleton of the Corpus Juris.' (History of the Register of Original Writs [1889] 3 Harv. L. Rev. 97.)

"Applying this eminently sound suggestion to the bond case put in 'example 12,' suppose, in the very early days, B. had paid the bond at or before maturity, but had failed to take a release under seal or a surrender of the bond instrument. In that situation the legal right of A. and the corresponding legal duty of B. would, according to the rule now obsolete, continue to exist, despite the fact of payment. But equity would say that, as a matter of substance, B. had the privilege of not paying again, and that, correlatively, A. had no right against B. If, therefore, A. were to threaten an action at law, B. could secure an injunction from equity restraining A. from doing the acts constituting 'the bringing of the action.' So, too, it goes without saying that A. could not secure 'discovery' against B. from a court of equity.

"But, on the other hand, if the bond has not been actually paid, it is clear that equity indorses and sanctions the legal primary right of A. If no ordinary affirmative suit can be maintained in equity, that must be because the remedial machinery of the law court is able to give adequate relief; and equity indorses and sanctions such remedial proceeding in the law court by refusing an injunction against it. Generally speaking, moreover, to the extent that the law court's remedy may not be adequate, equity stands ready to lend a hand and give direct affirmative relief. See Southampton Dock Co. v. Southampton Harbour & Pier Board (1870) L. R. 11 Eq. 254, 263. If, for example—again referring primarily to days gone by—A. needed the testimony of B. for the action at law, a separate proceeding in equity could be brought for that limited purpose,—that is, to secure discovery. In such a case it might fairly be said that the law tribunal and the equity tribunal were acting together as a single court. As Coke observed in relation to cases where a chancery court sends an issue of fact to a law court to be tried, 'for that purpose both courts are counted but one.' 4 Inst. 79. And, of course, it will not be forgotten that

according to the very early practice in England and the modern practice in some American jurisdictions, a mere bill for discovery sufficed as a foundation for praying and securing complete and final relief on the theory of avoiding multiplicity of suits. Besides all this, it is clear that under various other circumstances the bond right of A. might get direct vindication by the remedial machinery of a court of equity. If, for example, A. held such bond right in trust for X., but refused to proceed against B., X. might proceed in a court of equity against both A. and B. and get a decree for payment of the amount directly to X. See the exceptionally instructive opinion in Fletcher v. Fletcher (1844) 4 Hare, 67, 76–78. Similarly, if A., being the unencumbered owner of the bond right, were to assign half of it to M., either A., the assignor, or M., the partial assignee, might sue in equity for a decree ordering B. to pay half the amount of the bond to A. and the other half to M.

"So, in general, what are commonly called 'legal' rights are, when justice demands, vindicated in equity by bills for discovery, bills for an accounting, bills to quiet title, bills of interpleader, bills of peace and proceedings undertaken to avoid 'multiplicity' or 'circuity' of action; and, independently of these affirmative remedies, the mere refusal of a court of equity to enjoin the plaintiff's action at law is, as has already been suggested, a clear and decisive equitable vindication of the primary and remedial rights on which such action at law is predicated.

"When a jural relation is such as to be recognized and vindicated only in equity, it is, according to general usage, called 'exclusively equitable'—for instance, the right of a cestui against his trustee; and that usage seems justified by reason. Why, then, in aid of clear thinking, shouldn't all other jural relations be considered, by a precisely similar process of reasoning, 'concurrently legal and equitable'?"

This writer calls attention to the strict and loose senses of the term "Equity Jurisdiction" thus:

"When a court of equity has neither the ordinary jurisdiction over the person of the defendant, nor the statutory jurisdiction over the res, there is, of course, no 'power to hear and determine' in the regular way; that is, there is a want of jurisdiction in the proper sense of that term.

"But, curiously enough, the expression, 'want of equity jurisdiction,' is inveterately employed in a loose and confusing way to indicate merely that a case presented to a court of equity is such that according to the principles and rules governing equitable primary, remedial, and adjective rights, it would be error for the court to exercise its admitted power to grant the relief asked. The case containing the best discussion of this important distinction between the actual jurisdiction of a court of equity and error in its exercise, is People v. McKane (1894) 78 Hun, 154, 28 N. Y. Supp. 981.

"Thus, for example, if, in a suit for breach of contract to sell ordinary personalty, a court of equity should render a decree for damages, the decree, though erroneous as against seasonable objection, would be good until set aside by some form of direct attack. Bank of Utica v. Mersereau (1848) 3 Barb. Ch. (N. Y.) 527, 574, 49 Am. Dec. 189."

# APPENDIX II

## MODERN EQUITY IN ADMINISTRATIVE TRIBUNALS

The modern conception of equity is manifesting itself in forms scarcely recognized hitherto as judicial, viz., in the various administrative commissions, which, while in form arms of the executive power, in fact, exercise a jurisdiction in character essentially like that of a court of equity. These administrative commissions, like the national Interstate Commerce Commission, and the various state railroad and public utility commissions, are in the nature of administrative courts in the sense that they represent the government as the agency of the state, but in their conception of justice and their freedom in its application within the range of their jurisdiction,[1] they may be said to represent the modern conception of the king's conscience listening to the petitioner unable to secure his rights by reason of the superior advantage of his opponents. It is to these administrative commissions that we look now to see the rule of grace exercised by the modern sovereign, the state. Here is the old principle of throwing the power and authority of the sovereign upon the side of the weak petitioner reappearing in overcoming the advantage of the enormous superiority of the great utilities as against an individual shipper, consumer, etc.

We must look to see the new equity arising in this conception of the state establishing new modes of levelling differences in power, and bringing about a balance of legal position.

Like that of a court of equity, the very process of the administrative commission is in effect in personam since it partakes of the nature of an order to do or not to do the thing commanded, or suffer the consequences of fine or imprisonment for disobedience.

As illustrations of the analogy of these administrative courts in the form of commissions to courts of equity, observe the mode of working and the orders carried out under the California Commission, as shown in its report for 1911–12.[2]

[1] "The provisions of the Public Utilities Act (1912) with reference to procedure have been drawn with considerable care, so as to insure swiftness and certainty in the proceedings, both before the Commission and before the courts. The decisions of the Commission on questions of fact are conclusive. No cause of action can arise out of any order or decision of the Commission except in favor of a person or corporation which shall first have applied to the Commission for a rehearing, specifying the grounds thereof. If, after such rehearing has been denied, or if, after the same has been granted, such person or corporation is still dissatisfied with the Commission's decision, the remedy is a review in the state Supreme Court, on which review no additional evidence can be introduced and the sole question is whether the Commission has exceeded its jurisdiction. In this way it is possible to secure speedily a decision of the highest court of this state." Report of the Railroad Commission of California (1911-12) p. 23.

[2] "*Train Connections.*—One of the most important provisions of the present Public Utilities Act is that which gives the Commission authority to regulate the service of transportation companies. The Commission has directed changes in time cards, in order more conveniently to serve the public. In one case it was found that a railroad operating but one passenger train a day arranged its schedule so as to leave the junction of an overland system fifteen minutes before the arrival of the train at the connecting point, thereby making it necessary for passengers to wait over practically twenty-four hours. This road ran no trains on Sunday, so that a passenger arriving at the junction Saturday was obliged to wait

For the illustrations of the power of compulsory process on the person (corporation) refusing to obey the decree of the commission, see the California Public Utilities Act of 1912 below in note.[3]

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## PACIFIC TELEPHONE & TELEGRAPH CO. v. ESHLEMAN et al.

(Supreme Court of California, 1913. 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. [N. S.] 652.)

Application by the Pacific Telephone & Telegraph Company for a writ of review against John E. Eshleman and others, as members and constituting the Railroad Commission of the State of California.

HENSHAW, J.[4] The Tehama County Telephone Company and the Glenn County Telephone Company lodged with the Railroad Commission separate petitions or complaints, seeking orders of the Railroad Commission compelling the Pacific Telephone & Telegraph Company to permit a physical connection or physical connections to be made between its telephone lines and the lines of the complaining companies. The proceedings were consolidated, and, after hearing, the Railroad Commission made certain findings, upon which was based its order in accordance with the prayers of the petitioners. The Tehama County Telephone Company may be described as a telephone company doing a local business in the county of Tehama. In like manner the Glenn County Telephone Company is engaged in the same business in the county of Glenn. The Pacific Telephone & Telegraph Company does a similar local business in each of those counties, and in addition thereto conducts a long-distance business, reaching into many, if not all, of the counties of the state. The order of the Railroad Commission gives to the Tehama County Telephone Company and the Glenn County Telephone Company and their subscribers the use of all the extended long-distance service maintained by the Pacific Telephone & Telegraph Company within the state of California, excepting therefrom an interchange for use of the Pacific Company's lines between the two counties of Tehama and Glenn; the petitioning companies between themselves having established such communication.

In conformity with the provisions of section 67 of the Public Utilities Act (St. [Ex. Sess.] 1911, p. 55) the Pacific Telephone & Telegraph Company made application to this court for a writ of review. Hon. Ralph C. Harrison, as

forty-eight hours for a connection. * * * The Commission immediately directed the two roads to arrange the time cards so that the connection would be made.

"*Better Train Service.*—Complaints have frequently been made that trains were not operating on convenient schedules. One case in particular was the discontinuance of a train serving the suburbs of San Francisco, which inconvenienced residents of that district. The Commission arranged to have the train put back into service on its old schedule.

"*New Depots.*—The Commission has found on investigation at different times that shelters were required at stations where trains stopped to receive and discharge passengers and freight, and in such cases as these it arranged for the construction of depots and sidetrack facilities for the accommodation of the public."

Report of the Railroad Commission of California (1911-12) p. 35.

[3] "Sec. 76. Any public utility which violates or fails to comply with any provision of the constitution of this state or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than five hundred dollars nor more than two thousand dollars for each and every offense.

"Sec. 77. Every officer, agent or employee of any public utility, who violates or fails to comply with, or who procures, aids or abets any violation by any public utility of any provision of the constitution of this state or of this act, or who fails to obey, observe or comply with any order, decision, rule, direction, demand or requirement or any part or provision thereof, of the commission, or who procures, aids or abets any public utility in its failure to obey, observe and comply with any such order, decision, rule, direction, demand or requirement, or any part or provision thereof in a case in which a penalty has not hereinbefore been provided for such officer, agent or employee, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

Report of the Railroad Commission of California (1911-12) pp. 549, 550.

[4] Parts of the opinion and all of the concurring opinion of Sloss, J., are omitted.

amicus curiæ, filed a brief presenting to the attention of this court constitutional questions touching, not only its own jurisdiction in the matter, but as well the jurisdiction of the superior court. * * *

It is insisted that the attempt to confer exclusive jurisdiction upon the Supreme Court to review the proceedings of the Railroad Commission, to the impairment of the general jurisdiction of the superior court is itself violative of the Constitution, in that it is a plain legislative attempt to curtail the jurisdiction vested in the superior court by the Constitution. The language of the legislative act in this regard is that, "No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the Commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties." Public Utilities Act, § 67; Stats. Ex Sess. 1911, p. 55. Therefore, concludes the argument of the learned friend of the court, it is conceded that this court has the constitutional power to issue a writ of review. In the case at bar, admitting that the Railroad Commission in the matter in question was exercising judicial functions, this court's consideration is limited to the single proposition whether or not the Commission has exceeded its jurisdiction, or, what is the same thing in other words, "has regularly pursued its authority"; that this court will not, under the writ, undertake to determine whether constitutional rights have been violated or other errors have been committed, but must leave those questions to the superior court which, under the Constitution, has authority to determine them under proper application to enjoin the enforcement of the order complained of, and that it is the manifest duty of this court so to hold and to declare.

A minor branch or corollary of the main argument upon these jurisdictional questions rests upon the proposition that in the matter here under review the Railroad Commission was not exercising judicial functions, but that its acts were purely legislative or legislative administrative. As the Public Utilities Act is here for the first time before this court, as the question is thus fairly within this case, and as to ignore it is but to necessitate its consideration in subsequent litigation, it is proper to say that we hold the powers and functions of the Railroad Commission in many instances, and in the present one, to be of a highly judicial nature. That judicial powers were with deliberation vested in the Commission the language of the Constitution and of the legislative enactments following the Constitution leave no doubt. Thus the Constitution itself declares: "The Commission shall have the further power * * * to hear and determine complaints against railroad and other transportation companies; to issue subpœnas and all necessary process and send for persons and papers; and the Commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record." Section 22, art. 12. While, without quoting, a reading of sections 22 and 23 of article 12 of the Constitution and of sections 53 to 81 of the Public Utilities Act will establish beyond doubt that the Railroad Commission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising judicial functions of great moment. It may be said that the final order of the Commission in many instances is legislative administrative in character, but none the less the ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial. Robinson v. Sacramento, 16 Cal. 208; Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 120 Pac. 780. * * *

Pursuant to this grant of power by the Constitution [5] to the Legislature, the Public Utilities Act was passed and adopted. The act is altogether too long to be set forth in extenso, but, summarized, it provides for the organization of the Commission, confers upon it large powers of control over all public utilities, prescribes heavy penalties in the way of fines upon public utilities violating the orders of the Commission, and declares guilty of a misdemeanor the person who so violates or aids in violating an order, with punishment

[5] Constitution of the State of California, art. 12, § 22, as amended October 10, 1911 (St 1911, p. 2048).

fixed by a fine not exceeding $1,000, by imprisonment not exceeding one year, or by both. Power to punish for contempt is likewise conferred. * * *

Two constructions of the constitutional provisions above quoted have been presented to the consideration of the court. First, that the Constitution itself has designedly confered upon the Legislature the fullest possible powers to legislate concerning public utilities through the board of railroad commissioners; that it was designed that upon the board of railroad commissioners should be conferred whatsoever powers the Legislature saw fit, and that nothing in any other provisions of the Constitution should hamper the Legislature in so doing. * * *

That this was the view of the law to which the respondent inclined at the oral argument is manifest from the inquiries put by the Justices of this court and by the answers thereto. Thus, the Chief Justice said:

"I don't think there is any more important question in this case than the question whether there is anything in any provision of the Constitution of this state which limits the power of the Legislature to confer powers upon the Railroad Commission, and, if there is any limitation, I would like Mr. Thelen himself, as a member and representative of the board of commissioners, to state where he thinks that limitation is—if there is any provision of the state Constitution of California to which the powers conferred by this act are in opposition."

"Mr. Thelen: No. It seems to me—my own personal view is they are absolutely clear."

Again:

"Mr. Thelen: I think the Constitution has given to the Legislature every possible authority on this question.

"Mr. Justice Henshaw: . It would seem the sole recourse is the federal Constitution.

"Mr. Thelen: That is my point. * * * My view is that the Legislature has the right, irrespective of other provisions of the Constitution of this state, to confer power upon the Commission, * * * subject to the federal Constitution."

The second construction of these constitutional provisions is one which would limit the power which the Constitution authorizes the Legislature to confer upon the Railroad Commission strictly to the matter of "supervising and regulating" public utilities. * * *

In view of these considerations we regard the conclusion as irresistible that the Constitution of this state has in unmistakable language created a Commission having control of the public utilities of the state, and has authorized the Legislature to confer upon that Commission such powers as it may see fit, even to the destruction of the safeguards, privileges, and immunities guaranteed by the Constitution to all other kinds of property and its owners. And while, under our republican form of government (a form of government under which the three departments—administrative, executive, and judicial—have in the past one and all been controlled by the limitations of a written Constitution, In re Duncan, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219), it is perhaps the first instance where a Constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions, nevertheless this is but a reversion to the English form of government which makes an act of Parliament the supreme law of the land. * * *

We may now sum up our conclusions as follows:

1. The Constitution has, in the Railroad Commission, created both a court and an administrative tribunal.

2. The Constitution has authorized the Legislature to confer additional and different powers upon this Commission touching public utilities unrestrained by other constitutional provisions.

3. The legality of such powers as the Legislature has or may thus confer upon the Commission, if cognate and germane to the subject of public utilities, may not be questioned under the state Constitution.

4. That therefore the deprivation of jurisdiction of the courts of the state may not be questioned.

5. That therefore the reasonableness of the Railroad Commission's orders and decrees may not be inquired into by any court of this state, and consequently is of federal cognizance only.

6. That the right to exercise the power of eminent domain in matters involving public utilities has been vested by the Legislature in the Railroad Commission, and that the exercise of this power and the making of awards thereunder without the intervention and verdict of a jury are not in violation of the Constitution of this state or of the United States.

7. That payment of such awards must be made in advance of the actual taking.

8. That the order in question involves an exercise of the power of eminent domain and not of the police power.

9. That the order in question admittedly gives no compensation for the taking of petitioner's property, and is therefore void by force and virtue of the Constitution of the state and of the United States.

10. That the order in question must therefore be, and it hereby is, annulled.

We concur: LORIGAN, J.; MELVIN, J.

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## INTERSTATE COMMERCE COMMISSION v. UNITED STATES ex rel. HUMBOLDT S. S. CO.

(Supreme Court of the United States, 1912. 224 U. S. 474, 32 Sup. Ct. 556, 56 L. Ed. 849.)

MR. JUSTICE MCKENNA [6] delivered the opinion of the court:

The ultimate question in the case is whether Alaska is a territory of the United States within the meaning of the interstate commerce act as amended.

The Interstate Commerce Commission resolved the question in the negative and dismissed the petition of the Humboldt Steamship Company, the relator, which alleged violations of the act by the White Pass & Yukon Railway Company, operating in Alaska, applying its decision in Re Jurisdiction Over Rail & Water Carriers Operating in Alaska, 19 Interst. Com. R. 81.

The steamship company instituted an action in the supreme court of the District of Columbia, praying for a mandamus against the Commission to require it to take jurisdiction and proceed as required by the act and grant the relief for which the steamship company had petitioned, hereinafter specifically mentioned. The proceeding was dismissed. The court expressed the view that the Commission had "ample authority to assume jurisdiction over common carriers in Alaska, the same as in any other territory, and over those carriers operating between the state of Washington and Alaska, and between Alaska and Canada, and if they took jurisdiction no one could successfully question their right to do so." The court, however, held that it had no power "to require the Interstate Commerce Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach."

The court of appeals, to which court the case was taken by the steamship company, entertained the same view of the interstate commerce act as that expressed by the supreme court, but took a different view of the power of the courts to compel action upon the part of the Commission, and reversed the judgment of the supreme court and remanded the cause, "with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission, requiring it to take jurisdiction of said cause and proceed therein as by law required." To this ruling the Interstate Commerce Commission prosecutes this writ of error. * * *

It is next contended by the Commission that "mandamus is not a proper proceeding to correct an error of law like that alleged in the petition."

The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity, to require it or him to proceed, the manner of doing so being left to his or its discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. Ex parte Harding, 219 U. S. 363, 55 L. Ed. 252, 31 Sup. Ct. 324, 37 L. R. A. (N. S.) 392. But the full doctrine of that case cannot be extended to administrative officers. The Interstate

[6] Part of the opinion is omitted.

Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and, in the main, explicitly directed, by the act creating it. It may act of its own motion in certain instances,—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its nonaction be reviewed? The answer of the Commission is, by "a reversal of the tribunal of appeal." And such a tribunal, it is intimated, is the United States commerce court.

But the proposition is plainly without merit, even although it be conceded, for the sake of argument, that the commerce court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an application was not entitled to relief. This is so because the action of the Commission refusing to entertain a petition on the ground that its subject-matter was not within the scope of the powers conferred upon it would not be embraced within the hypothetical concessions thus made. A like view disposes of the cases relied upon in which it was decided that certain departmental orders were not susceptible of being reviewed by mandamus. We do not propose to review the cases, as we consider them to be plainly inapposite to the subject in hand.

In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to so do as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the court of appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission "to take jurisdiction of said cause and proceed therein as by law required." In other words, to proceed to the merits of the controversy, at which point the Commission stopped because it was "constrained to hold," as it said, "upon authority of the decision recently announced in Re Jurisdiction over Rail & Water Carriers operating in Alaska, 19 Interst. Com. R. 81, that the Commission is without jurisdiction to make the order sought by complainant," the steamship company.

Judgment affirmed.

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## INTERSTATE COMMERCE COMMISSION v. ILLINOIS CENT. R. CO.

(Supreme Court of the United States, 1910. 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280.)

MR. JUSTICE WHITE [7] delivered the opinion of the court:

Whether a duty rested upon the Illinois Central Railroad Company to obey an order made by the Interstate Commerce Commission is the question here to be decided. * * *

From the final decree enjoining the Commission from enforcing its order, in so far as it directed the taking into account the company fuel cars in the distribution of coal cars in times of car shortage, and in so far as it directed the future taking such cars into account, the Interstate Commerce Commission appeals.

It is stated in the brief of counsel for the railroad company that, at the hearing below, despite the scope of the prayer of the bill, no question was raised by the railroad company as to the validity of the order of the commission to the extent that it controlled private cars and foreign railway fuel cars. Irrespective, however, of this admission, as the Interstate Commerce Commission alone has appealed, the correctness of the conclusions of the court below on these subjects is not open to inquiry. And this also renders it unnecessary to consider in any respect the effect of the injunction to which we have previously referred as issued in the suit filed on behalf of the Majestic Coal Company, since such injunction only related to foreign railway fuel cars

[7] Parts of the opinion are omitted.

and private cars. Besides, it is stated in the brief of counsel that, before the decision of this case, the preliminary injunction in favor of the Majestic Coal Company was dissolved, and no appeal was taken therefrom.

In consequence of one of the comprehensive amendments to the act to regulate commerce, adopted in 1906 (§ 4, act June 29, 1906, 34 Stat. at L. 589, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1158), it is now provided that "all orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction." The statute endowing the Commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject.

Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 698, 39 L. Ed. 311, 316, 5 Interst. Com. R. 1, 15 Sup. Ct. 268, 360. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

Power to make the order, and not the mere expediency or wisdom of having made it, is the question. * * *

We think the issues for decision will be best disposed of by at once considering the contentions advanced by the railroad company to establish that there was a want of power in the Commission to make that portion of the order which the court below enjoined. The contentions on this subject are stated in argument in many different forms, and, if not in some respects contradictory, are, at all events, confusing, since, considered logically, we think they virtually intermingle power and expediency as if they were one and the same thing. We shall not, therefore, in making an analysis of the contentions, follow their mere form of statement, but shall treat them all as reducible to two propositions, viz.: First. That the act to regulate commerce has not delegated to the Commission authority to consider, where a complaint is made on such subject, the question of the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preference or undue discrimination. Second. That, even if such power has been delegated to the Commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority conferred by the statute. * * *

The right to buy is one thing, and the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things. The insistence that the necessary effect of an order compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal, and a preference in favor of other mines, but inveighs against the expediency of

the order. And this is true also of a statement in another form of the same proposition; that is, that if, when coal is bought from a mine by a railroad, the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal, and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficuly involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils. It follows from what we have said that the court below erred in enjoining the order of the Commission, in so far as it related to company fuel cars, and its decree is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

MR. JUSTICE BREWER dissents.

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## ATCHISON, T. & S. F. RY. CO. v. FOSTER LUMBER CO.

(Supreme Court of Oklahoma, 1911. 31 Okl. 661, 122 Pac. 139.)

Error from District Court, Noble County; W. M. Bowles, Judge.

Action by the Foster Lumber Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error.

DUNN, J.[8] This action presents error from the district court of Noble county. For the consideration thereof the court will assume the facts have been established in accordance with the contention of defendant in error, which was plaintiff in the lower court. Action was begun on the 1st day of June, 1908, by defendant in error as plaintiff against the plaintiff in error to recover in replevin a car of shingles in its possession at its station at Red Rock. The shingles involved had been shipped from Everett, Wash., on May 9, 1908, to Red Rock, Okl., over the lines of the Northern Pacific Railway Company to Billings, Mont., from that station to Concordia, Kan., over the Chicago, Burlington & Quincy Railway line, and from Concordia to Red Rock, over defendant's line. When the car arrived at its destination, the plaintiff offered to pay the freight on the same at the rate of 74½ cents per 100 pounds. The agent of the defendant company declined to accept the same and demanded 79½ cents per 100 pounds under the theory that the latter was the legal rate duly established according to law. Without going into detail, it may be stated that the controversy between them over the rate grew out of substantially the following facts: Prior to November 1, 1907, certain railway companies, among which were those named above with the exception of the defendant, had for such shipments an established rate of 74½ cents, but, desiring to put into force the higher rate and the one claimed by the agent of the defendant, duly published the same to take effect November 1, 1907. Prior to that date and in October, 1907, the lumber companies claiming that the proposed rate was unreasonable and excessive secured of the United States Circuit Court for the Western District of Washington, Northern Division, an injunction against the said rate, and it is the claim of plaintiff in this case that by virtue of said injunction the lower rate controlled and that the defendant was not justified in demanding the higher rate. The defendant claims that it was bound by the published rate of 79½ cents, and that to collect a lower rate would be in violation of the Interstate Commerce Law, for which, if knowingly done, it would be criminally liable. It is the claim of counsel for defendant that the court which granted the injunction was without jurisdiction of the subject-matter in

[8] Parts of the opinion are omitted.

that action, and that the decree rendered therein was void. As plaintiff must rely to succeed upon the validity of this decree or at least upon the jurisdiction of the court to render it, and as a decision on that question adversely to it would be conclusive of the case, we first address ourselves thereto.

The proposition is one which has had the attention of a number of the federal and state courts, and there is no little conflict of opinion; hence counsel for the respective parties are each able to cite a respectable array of authorities to sustain their various contentions. It is needless to say, however, that the final arbiter of this question is the Supreme Court of the United States, and its conclusion thereof is one to which all other authority must bow. * * * [In] the case of Southern Railway Co. v. Tift, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846 (in which distinguishing the case of Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075), Justice McKenna, considering the facts there involved, said: "In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decisions in Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553 [9 Ann. Cas. 1075], upon a different record than that before us. We are not required to say, however, that, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the Interstate Commerce Act, a suit in equity is also forbidden to prevent a filing or enforcement of unreasonable rates or a change to unjust or unreasonable rates." * * *

The Tift Case, decided in May, 1907, seems to have afforded the only apparent authority for the decisions of the inferior courts of the state and nation which have asserted jurisdiction to enjoin excessive rates proposed by interstate carriers. While the doctrine that jurisdiction existed has been accepted by some of the courts, it has not been without adverse declaration on the part of others, which, while their conclusions are no more final than those holding otherwise, yet as they are in the majority an accord with the ultimate expression of the Supreme Court of the United States, we do not deem it amiss to notice a few of them to have the benefit of some of the reasons given. For instance, the Circuit Court of Appeals of the Fifth Circuit, in the case of Atlantic Coast Line R. Co. v. Macon Grocery Co. et al., 166 Fed. 206, 218, 92 C. C. A. 114, 126, Judge McCormick after quoting from the Tift Case, says: "We are clear in our conviction that there is nothing in the Tift Case to support the jurisdiction of the Circuit Court in entertaining the bill exhibited by the appellees in this case, and because we find nothing in the numerous decisions of the Supreme Court which we have examined to weaken the conviction we have expressed that the reasoning which is convincing and controlling against the entertaining of an action at law for damages occasioned by the enforcement of unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the Interstate Commerce Act, for a stronger reason, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of rates, or a change to unjust or unreasonable rates, it is also forbidden by the Interstate Commerce Act, because it would work an incalculably greater mischief." * * *

The conclusion reached in the cases above noted finds further support in the case of United States v. New York Central & Hudson River R. Co., 212 U. S. 509, 29 Sup. Ct. 313, 53 L. Ed. 629. See, also, Thacker Coal & Coke Co. v. Norfolk & Western Ry. Co., 67 W. Va. 448, 68 S. E. 107, 28 L. R. A. (N. S.) 108, the best considered state case we have seen wherein jurisdiction is denied and a great number of the federal decisions are noted and reviewed.

Speaking of the effect of the allowance of the jurisdiction contended for by counsel for plaintiff in this case, Justice White, speaking for the Supreme Court of the United States in the case of Baltimore & Ohio Ry. Co. v. United States ex rel. Pitcairn Coal Co. et al. [215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292] supra, in part says: "In considering section 4 in the case of Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280, just decided, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the commission should be suspended or enjoined, were without power to invade the administrative functions vested in the commission, and therefore

could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene Case that the primary interference of the courts with the administrative functions of the commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found, the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission were to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record, but by the record in the case of Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452 [30 Sup. Ct. 155] 54 L. Ed. 280."

These decisions of the United States Supreme Court must be held to determine the question for all. Those which limited the force of the language of the Tift Case had not been promulgated when this case was filed and tried, hence counsel and the lower court did not enjoy the light which we have had in reaching the conclusion here found. That it was competent to inquire into the jurisdiction of the court issuing the injunction, see Southern Pine Lumber Co. v. Ward, 16 Okl. 131, 85 Pac. 459; Elliott v. Piersol, 1 Pet. (26 U. S.) 340, 7 L. Ed. 164.

It therefore follows that the judgment therein is reversed and the cause remanded to the lower court with instructions to set the same aside and enter one in accordance with this opinion.

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